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NO. COA07-515

NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2007

IN THE MATTER OF:
J.A.C.

Guilford County
No. 05 J 280

Appeal by respondent from order entered 23 February 2007 by Judge Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 20 August 2007.

Office of the Guilford County Attorney by Deputy County Attorney James A. Dickens for petitioner-appellee.

Robert W. Ewing for respondent-appellant.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett for guardian ad litem.

STEELMAN, Judge.

The evidence supported the trial court's findings of fact pertaining to the ground for termination set forth in N.C. Gen. Stat. § 7B-1111(a)(2). These findings in turn support the trial court's conclusion of law that grounds existed for termination of parental rights.

I. Factual Background

Respondent is the mother of J.A.C. (child), who initially came into the custody of the Guilford County Department of Social

Services ("DSS") on 15 March 2005. The court adjudicated the child as a dependent juvenile on 27 April 2005 based upon the father's substance abuse, domestic violence between the parents, and the parents' inability to provide the child with basic needs of food, clothing, and shelter. Respondent made some progress in complying with her reunification plan. However, she continued to maintain a relationship with the child's father, who had committed acts of domestic violence upon her, and was unable to obtain stable housing. Due to her young age and lack of family support in North Carolina, respondent agreed to a plan which provided that she move to Maryland and reside with her aunt.

Respondent regained custody of the child on 16 December 2005 and moved to Maryland with the child. However, respondent continued to communicate with the child's father. After engaging in an argument with an aunt's boyfriend concerning the child's father, respondent took \$300 in cash wired to her by the child's father and returned to North Carolina after staying only two days in Maryland. Upon her return to North Carolina, respondent had no place to stay and she had to rely upon others and DSS to assist her in finding shelter for herself and the child.

On 15 March 2006, respondent became involved in a heated argument with the child's father. The police responded to a disturbance call, and arrested both respondent and the child's father. DSS took custody of the child, who was with respondent at the time of the disturbance. After a few days, respondent was released from jail and she visited the child on two occasions

before being incarcerated again on 30 April 2006 on felony charges. The charges and resulting incarceration were caused by her continued association with the child's father. Respondent was repeatedly advised not to continue her relationship with the child's father because it was not in the child's best interest.

Respondent remained incarcerated through the date of the termination hearing. The child's father was incarcerated in the North Carolina Department of Correction in October 2006. The child's father has convictions of felony possession of cocaine, possession with intent to sell or deliver marijuana, and misdemeanor possession of marijuana.

On 18 September 2006 DSS filed a petition to terminate the parental rights of respondent and J.A.C.'s father. The court conducted a hearing on the petition commencing on 23 January 2007. At the conclusion of the hearing, the court entered an order terminating both parents' parental rights on the grounds: (1) they had neglected the child pursuant to N.C.G.S. § 7B-1111(a)(1); (2) they willfully left the child in foster care or out of home placement for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the condition which led to the removal of the child pursuant to N.C.G.S. § 7B-1111(a)(2); (3) for a continuous period of six months next preceding the filing of the petition, they willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so pursuant to N.C.G.S. § 7B-1111(a)(3); and

(4) they willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition pursuant to N.C.G.S. § 7B-1111(a)(7). Respondent appeals.

II. Standard of Review

Termination of parental rights is a two-step process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001) (citation omitted). In the first phase of the termination hearing, the petitioner must show by clear, cogent and convincing evidence that a statutory ground to terminate exists. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997) (citation omitted). The trial court must make findings of fact which are supported by this evidentiary standard, and the findings of fact must support the trial court's conclusions of law. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). "The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). The trial court's conclusions of law "are fully reviewable *de novo* by the appellate court." *Mann Contr'rs, Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999) (citation omitted).

Once the trial court has found a ground for termination, the court then considers the best interests of the child in making its decision on whether to terminate parental rights. *Blackburn*, 142

N.C. App. at 610, 543 S.E.2d at 908. We review this decision on an abuse of discretion standard, and will reverse a court's decision only where it is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

III. Willfully Leaving Child in Foster Care

Respondent contends that the trial court erred in terminating her parental rights based upon willfully leaving the child in placement outside the home for more than twelve months. Respondent contends the court's findings of fact were not supported by the evidence and that, in turn, the findings do not support this conclusion of law. We disagree.

