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NO. COA 08-486

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

In the Matter of
J.A., K.A. & D.A.,
Juveniles.

Macon County
Nos. 05 JA-10, 05-JA-75,
05-JA-76

Court of Appeals

Appeal by Respondent from orders dated 8 January 2008 by Judge Monica H. Leslie in Macon County District Court. Heard in the Court of Appeals on 26 August 2008.

William R. Shilling for Petitioner-Appellee Macon County Department of Social Services

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for Respondent.

Parker, Poe, Adams & Bernstein, L.L.P., by R. Bruce Thompson, II, for Guardian Ad Litem.

McGEE, Judge.

Respondent-Father J.A. (Respondent) appeals from adjudication and disposition orders terminating his parental rights to J.A., K.A., and D.A. (the children). We affirm the trial court's order terminating Respondent's parental rights.

Macon County Department of Social Services (DSS) petitioned the trial court for non-secure custody of the children on 2 November 2005 based on several allegations, including the following: (1) Respondent was convicted of three counts of assault

on a female and one count of misdemeanor child abuse and was sentenced to 150 days in jail and two years supervised probation; (2) Respondent was incarcerated at the time the petition was filed and was unable to provide for any needs of the children; (3) the children were witness to domestic violence between Respondent and the children's mother on several occasions; and (4) the children's mother told two of the children that she was going to kill herself, locked herself in the bathroom, and overdosed on prescription medication on 1 November 2005. The trial court entered orders on 2 November 2005 granting non-secure custody of the children to DSS.

A hearing with regard to K.A. and D.A. took place on 20 December 2005. Respondent was present in court at the 20 December hearing and consented to the continued custody of K.A. and D.A. with DSS, pending another hearing. Respondent signed a case plan with DSS in December 2005 in which he agreed to: (1) take parenting classes; (2) undergo a substance abuse assessment and follow and complete the treatment recommended; (3) attend Alcoholic Anonymous meetings regularly; (4) sign releases of information; (5) maintain employment; (6) undergo an anger management assessment and follow recommendations; (7) maintain appropriate and stable housing; and (8) maintain contact with the assigned DSS social worker, including weekly telephone contact and at least one face-to-face contact per month.

Respondent enrolled in parenting classes in January 2006. However, he only attended two classes before dropping out. At the time Respondent dropped out of the parenting classes, Respondent

said he intended to reconcile with the children's mother and take the classes with her at a later date, but he never did so.

Respondent was present at a hearing for K.A. and D.A. on 10 January 2006 during which he agreed to DSS' continued custody of K.A. and D.A., pending another hearing. A review hearing and permanency planning hearing was held on 20 February 2006 regarding the children. During the hearing, Respondent stipulated and agreed that the children were dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101(11), and the trial court concluded such as a matter of law. Also, the trial court ordered that the children remain in the custody of DSS and ordered Respondent to comply with his case plan.

Respondent was incarcerated in Georgia on 2 March 2006. Respondent was released from jail in July 2006. Following his release from jail, Respondent returned to North Carolina.

A review hearing and permanency planning hearing was held on 11 July 2006 with regard to D.A. Respondent was not present at the hearing but was represented in court by his attorney. During this hearing, the trial court found that Respondent had not completed any of his case plan. The trial court further found that Respondent was receiving counseling for alcohol addiction, but had attended only two sessions before dropping out of the treatment program.

A review hearing was scheduled for 30 October 2006 with regard to the children. A DSS social worker contacted Respondent on 29 September 2006 to remind Respondent of the 30 October hearing date.

At the 30 October 2006 hearing, the trial court found that Respondent had previously indicated to the DSS social worker that he had no plans to do anything towards reunification with the children. The trial court also found that Respondent had not complied with his case plan and had not maintained regular contact with DSS or the children. The trial court relieved DSS of making reasonable efforts to prevent or eliminate the need for placement of the children with regard to Respondent.

