NO. COA07-448

NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2007

IN THE MATTER OF:
A.B.W. and A.F.W.

Catawba County
Nos. 05 JA 88;
05 JA 89

Appeal by respondents from order entered 5 February 2007, *nunc pro tunc* 17 January 2007, by Judge Robert M. Brady in Catawba County District Court. Heard in the Court of Appeals 20 August 2007.

Melanie Stewart Cranford, for Guardian ad Litem, and Lauren Vaughan, for petitioner-appellee Catawba County Department of Social Services.

Mary McCullers Reece, for respondent-appellant-mother.

Terry F. Rose, for respondent-appellant-father.

JACKSON, Judge.

Phyllis W. ("respondent-mother") and Terry W. ("respondent-father") (collectively, "respondents"), parents of the minor children A.B.W. and A.F.W., appeal from a permanency planning order filed on 5 February 2007 that ceased further efforts toward reunification and established a permanent plan of adoption for A.F.W. and a concurrent permanent plan of adoption and guardianship for A.B.W. For the following reasons, we affirm.

On 7 April 2005, the Catawba County Department of Social Services ("DSS") filed a petition alleging that A.B.W. and A.F.W. were neglected juveniles. In the petition, DSS expressed concern that A.B.W. had poor school attendance and that A.F.W. continued to wear diapers at age four. DSS noted that these same concerns had been reported in 2002 and that on 17 October 2002, there had been a finding of neglect due to the juveniles' not receiving proper care. DSS further alleged that respondent-mother (1) utilized a hospital emergency room instead of establishing primary medical care for the juveniles; (2) refused to allow the social worker access to the home; and (3) demonstrated symptoms of "severe and persistent mental illness," but had refused to submit to a mental health assessment or follow any recommended treatment. Finally, DSS alleged that both respondents refused to (1) participate in any remedial service to ensure that A.B.W. attended school consistently; (2) establish consistent primary care for the juveniles; and (3) have a developmental evaluation completed for A.F.W. as recommended by a pediatrician.

On 19 April 2005, both respondents were appointed counsel, and respondent-mother was appointed a guardian *ad litem*. On 22 August 2005, the trial court entered an interim order expressing concern that A.B.W. had "missed a great deal of school and the same is not in her best interest." The court warned respondents that if A.B.W. continued to be absent from school without a valid note from a treating physician, then the court would consider granting non-secure custody of the juveniles to DSS.

By order entered 30 September 2005, the trial court ordered that respondent-mother establish care for the children with a family doctor and abstain from using the emergency room as the juveniles' primary health care provider. The trial court again warned respondents that they must ensure that A.B.W. attend school regularly and on time or else the court would consider granting DSS non-secure custody. Additionally, the trial court ordered that respondent-mother provide DSS and the guardian *ad litem* access to the residence and the juveniles.

Despite the trial court's orders, A.B.W. continued to be absent from school, and on 14 October 2005, DSS was granted non-secure custody of the juveniles. On 18 October 2005, DSS filed a motion for an order to show cause, alleging that it was unable to locate A.F.W. DSS claimed that respondent-mother was able to comply with the court's orders by disclosing A.F.W.'s location, but had "displayed willful disobedience of the [c]ourt's lawful orders, directives and instructions." DSS requested that respondent-mother appear and show cause as to why she should not be held in civil or criminal contempt.

On 2 December 2005, the Catawba County Sheriff's Department located A.F.W. in respondents' custody. Both respondents were charged with felony child abduction due to their actions in preventing DSS from assuming custody of A.F.W.

On 15 August 2006, the trial court entered a combined adjudicatory and dispositional order, concluding that A.B.W. and A.F.W. were neglected juveniles. The court ordered respondents

to (1) comply with a case plan developed by DSS; (2) attend individual therapy on a regular basis; and (3) participate in and complete the Nurturing Program.

By order entered 12 September 2006, the trial court found that respondent-mother had "flatly refused to comply" with its orders and that respondent-father demonstrated a "longstanding pattern to follow" respondent-mother's direction. The trial court ordered respondents to comply with their case plan and obtain a psychological evaluation. Both respondents refused to sign the case plan, seek counseling, and attend parenting classes, and both failed to appear for a psychological evaluation.

