NO. COA08-1184

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

IN THE MATTER OF:

J.M. Harnett County
No. 06 J 178

Appeal by respondents from an order entered 10 July 2008 by Judge George R. Murphy in Harnett County District Court. Heard in the Court of Appeals 30 December 2008.

E. Marshall Woodall and Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Pamela Newell Williams for Guardian Ad Litem.

Katherine Freeman, PLLC, for respondent-appellant father.

Mary McCullers Reece for respondent-appellant mother.

ELMORE, Judge.

Respondent-mother and respondent-father (respondents) appeal from an order terminating their parental rights to their son, John.[1] For the following reasons, we reverse and remand.

Harnett County Department of Social Services (DSS) has been involved with respondents since 2005 when DSS took custody of John's older brother, Paul[2], based on respondent-mother's mental

[1] "John" is not the child's real name.

[2] "Paul" is not the child's real name.

health condition and domestic violence between respondent-mother and respondent-father. DSS provided respondents with a family services case plan to work towards reunification. Respondents, however, did not participate in the case plan and Paul was placed with his maternal grandmother, Alice.

Upon John's birth in August 2006, DSS filed a juvenile petition alleging that John was a neglected and dependent child. The petition alleged that respondents, who were married, had separated, that respondent-mother suffered from bipolar disorder[3], that she was not taking her prescribed medication, and that she was unemployed. The petition further alleged that respondent-mother had not informed respondent-father about John's birth, that respondent-father had not made plans for John's care, and that because respondent-father had not improved his parenting skills to earn custody of Paul, placing John with him would put John at risk. DSS took nonsecure custody of John.

Respondents entered into separate Family Service Agreements (FSAs) with DSS. Respondent-mother agreed to participate in individual therapy and follow all recommendations, take prescribed medication, pay child support, and seek employment. Respondent-father agreed to attend parenting classes, attend HALT domestic violence prevention program, attend therapy, and pay child support. Respondents reconciled in October 2006 and DSS consolidated respondents' FSAs into a single case plan. In addition to the

[3] Respondent-mother was later diagnosed with schizoaffective disorder rather than bipolar disorder.

requirements in the separate agreements, respondents agreed to participate in marriage counseling.

On 8 December 2006, the trial court entered an "Adjudication/Disposition Consent Order" in which respondents consented to the adjudication of John as a neglected and dependent juvenile. The trial court adopted a plan of reunification. On 20 April 2007, the trial court entered a permanency planning review order continuing the plan of reunification with the parents. The court found that respondent-mother was attending individual therapy, was taking her medications, but that she had not paid child support or followed up with vocational rehabilitation after moving to Wake County. As to respondent-father, the trial court found that he had been terminated from parenting classes in January 2007 due to noncompliance, he had not accepted responsibility for his behavior, he had not enrolled in HALT, and he had not paid child support.

In May 2007, respondents entered into an updated Family Service Agreement. Respondent-father agreed to attend HALT or an equivalent program and participate in an anger management program. Respondent-mother agreed to attend individual therapy and take prescribed medication. Respondents agreed to pay child support, attend marriage counseling, and visit John.

By permanency planning review order filed October 2007, the trial court found that respondent-father had only partially complied with the agreement. The trial court found that respondent-father had not attended HALT, had again been terminated

from parenting classes for noncompliance, and had not paid any child support pursuant to a 1 April 2007 child support order despite owning a barber shop. However, he had enrolled in a Wake County anger management program and attended ten out of fourteen classes. The trial court found that respondent-mother had not attended individual therapy sessions since June 2007 and had not taken her prescribed medication. The trial court concluded that reunification efforts would be futile and changed the permanent plan from reunification to adoption.

On 28 November 2007, DSS filed a motion to terminate respondents' parental rights. Afterwards, respondents again separated. Incidents led each respondent to seek a domestic violence order against the other in February and March 2008. However, both orders were dropped. On 22 March 2008, respondent-mother was involuntarily committed to Dorothea Dix Hospital for about one month as a result of one of those incidents.

The trial court held a hearing on the motion to terminate in May 2008. By order filed 10 July 2008, the trial court terminated respondent-mother's parental rights and cited the following statutory grounds: (1) neglect (§ 7B-1111(a)(1)); (2) willfully leaving a child in foster care for more than twelve months without showing reasonable progress (§ 7B-1111(a)(2)); (3) failure to pay cost of care (§ 7B-1111(a)(3)); and (4) incapability of providing child's proper care or supervision with a reasonable probability that such incapability would continue for the foreseeable future (§ 7B-1111(a)(6)). The trial court terminated respondent-father's

parental rights, citing §§ 7B-1111(a)(1), (a)(2), and (a)(3) as grounds. Respondents separately appeal.