Respondent was again incarcerated on 22 November 2006 and was not released until August 2007. A review hearing was held on 19 September 2007 with regard to the children. During this hearing, the trial court found that supervised visits were made available to Respondent and the children's mother. However, there had been no recent visits between Respondent, the children's mother, and the children. The trial court further found that Respondent and the children's mother had left the children in the custody of DSS for approximately twenty-two months. The trial court also found that there was no evidence that Respondent had made any progress toward accomplishing the requirements of his case plan other than being employed and having a residence. Lastly, the trial court changed the permanent plan for the children to termination of parental rights.

DSS filed a Motion Seeking Termination of Parental Rights on 14 November 2007. Respondent filed a response on 14 December 2007, in which he admitted to the allegations contained in the DSS motion, with the exception of one allegation. Respondent denied

that he willfully left the children in foster care for more than twelve months without showing to the satisfaction of the trial court that reasonable progress had been made in correcting those conditions which led to the removal of the children.

The trial court held an adjudicatory hearing on the DSS motion seeking termination of parental rights on 8 January 2008. The trial court found that Respondent was employed from December 2005 to January 2006 and that Respondent testified he was employed at the time of the hearing. The trial court also found that Respondent failed to provide DSS with verification of his current employment although the DSS social worker requested that Respondent do so. The trial court further found that Respondent testified that he had been attending Narcotics Anonymous meetings once a week since November 2007 and had also been attending anger management classes. The trial court further found that the children's Guardian ad Litem verified that Respondent had been attending these two programs. However, the trial court found DSS had requested that Respondent provide verification of his attendance at these meetings, but that Respondent had failed to provide DSS with verification.

The trial court further found that Respondent, while incarcerated, did write letters to the children but that the letters had to be monitored by DSS due to inappropriate content. The trial court also found that Respondent did not make any progress on his case plan, did not enroll in or complete any classes, and did not visit with the children during those periods

when he was not incarcerated. The trial court found that since Respondent's release from incarceration in August 2007, he had maintained telephone contact with the children. However, the trial court also found that Respondent had only visited two of the children once and had not visited the third child at all since Respondent's release from incarceration in August 2007.

The trial court found that since his release from incarceration in August 2007, Respondent had lived at three different residences. The trial court found that a DSS social worker conducted a home visit at Respondent's request on 19 December 2007, and that the social worker thought the home was appropriate, but was unsure if the home was large enough for Respondent and the children.

The trial court further found that Respondent had failed to attend his first appointment with his probation officer on 11 November 2007, during which Respondent was scheduled to take a drug test, and that Respondent had rescheduled the appointment for sometime in January 2008. The trial court also found that on 19 December 2007, a DSS social worker requested that Respondent submit to a random drug screen, and Respondent agreed. The trial court found that the social worker offered to give Respondent a ride to the drug test site. However, the trial court also found that the following day Respondent left a message for the social worker stating that Respondent was unable to take the drug test because he did not have a ride.

In addition, the trial court found that with the exception of

Respondent's initial substance abuse assessment, his signing the case plan, and attending two parenting classes and two substance abuse classes, all of which occurred in December 2005 and January 2006, the progress that Respondent made on his case plan occurred after the filing of DSS' motion to terminate Respondent's parental rights. Also, the trial court found and concluded that there were grounds to terminate the parental rights of Respondent and the children's mother in that Respondent and the children's mother willfully left the children in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the trial court that reasonable progress had been made in correcting those conditions that led to the removal of the children from the home. Moreover, the trial court found that Respondent left the children in placement outside the home or in foster care for over twenty-six months.

At the dispositional hearing, which was also held on 8 January 2008, the trial court determined that it was in the best interests of the children that the parental rights of Respondent and the children's mother be terminated. Thus, the trial court ordered that the parental rights of Respondent and the children's mother be terminated. Respondent appeals.