By order entered 5 February 2007, the trial court found that both respondents had "failed to make any substantial or significant progress toward compliance with the case plan or the [c]ourt's prior orders." Specifically, the court found that respondents had failed to (1) obtain independent housing; (2) obtain psychological evaluations; (3) obtain mental health counseling; and (4) complete the Nurturing Program. The court further noted that both respondents "have openly and adamantly refused to do what the [c]ourt requires" and that respondent-mother has "a very rigid belief system that is logical to her, but which interferes with her ability to exercise good judgment in the care of her children." Additionally, the court found that both respondents "rigidly believe that they are excellent parents and that no intervention is necessary" and that their "refusal to abide by the [c]ourt's orders and to accept intervention and treatment directly impacts their

children and any chance of reunification." After finding that "if the children were returned to the parents in the absence of such intervention and treatment, the same issues that brought these children into foster care would immediately resume," the trial court concluded that further efforts at reunification would be futile and ordered DSS to cease reunification efforts. The trial court, therefore, ordered DSS to pursue a permanent plan of adoption for A.F.W. and a concurrent permanent plan of adoption and guardianship for A.B.W. Respondents filed timely notice of appeal.

Respondent-father first contends that the trial court erred by failing to appoint him a guardian *ad litem*. Specifically, respondent-father contends that a guardian *ad litem* should have been appointed because he was "dominated by his wife" and had been diagnosed with depression. We disagree.

Pursuant to North Carolina General Statutes, section 7B-602 — applicable on the date the petition was filed — a guardian *ad litem* must be appointed to represent a parent "[w]here it is alleged that the juvenile is a dependent juvenile . . . in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile." N.C. Gen. Stat. § 7B-602(b) (2003). This statute may be implicated when neglect is alleged and a parent's "mental health issues and the child's neglect [are] so intertwined at times as to make separation of the two virtually, if not, impossible." *In re J.D.*, 164 N.C. App. 176, 182, 605 S.E.2d 643, 646, *disc. rev.*

denied, 358 N.C. 732, 601 S.E.2d 531 (2004). However, the trial court is not required to appoint a guardian *ad litem* anytime a "cause or condition" under section 7B-602(b) is alleged. *See In re J.A.A.*, 175 N.C. App. 66, 71, 623 S.E.2d 45, 48 (2005); *In re H.W.*, 163 N.C. App. 438, 447, 594 S.E.2d 211, 216, *disc. rev. denied*, 358 N.C. 543, 603 S.E.2d 877 (2004). Instead, the relevant inquiry is whether there has been an allegation of dependency or of respondent's incapability to parent. *See In re D.H.*, 177 N.C. App. 700, 708, 629 S.E.2d 920, 924–25 (2006) (citing *J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 48).

In the instant case, the juveniles were alleged to be neglected, not dependent, and it was not alleged that respondent-father was incapable of providing proper supervision and care for the children as a result of any illness or condition listed in section 7B-602. Although the petition noted DSS's concerns about respondent-mother's mental health, the allegations in the petition with respect to respondent-father concern his unwillingness, as opposed to any inability, to appropriately parent the juveniles.

Although the petition did not allege dependency or incapacity, this Court still "must consider whether the trial court had a duty to appoint a guardian *ad litem* to represent respondent under Rule 17 of the Rules of Civil Procedure." *J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49. Pursuant to Rule 17,

> [i]n actions or special proceedings when any of the defendants are . . . incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed

> as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons.

N.C. Gen. Stat. § 1A-1, Rule 17(b)(2) (2003). We review a trial court's decision under Rule 17 for abuse of discretion. *See J.A.A.*, 175 N.C. App. at 73, 623 S.E.2d at 50.

Here, respondent-father argues in his brief that he is "somewhat meek," "overwhelmed," and a "passive observer" dominated by his wife. Respondent-father also notes that he was required by the trial court to obtain a psychological assessment, which indicated that respondent-father had been diagnosed with depression. However, the mere fact that the trial court ordered a psychological evaluation does not require the appointment of a guardian *ad litem*. Further, although respondent-father obtained a psychological evaluation indicating that he had been diagnosed with depression, respondent-father testified that "anybody, any parent, would be depressed over a situation like this." Respondent-father explained that treatment was not necessary and refused to obtain additional court-ordered psychological evaluations, stating, "[W]e've had one, and that wasn't good enough, so I figured that another one wouldn't be good enough." Ultimately, nothing in the record "raise[s] a substantial question as to whether [respondent-father] is *non compos mentis*," and respondent-father, therefore, fails to meets the standard for legal incompetency pursuant to Rule 17. *Id.* at 72, 623 S.E.2d at 49. Accordingly, the trial court did

not err in failing to appoint a guardian *ad litem* for respondent-father.

