NO. COA08-62

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

IN THE MATTER OF:

H.N.B.

Haywood County
No. 07 JT 12
05 J 38

Appeal by respondent from judgment entered 15 November 2007 by Judge Monica H. Leslie in Haywood County District Court. Heard in the Court of Appeals 27 May 2008.

Ira L. Dove, for petitioner-appellee Haywood County Department of Social Services.

North Carolina Administrative Office of the Courts, by Pamela Newell Williams, for appellee Guardian ad Litem.

Thomas B. Kakassey, for respondent-appellant.

ELMORE, Judge.

Respondent M.B. appeals from the trial court's order terminating his parental rights as the father of H.N.B. on the bases of neglect and of leaving the child in foster care for more than twelve months without making reasonable progress. For the following reasons, we affirm the decision of the trial court.

I. Facts and background

Minor child H.N.B., born in 2004, is the child of mother Sheila D.[1] and father Matt B. (respondent). On 2 March 2005, the trial court granted the Haywood County Department of Social Services (DSS) non-secure custody of the minor child upon a petition alleging abuse, neglect, and dependency. The basis for the petition included several incidents of alleged domestic violence between respondent and Sheila D., as well as illegal drug use by both parents. Non-secure custody was continued by orders entered 29 March, 5 April, 25 April, 2 June, 27 July, and 16 August 2005.

On 8 September 2005, H.N.B. was adjudicated neglected due to lack of proper care, supervision, and discipline, and to living in an environment injurious to her welfare. H.N.B. had severe developmental delays that required specialized services while in foster care. Respondent was allowed supervised visitation with H.N.B. He was required to complete a substance abuse assessment, a domestic violence assessment, drug screens, and to cooperate with DSS regarding child support payments.

At the ninety-day review hearing held on 8 December 2005, the trial court found that respondent had (1) failed to complete any of the drug screens requested by DSS, (2) failed to inform DSS where he was living, (3) had not completed a case plan as he agreed to do, and (4) had not set up a child support payment plan. In addition to the requirements set forth in the adjudication and

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[1] Sheila D. died in 2006 and will be referred to throughout the opinion as Sheila D. or mother.

disposition order, respondent was also ordered to inform DSS how to stay in contact with him, and to complete a capacity to parent assessment and follow all recommendations. His visitation was made conditional upon complying with these requirements.

The first permanency planning review was held on 23 February 2006. The trial court found that respondent had completed a substance abuse assessment, but no evidence was available regarding whether he had completed a domestic violence assessment. Although respondent had completed four drug screens that came back negative, the drug screens could not be scheduled on a random basis due to his job schedule. Further, although respondent had not contacted the child support agency to set up payments, he did have a job, and he was consistent in his visitation with H.N.B. Substance abuse classes were scheduled but had not yet begun. The trial court directed DSS to continue to make reasonable efforts to reunify the minor child with respondent, and ordered that the permanent plan for H.N.B. be reunification. Respondent was ordered to complete a domestic violence assessment, a parenting capacity assessment, and random drug screens, and to set up a child support payment plan.

The next permanency planning review hearing was held on 30 November 2006. The hearing was delayed because respondent requested a new parenting capacity assessment after complaining that he could not understand the questions presented to him in the first assessment, administered by Dr. Pete Sansbury. Respondent was thereafter administered an audio version of the assessment. When Dr. Sansbury released his revised evaluation, respondent filed

a motion with the trial court requesting more time in which to have an independent evaluation performed by another doctor. The trial court granted respondent's request. At the November 2006 hearing, the trial court found that respondent's progress included the following: (1) completion of four out of nine drug screens, one of which came back positive for marijuana; (2) completion of a substance abuse assessment as well as some treatment recommended by the assessment; (3) completion of a domestic violence assessment[2]; (4) visitation with H.N.B. nine times out of twenty-two scheduled visits[3]; (5) no documentation regarding parenting classes was presented, but respondent asserted at the hearing that he had completed parenting classes; and (6) failure to take any steps toward setting up or making child support payments. The trial court ordered that the permanent plan be changed from reunification to adoption, and authorized DSS to cease reunification efforts. Respondent was allowed to maintain his visitation schedule with H.N.B.

DSS filed a petition for termination of parental rights on 22 January 2007. Grounds for termination were: (1) neglect, (2) wilfully leaving the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions that led to the removal of the child, and (3) wilful

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[2] Respondent denied any domestic violence and therefore no recommendations for treatment were made.