Our Court has held that:

A termination of parental rights proceeding is conducted in two phases: (1) adjudication and (2) disposition. During the adjudication phase, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination under N.C. Gen. Stat. § 7B-1111(a) exists. If a petitioner meets

its burden of proving that one or more statutory grounds for termination exists, the trial court then moves to the disposition phase where it must consider if termination is in the child's best interests. The standard of review of a termination of parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support its conclusions of law.

In re J.G.B., 177 N.C. App. 375, 379, 628 S.E.2d 450, 453-54 (2006) (citations omitted).

I.

Assignments of Error Relating to Adjudicatory Order

A.

Error in finding that grounds for termination exist

The motion filed by DSS alleged that termination of Respondent's parental rights was warranted pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). The pertinent portion of this statute provides:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

. . .

(2) The 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). "[T]o find grounds to terminate parental rights under N.C.G.S. § 7B-1111(a)(2), a trial court must perform a two-part analysis." *In re J.G.B.*, 177 N.C.

App. at 382, 628 S.E.2d at 456 (2006) (citing *In re O.C. & O.B.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005)). First, "[t]he trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months[.]" *Id.*, (quoting *In re O.C. & O.B.*, 171 N.C. App. at 464-65, 615 S.E.2d at 396). Second, the trial court must determine, "that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child." *Id.* "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001) (citation omitted).

The trial court made the following findings of fact, among others, to support its conclusion that grounds for termination of parental rights existed under N.C.G.S. § 7B-1111(a)(2):

40. That throughout the pendency of this case, [Respondent] has been inconsistent in maintaining contact with the assigned DSS social worker.

. . .

43. That from July 2006 until November 2006, [Respondent] did not make any progress on his family services case plan, did not enroll in or complete any classes, and did not visit with the minor children.

. . .

55. That all of the progress that has been made in this case by [Respondent] [(with the exception of the initial substance abuse assessment, signing a case plan, attending two parenting classes, and attending two substance abuse classes, all of which occurred in December 2005 and January 2006)] has occurred after the filing of the DSS motion to terminate [Respondent's] parental rights on November 14, 2007.
56. That [Respondent] has left the minor children in foster care or placement outside the home for more than 12 months without showing reasonable progress in correcting those conditions which led to the removal of the minor children from the home.
- . . .
58. That these minor children have been left in placement or foster care outside the home for over 26 months.

Respondent assigns error to each of the findings of fact listed above. We disagree with Respondent and conclude that each of the trial court's findings of fact are supported by clear, cogent, and convincing evidence. We will address each finding of fact in turn.

Respondent first argues that the trial court erred in finding that Respondent was inconsistent in maintaining contact with DSS throughout the pendency of the case. We disagree.

In his brief, Respondent points to one face-to-face meeting with a DSS social worker on 19 December 2007. He also notes several telephone conversations he initiated with a DSS social worker during December 2007.

A DSS social worker testified that she had telephone contact and face-to-face contact with Respondent after the filing of the

motion to terminate Respondent's parental rights in November 2007. However, another DSS social worker testified that prior to the filing of the motion to terminate Respondent's parental rights, Respondent had failed to maintain consistent contact with DSS. More specifically, the DSS social worker testified that within two months of Respondent's signing the case plan, Respondent was no longer in contact with DSS. A DSS social worker testified that she had to pursue Respondent in order to find out how Respondent was doing with his case plan, and that she also had problems locating Respondent.

This case spanned approximately two years at the trial court level. However, Respondent can only point to one month during which he maintained consistent contact with DSS. Therefore, we conclude that the trial court did not err in finding that Respondent failed to maintain consistent contact with DSS during the pendency of this action.

Respondent next argues that the trial court erred in finding that from July 2006 until November 2006, Respondent failed to make any progress on his case plan, did not enroll in or take any classes, and did not visit with the children. We disagree.

Respondent, in his brief, admits that "little progress" was made from July 2006 until November 2006. Respondent fails, however, to list what he did during this time that would even constitute "little progress" on his case plan. A DSS social worker testified that as of 30 October 2006, Respondent had not completed any of his case plan. Considering Respondent's failure to state

what he in fact did in furtherance of making progress on his case plan between July 2006 and November 2006 and considering the DSS social worker's testimony that Respondent had not completed any of his case plan by 30 October 2006, we conclude that the trial court was correct in finding that Respondent failed to make progress on his case plan from July 2006 to November 2006.