Respondents next argue that certain findings of fact made by the trial court are not supported by the evidence. "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re S.J.M.*, __ N.C. App. __, __, 645 S.E.2d 798, 801 (2007) (internal quotation marks and citation omitted). We are "bound by the trial court['s] findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984). "If unchallenged on appeal, findings of fact 'are deemed supported by competent evidence' and are binding upon this Court." *In re J.M.W.*, __ N.C. App. __, __, 635 S.E.2d 916, 919 (2006) (quoting *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003)).

In the case *sub judice*, both respondents assign error to findings of fact numbers 28, 29, 31, and 33. Respondent-father also assigns error to findings of fact numbers 16, 18, 34, 35, 37, 41, 42, 47, 48, and 49, and respondent-mother assigns error to findings of fact numbers 21, 32, and 40.

As a preliminary matter, we note that both respondents failed to present argument in their briefs with respect to finding of fact number 31, and therefore, their assignments of error concerning this finding are deemed abandoned. *See* N.C. R. App. P. 28(b)(6)

(2006). Additionally, respondent-father has presented no argument with respect to findings of fact numbers 42, 48, and 49, and respondent-mother has presented no argument in her brief with respect to findings of fact numbers 33 and 40. Accordingly, these assignments of error also are deemed abandoned. *See id.* Furthermore, respondent-mother addresses findings of fact numbers 41, 42, 47, and 49 in her brief but has failed to reference in her brief any assignments of error relating to these particular findings of fact. *See id.* ("Immediately following each question presented shall be a reference to the assignments of error pertinent to the question . . . ."). Accordingly, we decline to review respondent-mother's arguments related to findings of fact numbers 41, 42, 47, and 49. *See In re Foreclosure of Cole*, 175 N.C. App. 653, 661, 625 S.E.2d 155, 160 (2006) (holding that questions not corresponding to the correct assignments of error will not be reviewed).

First, respondent-father challenges finding of fact number 16, in which the court found that

> [f]ollowing the filing of the petition [on 7 April 2005], and prior to the adjudication of this matter [by order entered 15 August 2006], the [c]ourt entered interim orders in an effort to prevent nonsecure custody of the minor children. Most importantly, this [c]ourt ordered that [A.B.W.] should miss no school days, except for excused absences documented by a licensed physician specifically as to the illness and condition and the severity that would necessitate missing school. The parents failed to abide by this [c]ourt's orders.

This finding of fact is fully supported by the evidence in the record. Although the trial court ordered on 13 September 2005 that A.B.W. "shall not incur any new unexcused absences or tardies from school," both the guardian *ad litem* and DSS reports noted that A.B.W. had continued to incur numerous unexcused absences and tardies. The trial court, therefore, properly found that respondents failed to abide by the court's interim orders. Accordingly, respondent-father's assignment of error is overruled.

Respondent-father next challenges finding of fact number 18, in which the court found that "[t]he [c]ourt ordered that the children be placed in the agency's nonsecure custody on October 14, 2005. [A.B.W.] was taken into the Department's physical custody that day, but the parents hid [A.F.W.] from [DSS]." This finding is fully supported by finding of fact number 19 — to which respondent-father does not assign error and, therefore, is binding on this Court — in which the trial court found that

> [w]hen [A.F.W.] was located, with the assistance of law enforcement, both parents were present. [Respondent-father] had been present for hearings when he testified under oath that he had no knowledge of the child's whereabouts, and he had been ordered to notify [DSS] immediately if he became aware of the child's whereabouts.

Respondent-father's assignment of error, therefore, is overruled.

Finally, respondent-father assigns error to the following findings of fact:

> 34. [Respondents] have obtained no mental health counseling.
>
> 35. [Respondents] have failed to participate in or complete the Nurturing Parent Program.

> . . . .
>
> 41. Although this [c]ourt has made it clear to [respondents] what is necessary in order for them to reunify with their children, both [respondents] have openly and adamantly refused to do what the [c]ourt requires. Their adamant refusal continues even today. Both parents rigidly believe that they are excellent parents and that no intervention is necessary.
>
> 47. [Respondents] have flatly refused to comply with this [c]ourt's orders. Their refusal has persisted for over one year while their children wait in foster care. Such refusal would render any further efforts at reunification futile and inconsistent with the needs of the children for a safe, permanent home within a reasonable period of time.

Respondent-father concedes in his brief that "[h]e just has not done those tasks given to him," but contends that he was controlled by respondent-mother and bases this argument upon finding of fact number 37,[1] in which the court found that respondent-father "is a somewhat passive observer who does not appear to form any independent thought, apart from the direction of [respondent-mother]." Respondent-father, however, cannot justify his failure to complete tasks required of him by the trial court on the grounds that he "is a somewhat passive observer." He concedes that he did not complete the required tasks, and the record supports the court's finding that respondent-father adamantly refused to comply with court orders and DSS recommendations as noted *supra*. We hold

[1]Inexplicably, respondent-father assigned error to finding of fact number 37, notwithstanding the fact that he bases his argument upon the veracity of this finding.

that competent evidence supports the trial court's findings, and accordingly, these assignments of error are overruled.