[3] Respondent did not show or call eight times, had to cancel five times, and never requested to reschedule any of the missed visits.

failure to pay a reasonable portion of the cost of care for the child despite an ability to do so. Respondent denied the material allegations of the petition.

Another permanency planning hearing was held on 18 July 2007. At that time the trial court noted the following updates regarding respondent's progress: (1) he had completed a substance abuse assessment on 25 June 2007; (2) sometime in June 2007 he had tested positive for marijuana; (3) he had missed four visits within the previous six weeks, two times when he was on vacation and two times when he simply did not show up; (4) he had not paid any child support until March 2007; (5) he had a pending criminal charge for intimidation of a witness in the termination of parental rights case; and (6) he had new pending charges for assault and battery. The trial court stated that the permanent plan for H.N.B. would remain adoption, but allowed respondent to continue with his visitation schedule.

The termination case was continued several times, mostly to allow respondent more time to conduct discovery. The termination hearing was held over three days, the twelfth and thirteenth of September and the ninth of October 2007. For the adjudicatory phase, DSS called several witnesses, including respondent, Dr. Sansbury, social worker Mary Bidwell, and foster care supervisor Paula Watson. DSS also called witness John Gernandt, who testified regarding incidents in which respondent threatened Mr. Gernandt and his family in June 2006 and in March 2007. The March incident resulted in criminal charges against respondent.

Respondent called to the stand DSS employee Sheila Holden, respondent's girlfriend Sherry Coles, and respondent's mother Laurie Arwood. Numerous documents were presented and admitted into evidence from both sides. After all the evidence was presented, the trial court concluded that DSS had proven two of the three grounds for termination stated in the petition: (1) that respondent had neglected the child and that the neglect continued at the time of the hearings, and (2) that respondent had wilfully left the child in foster care for more than twelve months without making reasonable progress. The trial court did not find as a ground for termination that respondent had not provided for the reasonable cost of care of H.N.B. in foster care.

The trial court then conducted the disposition phase of the hearing. DSS called social worker Mary Bidwell to testify regarding H.N.B.'s progress in foster care. Respondent did not present any evidence. The trial court ultimately concluded that termination would be in the best interests of the child, and ordered that respondent's parental rights be terminated. Further facts will be discussed as necessary below.

II. Standard of Review

Termination of parental rights cases involve two separate components. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the burden is on the petitioner to prove that at least one ground for termination exists by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f) (2007); *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at

908. Review in the appellate courts is limited to determining whether clear and convincing evidence exists to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). Once the trial court has determined that a ground for termination exists, the court moves on to the disposition stage, where it must determine whether termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a) (2007). The trial court's decision at this stage is reviewed for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

III. Disposition Phase

Respondent first argues that the trial court erred in making findings of fact 58, 59, and 60, which stem from reports made by Dr. Sansbury. Respondent contends that those reports relied in turn on unproven evidence and that they are internally inconsistent. Those findings are:

> 58. In reaching his conclusions for the second capacity to parent evaluation, Dr. Sansbury read numerous investigative arrest reports and criminal warrants regarding charges for which [respondent] was not convicted and considered the fact that the truck [respondent] drove to the evaluation had windows busted out, in addition to the new test results. Dr. Sansbury also believed that [respondent] had manipulated the Court into allowing him a second evaluation.
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> 59. Although the Court generally accepted the testing results of both assessments, the Court gave minimal weight to some of the conclusions that were intertwined with Dr. Sansbury's analysis of those records, and was much more persuaded by the Respondent Father's behaviors

> and efforts while his child has been in the custody of the Department of Social Services.
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> 60. From Dr. Sansbury's reports, the Court specifically finds that the Respondent Father tends not to take personal responsibility for problems in his life and instead blames others, and that the Respondent Father has difficulty trusting others and does not expect cooperation from people.

Respondent's counsel objected to Dr. Sansbury's testimony regarding his evaluations at the hearing, on the basis that the doctor had taken into consideration the numerous warrants taken out against respondent even though no convictions were obtained, and that any conclusions based on those warrants were thus invalid. We are not persuaded by respondent's argument.