Respondent further argues that the trial court erred when it found that all of the progress made by Respondent, with the exception of the initial substance abuse assessment, signing a case plan, attending two parenting classes and two substance abuse classes, all of which occurred in December 2005 and January 2006, occurred after the filing of the DSS motion to terminate Respondent's parental rights on 14 November 2007. We disagree.

We first note that in Respondent's assignments of error, Respondent correctly identified the finding of fact that corresponds with his argument. However, in Respondent's brief, Respondent mislabeled the finding of fact that corresponds with his assignment of error.

Following the filing of the motion to terminate Respondent's parental rights on 14 November 2007, Respondent secured employment, began attending Narcotics Anonymous meetings and an anger management class at least once per week, secured a residence, and requested a home study. In addition, a DSS social worker testified that she did not have telephone contact nor face-to-face contact with Respondent until November 2007, which coincided with the filing of the motion to terminate Respondent's parental rights.

It is clear from our review of the record and transcript that the trial court did not err in finding that all of the progress Respondent made, notwithstanding the exceptions listed above, occurred after the filing of the motion for termination of parental rights. Thus, Respondent's assignment of error fails.

Respondent next argues that the trial court erred in finding and concluding that Respondent left the children in foster care or placement outside the home for more than twelve months without correcting those conditions which led to the removal of the children from the home. We disagree.

"The relevant time period for measuring 'reasonable progress under the circumstances' begins after 'removal of the juvenile' from the home." *In re C.W. & J.W.*, 182 N.C. App. 214, 225-26, 641 S.E.2d 725, 733 (2007) (quoting N.C. Gen. Stat. § 7B-1111(a)(2) (2005)). "A parent's incarceration is a 'circumstance' that the trial court must consider in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile.'" *Id.* at 226, 641 S.E.2d. at 733 (quoting *In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003)). The children were removed from Respondent's home on 2 November 2005, and the hearing on the motion to terminate Respondent's parental rights was held on 8 January 2008. As DSS argues in its brief, Respondent was not incarcerated and had the ability to show reasonable progress for approximately thirteen months out of the twenty-six months the children were in the custody of DSS.

However, as we established above, the record supports the trial court's finding that Respondent failed to adhere to his case plan during those times he was not incarcerated. Although it appears that Respondent attempted to make progress on his case plan beginning in November 2007, "[e]xtremely limited progress is not reasonable progress." *In re Baker*, 158 N.C. App. 491, 497 581 S.E.2d 144, 148 (2003) (quoting *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995)).

Respondent further argues that the principal condition which led to DSS' removal of the children from the home was the attempted suicide by the children's mother, which is a condition over which he lacked control. However, according to the record, DSS filed a petition for non-secure custody of the children for several reasons, including the following: (1) the attempted suicide by the children's mother; (2) the children witnessed domestic violence between Respondent and the children's mother on several different occasions; (3) Respondent had been convicted of and incarcerated for assault on a female and misdemeanor child abuse; and (4) Respondent was incarcerated when the petition was filed. Moreover, at the hearing upon the merits of the petition on 20 February 2006, Respondent stipulated to the allegations contained in the petition. We conclude that the trial court did not err in finding and concluding that Respondent left the children in foster care or placement outside the home for more than twelve months without correcting those conditions which led to the removal of the children from the home.

Also, Respondent assigns as error the trial court's finding that the children had been left in placement or foster care outside the home for over twenty-six months. However, Respondent failed to argue this assignment of error in his brief. Thus, Respondent's assignment of error is deemed abandoned. See N.C.R. App. P. 28(a).

B.