With respect to respondent-mother's arguments, she first assigns error to finding of fact number 21, which provides:

> This [c]ourt was aware of the evaluation of [respondent-mother] by Dr. Santosa at the time of the initial adjudication and disposition of this matter, and did not find said evaluation to be adequate. The [c]ourt found then, and finds now, that the evaluation by Dr. Santosa is primarily based on self-report, and is not based upon independent fact-finding, psychiatric or psychological testing, or psychological data. The only assessment done was a mental status exam. Thus, the [c]ourt ordered at the time of the initial Disposition that [respondent-mother] undergo a more thorough psychological evaluation to be followed by a psychiatric evaluation if deemed appropriate.

Respondent-mother argues that this finding was not supported by the evidence. She further contends that Dr. Santosa did not recommend further treatment and that as a result, any attendant findings that she had not followed the recommendations or obtained mental health counseling as needed also were not based upon the evidence. We disagree.

Prior to the adjudication, respondent-mother had been evaluated by Dr. Santosa, and in the adjudicatory order, the trial court found that

> [t]he report received regarding [respondent-mother] from Dr. Rudy Santosa appears to be a self-reporting evaluation and not by any means a full psychological evaluation. It would appear that Dr. Santosa took [respondent-mother's] word as to the remission of her depression and her word that her anxiety was caused by the agency's involvement with her. The evaluation does not indicate a full

> understanding of all the circumstances surrounding the removal of these children. It does not appear that Dr. Santosa was aware of the many factors this [c]ourt has considered and the efforts made by the agency to prevent removal.

The trial court, therefore, ordered respondent-mother to undergo a "full psychological work-up and testing." Subsequently, DSS scheduled appointments for respondent-mother to undergo the psychological evaluation, but respondent-mother failed to attend any of the appointments. At the permanency planning review hearing, respondent-mother conceded that she had been ordered to have a full psychological evaluation, but asserted that she already had been evaluated — *i.e.*, by Dr. Santosa — and that she would not undergo any further evaluation. Respondent-mother further admitted that she had been asked by DSS to go to therapy sessions and that she had refused. The trial court's findings, therefore, were supported by competent evidence, and accordingly, this assignment of error is overruled.

Respondent-mother also assigns error to finding of fact number 32, in which the trial court found that respondents "have failed to obtain psychological evaluations as ordered by the [c]ourt, even though [DSS] was ordered to pay for said evaluations." Respondent-mother, however, contends that "[w]hile it is true that [respondent-mother] did not obtain a third psychological evaluation after the trial court ordered her to, it is also true that she obtained two psychological evaluations during her involvement with [DSS]." Respondent has not contended that the trial court abused its discretion in ordering a third psychological evaluation. *See,*

e.g., *In re L.B.*, __ N.C. App. __, __, 639 S.E.2d 23, 33 (2007). Accordingly, as respondent-mother concedes that she did not obtain the court-ordered psychological evaluations, this assignment of error is overruled.

Next, both respondents assign error to finding of fact number 28, in which the trial court found that respondents "have failed to make any substantial or significant progress toward compliance with the case plan or the [c]ourt's prior orders." Respondents contend that this finding was not supported by competent evidence. We disagree.

On 17 October 2005, the trial court entered a non-secure custody order after respondent-mother consistently disobeyed the court's orders to establish care for the children with a family doctor and not use the emergency room as the juvenile's health care provider. Upon entry of the non-secure custody order, respondents concealed A.F.W.'s whereabouts from DSS. Respondents failed to comply with the trial court's adjudication and disposition order, which required, *inter alia*, that they obtain a full psychiatric evaluation, attend individual regular therapy, and successfully complete the Nurturing Program. As explained by the guardian *ad litem* in its report for the permanency planning hearing, "[i]n short, neither [respondent-mother] nor [respondent-father] has made any progress toward rectifying the problems that exist in their family." Similarly, DSS noted in its report for the permanency planning hearing that

> [b]oth [respondents] have been ordered to do specific tasks and have not complied.

> [Respondent-mother] continues to verbalize distrust of the agency or acknowledge the reasoning behind the tasks ordered of her. [Respondent-father] seems to do what is put on him to do by [respondent-mother]. He will agree in private with the social worker to attend the psychological evaluation[] and nurturing class but will not go.