Respondent-Mother

Respondent-mother advances two arguments: (1) The trial court erred by concluding that grounds existed for the termination of her parental rights and (2) the trial court erred by concluding that it was in John's best interest to terminate her parental rights.

As an initial matter, we note that, although respondent-mother makes factual arguments in her brief, she specifically challenged only two – findings of fact 51 and 52. Because respondent-mother has not argued her assignments of error on the remaining findings of fact, we must deem those assignments of error abandoned. *In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989) (citing N.C.R. App. P. 28(b)(5)). The uncontested findings of fact are deemed to be supported by sufficient evidence and are binding on appeal. *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (citation omitted).

Although the trial court found four separate grounds to support the termination of respondent-mother's parental rights, "[a] single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 789, 635 S.E.2d 916, 917 (2006) (citation omitted). We must affirm the trial court where "the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental

termination should occur[.]" *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). "So long as the findings of fact support a conclusion [that one of the enumerated grounds exists] the order terminating parental rights must be affirmed." *Id.* Therefore, if we find that the findings of fact support one of the grounds, we need not review the others. *Id.* at 540, 577 S.E.2d at 426-27 (citation omitted).

Parental rights may be terminated when "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2007). Willfulness does not imply fault on the part of the parent, but may be established "when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re O.C. & O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005) (quotations and citation omitted). Even if a parent has made some efforts to regain custody, a trial court may still find that he or she willfully left the child in foster care under section 7B-1111(a)(2). *Id.*

The uncontested findings of fact provide the following factual support for the trial court's conclusion that respondent-mother willfully left John in foster care or placement outside the home for more than 12 months without reasonable progress: Before John's birth, respondent-mother had not informed respondent-father of her

pregnancy and "had not made appropriate plans to care for [John] following his birth." Respondent-mother is mentally ill and, at the time of John's birth, was unemployed, unable to take her medication, and "totally dependent on others such as the ladies of her church and her acquaintance." Respondent-mother had "failed to substantially comply with the provisions of" her FSA. On 5 October 2008, respondent-mother "reported to the social worker that she had not attended individual therapy sessions since June 2007 and had not been on her prescribed medication since April 2007. She ha[d] made one child support payment of $24.38 as of October 5, 2007." On 22 March 2008, respondent-mother was involuntarily committed to Dorothea Dix Hospital for one to two months after she threatened to kill respondent-father and broke the head and tail lights of his car with a golf club. By 25 March 2008, respondent-mother was homeless. John has been in DSS custody since 3 August 2006 and the uncontested findings of fact show that respondent-mother did not show "to the satisfaction of the court that reasonable progress under the circumstances ha[d] been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2) (2007).

Respondent-mother next argues that the trial court erred by concluding that terminating respondent-mother's parental rights would be in John's best interest.

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. In making this

> determination, the court shall consider the following:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2007). "Should the court conclude that, irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the juvenile require that rights should not be terminated, the court shall dismiss the petition or deny the motion[.]" N.C. Gen. Stat. § 7B-1110(b) (2007).

Respondent-mother challenges the following two findings of fact as unsupported by the evidence:

> 51. During the termination hearing, the maternal grandmother testified that she was not able to care for the juvenile. The grandmother has never met or visited with the juvenile. There is no relationship between the juvenile and the grandmother. Placement of the juvenile wit[h] the grandmother at this time would not be in the best interest of the juvenile.
>
> 52. The juvenile has been in foster care all his life; he has never resided in the parents' home. He has visited with his

> parents on a supervised basis. The social worker reported he recognizes them and plays with them and that visitation with the parents had been appropriate. It does not appear to this court that a parental bond exists between the juvenile and the parents.

Respondent-mother correctly contends that her mother did not testify that she was unable to care for John. The grandmother, Alice, testified, "I have no problems of taking care of my children, mine – I call [Paul] mine; and would no – definitely have no problems taking care of [John.]" She explained that she had turned down respondent-mother's request to keep John when he was born because she was overwhelmed by the care that Paul required and did not have the time or financial resources to care for a baby. She testified that Paul was now "older and stable" and would "be a lot of help. . . . [He] wants his little brother. He and I have talked about it." When asked if she now had the time and financial ability to care for John, Alice testified, "I've thought about the situation, and . . . it's no problem having another one; and yes, I am financially – can take care of [John] at this time." She further testified that she had already arranged daycare for John.