Error to include reference to adjudication of dependency in order

Respondent argues that the trial court erred in its termination of parental rights order by making conclusions of law and making a decree regarding the dependency of the children when dependency was not alleged as a ground in the petition, nor is it authorized as a ground by statute. Respondent argues that when the trial court referred to the children's dependency in the order to terminate Respondent's parental rights, it did so "presumably" as a justification for the termination. We disagree.

There is no basis for Respondent's argument that the trial court referred to the dependency status of the children "presumably" as justification for the order to terminate Respondent's parental rights. As DSS argues in its brief, there is no finding of fact, no conclusion of law, nor is there a decree in the trial court's order that would justify Respondent's presumption. In fact, the order makes clear that the statutory grounds upon which the trial court based its order to terminate Respondent's parental rights is N.C. Gen. Stat. § 7B-1111(a)(2). Respondent's argument that the trial court "presumably" used the adjudication of dependency as grounds to terminate Respondent's

parental rights is without merit because there is no evidence to indicate that the trial court did so.

Respondent further argues that when the trial court concluded that the children "were adjudicated . . . to be dependent juveniles . . . and continue to be dependent up to and including this date and at the time of this hearing . . . ," the trial court was confusing neglect and dependency. Respondent argues that the trial court combined neglect case law, which requires a finding that neglect continues to the date of the termination hearing, with the adjudication of dependency, as if that established a ground for termination in and of itself.

Assuming, *arguendo*, that the trial court mistakenly combined the neglect standard with the adjudication of dependency, such an error would have no impact on Respondent. As we stated earlier, there is nothing in the trial court's order that indicates it based its decision to terminate Respondent's parental rights on the children's former dependency adjudication. Moreover, review of the trial court's order makes clear that the trial court based its decision to terminate Respondent's parental rights solely on the grounds provided by N.C. Gen. Stat. § 7B-1111(a)(2).

II.

Assignments of Error Relating to Dispositional Order

A.

Error in finding likelihood of adoption is very good

Respondent further argues that because the evidence showed the children had problems that impaired their adoptability and because

no prospective adoptive placement was identified, the trial court erred in finding that the likelihood of adoption was very good. We disagree.

Respondent points to a DSS report which stated that the children have various developmental and behavioral issues. As well, Respondent points to the trial court's finding that due to the mental health issues of the children, there was not a prospective adoptive placement identified at the time of the hearing. However, additional evidence was presented and considered by the trial court on the issue of the adoptability of the children. The record shows that the trial court considered court reports prepared by the Guardian ad Litem and DSS, both of which supported the finding that the likelihood of adoption was very good. As well, the trial court considered testimony by a DSS social worker as to the turbulent bond between the children and Respondent. Although Respondent disagrees with the trial court's finding, "findings of fact are conclusive on appeal if they are supported by 'ample, competent evidence,' even if there is evidence to the contrary." *In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) (quoting *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). Therefore, we conclude that the trial court did not err in finding that the likelihood of adoption of the children was very good since its finding was based on ample and competent evidence.

B.

Error in concluding that termination in children's best interest

Respondent argues that the trial court erred in concluding that the best interests of the children would be served by terminating Respondent's parental rights because the trial court failed to make any findings of fact about the children's opinions. We disagree.

"[T]he trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests." *In re McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174. In making its determination, the trial 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). "'We review the trial court's decision to terminate parental rights for abuse of discretion.'" *In re V.L.B.*, 168 N.C. App. 679, 684, 608 S.E.2d 787, 791, *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005) (quoting *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002)).

According to the record, the trial court addressed all of the factors necessary to make a valid determination as to whether

termination of Respondent's parental rights was in the best interests of the children. In making its determination, the trial court considered, among other things: (1) the children's opinions regarding the termination of Respondent's parental rights; (2) the likelihood of adoption for all three children was very good; and (3) the social worker's testimony that the bond between Respondent and the children was very turbulent. We conclude, therefore, that the trial court did not abuse its discretion.

Affirmed.

Judges McCULLOUGH and STROUD concur.

Report per Rule 30(e).