The trial court's finding that respondents failed to comply with their case plan and prior court orders was supported by competent evidence. Accordingly, respondents' assignment of error is overruled.

Both respondents also contend that the trial court erred in making finding of fact number 29, in which the trial court found that respondents failed to obtain independent housing. We disagree.

Since the filing of the petition, respondents have moved several times. On 28 November 2005, respondents' landlord informed DSS that he was in the process of evicting respondents. On 6 December 2005, respondent-mother testified that she had been living with friends and in motels while attempting to hide A.F.W. from social workers. Subsequently, respondents proposed Martha McCall, respondent-mother's aunt, as a possible placement for the juveniles. During a homestudy, McCall reported that respondents were "working on getting their own place" and that respondent-mother "stays between [McCall's] home, her sister's home, and her brother's home." DSS declined to recommend McCall as a placement option.

As of 22 May 2006, respondents lived with Angela Hood, respondent-mother's sister. The adjudication and disposition order

required respondents to comply with the terms of a case plan, which, in turn, required respondents to obtain stable housing. However, at the time of the permanency planning review hearing, respondents had resumed living with McCall, whom DSS had declined to recommend as a placement option. Although respondent-mother has claimed to be an owner of the home in which she purported to live, it is undisputed that respondents have lived in numerous locations since the filing of the petition. The trial court's finding that respondents had not obtained independent housing was supported by competent evidence, and accordingly, respondents' assignment of error is overruled.

In their final argument with respect to the trial court's findings of fact, both respondents assign error to finding of fact number 33, in which the trial court found that respondents "have . . . failed to follow any recommendations from psychological evaluations, including psychiatric evaluations." This finding, however, is based upon finding of fact number 32, in which the court found that respondents "have failed to obtain psychological evaluations as ordered by the [c]ourt, even though [DSS] was ordered to pay for said evaluations." Respondent-father failed to assign error to this finding of fact, and as discussed *supra*, respondent-mother conceded that she has failed to obtain court-ordered psychological evaluations. Accordingly, respondents' assignment of error is overruled.

Finally, both respondents assign error to the trial court's conclusions of law. Specifically, they argue that the trial court

erred by (1) ceasing reunification efforts, (2) adopting a permanent plan of adoption for A.F.W., and (3) adopting a concurrent permanent plan of adoption and guardianship for A.B.W. We disagree.

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2003). The trial court may "order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). On appeal from an order ceasing reunification efforts, this Court must determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition. *See id.* at 477–78, 581 S.E.2d at 137.

In its permanency planning review order, the trial court made fifty separate findings of fact. In its findings, the trial court noted: (1) the extensive history between respondents and DSS; (2) respondents' continued failure to ensure that A.B.W. attended school regularly; (3) respondents' lack of cooperation with DSS; and (4) respondents' "adamant refusal" to do what the trial court required in order for respondents to be reunified with their children. The trial court further found that respondents' refusal to comply with the trial court's orders rendered reunification

efforts futile and was inconsistent with the juveniles' needs for a safe, permanent home within a reasonable period of time. Finally, the trial court found that the current placement for the children was appropriate, that A.F.W. was "doing well," and that A.B.W. was "doing as well as can be expected."

Based upon its findings, the trial court concluded:

> 2. That [DSS] has exercised reasonable efforts towards reunification of the minor children with [respondents], but reunification is not in the best interest of the minor children at this time.
>
> 3. That further efforts toward reunification with either [respondent] would be futile and inconsistent with the juveniles' need for a safe permanent home within a reasonable period of time. Therefore, reunification efforts should cease.
>
> 4. There are no relatives who are willing and able to provide proper care and supervision of the children in a safe home.
>
> 5. That return to the home of [respondents] is not in the best interest of the children at this time, and is contrary to the health, safety and welfare of the children.
>
> 6. That the most appropriate permanent plan is one of adoption. The current barriers to adoption are the termination of parental rights, and the potential difficulties in placing [A.B.W.] for adoption, due to her age and her loyalty to [respondents]. For that reason, [A.B.W.] should also have a concurrent plan of guardianship.

The trial court, therefore, ordered that (1) custody of the juveniles remain with DSS; (2) reunification efforts cease; (3) the permanent plan for A.F.W. be changed to adoption; and (4) the permanent plan for A.B.W. be changed to a concurrent permanent plan of adoption and guardianship.

The record before this Court demonstrates that the trial court made sufficient findings of fact supported by competent evidence and that the trial court did not abuse its discretion in ordering the cessation of reunification efforts between respondents and the juveniles. Accordingly, we affirm.

Respondents' remaining assignments of error not argued in their briefs are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2006).

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).