The record includes a letter from a physician that the grandmother is "very active in the community and very physically active. She would have no problem taking care of children beyond normal fatigue that any parent would experience." The physician also noted, "I think she is a wonderful grandmother and a wonderful caretaker, and would have absolutely no qualms about her skills in this and about her medical condition to do so."

Accordingly, the first sentence of finding of fact 51 is not supported by clear, cogent, or competent evidence, and in fact is directly contradicted by Alice's testimony. The next two sentences are supported by Alice's testimony, but the last sentence is a conclusion of law, not a finding of fact.

With respect to finding of fact 52, all but the last sentence is supported by clear, cogent, and competent evidence. The evidence supporting the final finding, that no parental bond exists between John and his parents, is less apparent.

The record shows that both respondents attended every visitation that the court allowed.[4] Visitation was supervised and scheduled for one hour twice a week. When asked about John's relationship with his parents, Amanda Messer, John's social worker, testified:

> He enjoys spending time with his parents. I mean, he recognized them when he saw them for visits. They would always come to visitation. [John] appeared happy to see them, and he recognized them as his – his parents. He'd – he would play with them. The - the overall interaction between [respondents] and [John] was appropriate during visitation. There were some concerns initially between [respondents] during visitation that I addressed with [respondents] between their interaction between the adults during visitation.
>
> And that improved once I addressed the interaction between the adults in the – during the visitation. So, but overall, you know, [respondent-father] would clip . . . [John's] fingernails, you know; they would change diapers. They would care for [John] during visitations. They would feed him, things of

[4] The court ceased all visitation by both parents by order filed 12 October 2007.

> that nature. They would - they would take care of his needs during visitation.

Messer's testimony did not address the strength of respondent-mother's parental bond with John, but does suggest that a bond exists and that respondent-mother has attempted to establish a parental bond by attending visitation, caring for John during visitation, and adjusting her interactions with respondent-father as requested by the social worker.

In its 5 October 2007 court report, regarding visitation, DSS stated that

> [respondent-father] has done a better job of treating [respondent-mother] as an equal parent during visitations since the last court date. Both parents visit twice a week for one hour. [Respondent-father] has been less critical of [respondent-mother's] parenting during visitation. The parents do a good job and [*sic*] taking care of [John] during the visitation. [Respondent-father] is sometimes reluctant to follow [John's] schedule in regards to feeding times. [Respondent-father] will clip [John's] fingernails during visitations.

The 2 May 2007 FSA states that the primary permanency plan for John at the time was reunification "because child is bonded." Messer did not fill out the section IV-a, "Progress Toward Meeting the Identified Need." The 19 October 2006 FSA states that the primary permanency plan for John was reunification "because child is bonded" and, should reunification not be accomplished, the concurrent plan was guardianship with Alice. Here, Messer checked off "Partially Achieved" in section IV-a. She also checked off "Partially Achieved" on respondent-mother's 25 August 2006 FSA and respondent-father's 24 August 2006 FSA as well as commenting on

both FSAs that John could not be placed with Paul because of Alice's finances. Although the trial court has prohibited visitation for the last 14 months, there is no evidence to support finding of fact 52 that no parental bond exists between John and his parents.

The court report filed by the guardian ad litem (GAL) on 6 June 2008, *after* respondents' parental rights were terminated, states that "Because it has been almost two years and [John] has no relationship with [Alice] or [Paul] I do not feel that it would be in his best interest to move. He is extremely attached to his current family." The GAL's report also notes that John's foster parents "are willing to make him a permanent part of their family." There is no explanation as to why that information was not made available before or during the termination of parental rights hearing.

It is also unclear to this Court, based upon the record before us, why placement with Alice was not pursued. She expressed a willingness, desire, ability, and preparedness to take custody of John. John's brother, Paul, has flourished in her care; he receives high grades, was elected class president, and is on sports teams at his school. There was no testimony that John's foster parents want to adopt John, only that they would be given the right of first refusal to adopt John. The GAL expressed her belief that it would be better for John to be raised by his foster family than to be united with his grandmother and brother because John has been with his foster family for all but a few days of his life. If

guardianship with Alice is not pursued, it appears likely that John will not ever meet his grandmother or brother. *See Santosky v. Kramer*, 455 U.S. 745, 761, n.11, 71 L. Ed. 2d 599, 611, n.11 (1982) ("For a child, the consequences of termination of his natural parents' rights may well be far-reaching. . . . The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever. Some losses cannot be measured.") (quotations and citations omitted; alterations in original).