In considering the ground for termination under Section 7B-1111(a)(2), the trial court must go through a two-part analysis and determine: (1) that a child has been willfully left by the parent in foster care or placement outside the home for over 12 months; and (2) as of the time of the hearing, that the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005), *cert. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). Willfulness under this section means something less than willful abandonment, and "does not require a finding of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted).

Respondent does not challenge the court's finding of fact in paragraph 13(a) which states:

Prior to the filing of the Petition for Termination of Parental Rights, the juvenile was in foster care from March 15, 2005 to December 16, 2005, then from March 15, 2006 to September 18, 2006. This was a total period of 15 months.

Findings of fact not challenged on appeal are binding on the appellate court. *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984). There is no requirement that the period of foster care be twelve *continuous* months, *In re Taylor*, 97 N.C. App. 57, 62, 387 S.E.2d 230, 232 (1990), and we hold this element of Section 7B-1111(a)(2) is satisfied.

Respondent contests the conclusion of law on the grounds that she did not "willfully" leave her child in foster care for twelve months because she was incarcerated for 4 ½ months prior to the termination hearing. Specifically, respondent contends that the court's findings in paragraphs 15(b) and 13(f) of the termination order were made in error. Paragraph 15(b) of the termination order states "[t]he Respondent-mother made choices and committed acts that caused her to be placed in jail rather than to be an available parent for her child." Paragraph 13(f) states "[b]oth Respondent-parents committed acts which caused them to be placed in jail and deprived them of the opportunity to work toward reunification with the juvenile."

While our courts have found that incarceration alone is insufficient to show willful abandonment, they have also rejected the argument that periods of incarceration preclude such a finding. *In re Harris*, 87 N.C. App. 179, 184, 360 S.E.2d 485, 488 (1987) (rejecting the argument that periodic incarcerations precluded a

finding that respondents' leaving their children in foster care was "willful"). Respondent relies on *In re Shermer* to assert that lack of progress cannot be willful when she was incarcerated. *Shermer* is distinguishable from the present case. The Respondent in *Shermer* was incarcerated for the entire twelve months prior to the filing of a termination petition. The court in *Shermer* noted that the father "had no involvement with the events that led to the children's removal[.]" *Shermer*, 156 N.C. App. at 290, 576 S.E.2d at 409.

In contrast, respondent in the instant case was an active participant in the circumstances leading to the child's removal from her custody. Her incarceration was the direct result of her own criminal conduct arising from her continued association with the child's father, despite being advised repeatedly that it was not in the child's best interest to continue the relationship. The social worker, Erin Calighan, testified that respondent admitted that the father hit her or knocked her down. The court found that the affiliation between respondent and the child's father was a "direct cause of her incarceration in April 2006."

The court's findings demonstrate that respondent had not made reasonable progress in correcting the conditions which led to the removal of J.A.C. from her care. The court noted that respondent only completed one item of her service agreement. When asked about her attempts to contact her son while she had been in jail, respondent testified that she had not sent anything to him, including cards or notes. She did not testify about any other

attempts to contact her son, and did not inquire about him to visitors who came to the jail.

A court may find that a parent has failed to show reasonable and positive progress even when the parent has made some attempt to regain custody of the child. *In re Nolen*, 117 N.C. App. 693, 699-700, 453 S.E.2d 220, 224-25 (1995). In the present case, even though the respondent made some progress in the year preceding the filing of the termination petition, the evidence supports the trial court's finding of fact that she did not make sufficient progress in correcting conditions that led to the child's removal, and that this failure was willful. This argument is without merit.

IV. Conclusion

As the trial court is in the best position to weigh the evidence, the role of this Court is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence[.]" *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). Where the findings of the court are supported by competent evidence, they are binding on appeal, despite the existence of evidence to the contrary. *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) (citations omitted). We hold that there was sufficient evidence to support the trial court's finding that respondent's extremely limited progress was not reasonable progress. We further hold that the trial court's findings were sufficient to support its conclusion that respondent's lack of progress justified termination

of her parental rights under Section 7B-1111(a) (2). Respondent has not challenged the court's determination of the child's best interests, and the court's termination of respondent's parental rights is affirmed.

Having concluded that one ground for termination of parental rights exists, we need not address the additional grounds found by the trial court. See *In re Brim*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000).

AFFIRMED.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).