The record and transcript paint a more nuanced picture of this family's situation than does the order terminating parental rights. Although the trial court's ultimate determination that respondent-mother's parental rights should be terminated may be correct, critical findings of fact supporting that conclusion are not supported by clear, cogent, and convincing evidence. Accordingly, we reverse the order terminating respondent-mother's parental rights and remand for reconsideration consistent with this opinion.

Respondent-father

Respondent-father first argues that the trial court erred by concluding that grounds exist for the termination of his parental rights. Unlike respondent-mother, he specifically challenged the following findings of fact in his brief: 15, 25, 28, 29, 30, 31, 39, 43, 51, 52, 55, and 56. He argues that these findings of fact

are not supported by clear, cogent, and convincing evidence in the record. Findings of fact 51 and 52 are recited above. The other findings of fact state, in relevant part:

> 15. . . . . Respondent father did not support the mother during her pregnancy with the juvenile and immediately following the birth, denied that the juvenile was his child. . . .
>
> 25. The respondent parents failed to substantially comply with the provisions of their respective agreements [FSA].
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> 28. Although there was no evidence in October 2007 that the parents had been involved in acts of domestic violence or disagreements, the parents have failed to comply with the FSA provision concerning marriage counseling.
>
> 29. The sole provision of the FSA plan which the parents had favorably accomplished was visitation with the juvenile [supervised visits].
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> 30. As of October 5, 2007, the juvenile had been out of the parents' custody and home for fourteen (14) months. The court, in its permanency planning order of that date, made a finding that "the parents had sufficient time and opportunity to comply with the terms of the Family Service Agreement and be reunited with the juvenile within a reasonable time."
>
> 31. At first the parents were reluctant to work on the plan of reunification; then the parents commenced to show a renewed effort after the May 2, 2007, FSA update. Yet after fourteen months, the parents failed to make reasonable progress under the following circumstances that the juvenile would be safe if placed in their home. These circumstances are as follows: [1] the past history of domestic violence between the parents had not been satisfactorily dealt with by them on the basis of appropriate treatment; . . . [3] the parents had failed to comply with the

> reunifiction plan with the older sibling and they had not visited with him on a regular basis; and [4] the parents had failed to accept the parental responsibility of juvenile support when they had the ability and means to do so.
>
> 39. The parents have had sufficient time and opportunity to comply with the terms of the court's plan of reunification [as expressed in the FSA] within a reasonable period. They have not substantially complied with the plan. The parents have again engaged in acts of domestic violence. . . . The parents have not demonstrated that their home would be a safe environment within which to place the juvenile. The juvenile has now been in foster care for approximately 21 months. The parents have failed to make changes in their lives so as to allow a return of the juvenile to the parents within a reasonable period of time.
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> 43. During the aforesaid six month period [May 28 to November 28, 2007], the father failed to pay a reasonable portion of the cost of the juvenile's care. For said period, the father had the ability to pay considerably more.
>
> 55. Termination of the rights of their [*sic*] parents will assist in obtaining a safe and stable home.
>
> 56. It is in the best interest of the juvenile for the rights of his parents to be terminated.

Having already passed judgment on findings of fact 51 and 52 above, we now examine the factual bases for respondent-father's other challenged findings of fact.

Finding of fact 15 is supported by the evidence and respondent-father's rebuttal of that finding is better characterized as an explanation; respondents had been separated for some time before John's birth and respondent-mother did not inform

respondent-father of her pregnancy or that the child was his. Accordingly, this finding of fact is supported by clear, cogent, and convincing evidence, but does not necessarily support termination of respondent-father's parental rights.

Findings of fact 25, 28, and 29 address respondents' compliance with their FSAs. As noted above, social worker Messer indicated that respondent-father had partially accomplished the requirements of his FSAs.[5] The 19 October 2006 joint FSA states the following objectives for respondent-father:

1. Cooperate with and pay child support.
2. Cooperate with unannounced and announced home visits.
3. Attend ReEntry and follow recommendations to include parenting classes.
4. Attend HALT and follow recommendations.
5. Attend marriage counseling and follow recommendations.
6. No domestic violence.

Messer made the following comments on 8 January 2007 regarding respondent-father's partial achievement of his objectives: "[Respondent-father] said he did a VSA agreed for 480.00, reports sent 2 payment. . . . [Respondent-father] reports has not missed any parenting classes at PRIDE. [Respondent-father] has not completed VSA for [illegible] and has made no payments." "Parents are not attending marriage counseling. Parents have not moved into new residence. No new reports of domestic violence. [Respondent-father] reports not attending HALT." The 20 April 2007 DSS court report states that respondents were cooperative with announced home

[5]The contents of respondent-father's first FSA, dated 24 August 2006, appear to have been written in pencil and are not legible.

visits and home assessment of a new residence; it is silent with respect to unannounced home visits.

The 2 May 2007 joint FSA identifies four activities for respondent-father to complete, but Messer did not assess his progress toward completing those activities. The identified activities are:

1. Attend HALT or equivalent program and follow the recommendations.
2. Cooperate with and pay child support.
3. Attend marriage counseling and follow recommendations.
4. Attend visitation as allowed by the court.

The record shows that respondent-father attended ten of fourteen classes in Controlling Anger Positively (CAP), which is "a course for non-violent individuals who do not need or meet the criteria for long-term therapy." HALT is a batterers' treatment program and DSS appears to have accepted CAP as an acceptable substitute for HALT. The record also shows that respondent-father attended marriage counseling at least six times, but the marriage counselor did not comment as to whether respondent-father followed her recommendations. It is undisputed that respondent-father attended every visitation allowed by the court. However, respondent-father did not complete his child support payments and was $3,033.00 in arrears as of 5 October 2007.

It is clear that respondent-father partially complied with the requirements of the FSAs and, with the exception of paying child support, substantially complied.

As to finding of fact 31, we agree with respondent-father that his failure to comply with reunification efforts with Paul should not have been included as a basis for his noncompliance with John's case plan. We note that the trial court sustained objections to the social worker's testimony about Paul's adjudication. Thus, the third sentence of finding of fact 31 should be stricken. We also agree that respondent-mother's failure to comply with the mental health requirements of her case plan should not be attributed to respondent-father's compliance with his case plan. Although Messer testified that, as of October 2007, respondents "had been non-compliant with the Family Services Agreement" and "had not made reasonable efforts to rectify the issues that led to him coming into foster care," our review of the record reveals that respondent-father was partially, if not substantially, compliant with the FSA.

Regarding respondent-father's domestic violence, the sole incident that occurred between respondents during the relevant time period stemmed from respondent-mother's unmedicated and, apparently, unprovoked, golf club attack upon respondent-father's car. Given that the parents no longer live together, that no history of domestic violence exists between respondent-father and John or Paul, and that the incidents of domestic violence appear to be related to respondent-mother's mental illness, it seems that the trial court's findings with respect to respondent-father's domestic violence are too conclusory.

With respect to finding of fact 48, in which the trial court determined that respondent-father had the ability to pay child support, the evidence is slim. Finding of fact 43 refers to a six month period from 28 May 2007 to 28 November 2007. The record does not include any information about respondent-father's income during this period. We acknowledge that finding of fact 42, which is binding, states, "From the barber shop, [respondent-father's] net earnings during the year 2005 were $16,810 and for the year 2006 was $27,162." However, there is no corresponding finding with respect to the relevant six-month period in 2007.

Finding of fact 55 is supported by the evidence. John is adoptable, healthy, and young. He has stayed in the same placement since he was removed from his parents and has been well-socialized by his foster parents.

Finding of fact 56 is, like finding of fact 51, a conclusion of law. However, it does bring us to respondent-father's next argument, which is that termination of his parental rights is not in John's best interest. As noted in our discussion of respondent-mother, it appears that John is bonded to respondent-father. Although this might have changed as a result of the termination of visitation, we have no evidence to support that assumption. Also, the record does not include a proposed adoptive parent, so we are unable to assess that element except to note its absence. We hold that the trial court's findings of fact are not supported by clear, cogent, and convincing evidence and, as a result, do not support the trial court's conclusions of law. Accordingly, we reverse the

order of the trial court terminating the parental rights of respondent-father and remand for reconsideration consistent with this opinion.

Moreover, we strongly recommend that the trial court and DSS pursue guardianship with John's grandmother, Alice. Based upon the record before us, it appears that she has a home and the means to support John and has proven herself to be a fit guardian of John's older brother, Paul, who has flourished in her care. Here, there is an opportunity to unite the brothers and unite John with their grandmother; it appears that this option, which will keep part of the family unit together, was not given proper consideration at the trial level.

Reversed and remanded.

Judges MCGEE and STROUD concur.

Report per Rule 30(e).