When both competent and incompetent evidence is presented, trial judges sitting as finders of fact are presumed to rely on the competent evidence and to ignore the incompetent evidence. *State v. Coleman*, 64 N.C. App. 384, 385, 307 S.E.2d 207, 208 (1983). As long as competent evidence exists to support a finding, that finding will be upheld on appeal. *Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840. Here, finding 58 merely states the factual basis for Dr. Sansbury's evaluation and is directly supported by the record and his testimony at trial. The finding accurately notes that respondent was not convicted for any of the charges, which addresses respondent's concern. Moreover, findings 59 and 60 appear to counteract respondent's argument; the Court specifically stated that it gave little weight to some of the doctor's conclusions, and more credence to respondent's own behaviors.

Although the trial court did rely on the doctor's evaluations in finding 60, the trial court's finding has more to do with respondent's personality and his response to others than anything to do with the warrants taken out against him. In any case, the findings are supported by the evidence submitted at trial, and therefore this argument has no merit.

Respondent next challenges findings of fact 11, 15, and 16 as being unsupported by evidence because they all refer to domestic violence claims made against respondent which were never substantiated. The findings read as follows:

> 11. On or about the 3rd or 4th day of February 2005, there was a physical altercation between Ms. Davis and [respondent]. During that altercation glass was broken in the home. [Respondent] physically abused Ms. Davis on that occasion. He had done so many times. On some of these occasions, the domestic violence occurred while the Respondent Mother was holding [H.N.B.] and on other occasions the violence occurred in the presence of two of her other children . . . .
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> * * *
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> 15. On or about March 3, 2005, Ms. Davis had gone to get her daughter from [respondent]. When she got to him, he had pulled her hair, hit her in the head, and hit her as she attempted to get the child in the car seat. As Ms. Davis drove off with [H.N.B.], [respondent] threw rocks at the van and kicked the van. The Respondent Mother filed a complaint for domestic violence regarding this incident.
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> 16. Based on her complaint and motion filed March 3, 2005, Ms. Davis was issued an Ex-Parte Protective Order. The Order required [respondent] to stay away from the Respondent Mother and the minor child [H.N.B.]. The Order, as a result of various continuances, stayed in effect until June 13, 2005, at which time it was dismissed when the Respondent

> Mother failed to appear on the scheduled trial date.

These findings are taken from the trial court's order adjudicating the minor child neglected on 8 September 2005. The trial court took judicial notice of the adjudication order at the termination hearing. We note that a trial court "may take judicial notice of earlier proceedings in the same cause." *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985). More specifically, prior orders adjudicating a child neglected are admissible in a termination hearing. *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231-32 (1984). Respondent did not appeal from the adjudication order and there is no showing in the record that respondent objected to these findings when they were first made. Therefore, we do not agree that the trial court erred in relying on the previous order in this case, and these assignments of error are overruled.

Respondent next argues that the trial court erred in entering finding of fact 54, which reads:

> 54. [Respondent] had more than 20 criminal charges pending during the period of this action. Several involved domestic violence with the Mother of the minor child, who is now deceased. All but three or four of those charges have been dismissed.

Respondent contends that this finding is contradicted by finding of fact 73 as well as by the record. Finding of fact 73 reads:

> 73. [Respondent] spent 42 days in jail in May to June 2005, for failing to appear in court on domestic violence charges. All of the charges were dismissed except for one assault

> (non-domestic) for which he received 10 days pretrial credit.

We believe that respondent has misconstrued these findings of fact.

We find that evidence from the record and transcript supports each of these findings. Respondent himself testified that Sheila D. took out "thirty or forty" warrants against him for domestic violence incidents, that he had a pending charge against him for intimidating a witness, that he spent forty-two days in jail, and that he was never convicted of any of the domestic violence charges. He also testified that he spent ten days in jail for a fight he had with a man. Further, we note that respondent did not challenge two other findings in the order which refer to respondent's two convictions for traffic offenses and one conviction for assault. Findings of fact that are supported by competent evidence are conclusive on appeal even though some evidence may support contrary findings. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). In light of the evidence presented, the trial court did not err in making these findings of fact.

In respondent's next argument, he challenges numerous findings of fact regarding respondent's incomplete compliance with his case plan. Respondent contends that findings of fact 23, 30, 32, 33, 37, 40, and 62 are not supported by the evidence, and that the evidence shows that respondent did substantially comply with his case plan. The contested findings read as follows:

> 23. The Respondent Father had not completed any drug screens requested by the Department of Social Services and had not disclosed to

> the Department where he was living since this case was opened.
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> * * *
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> 30. [Respondent] had completed a Substance Abuse Assessment; however, the Department of Social Services had no record of his Domestic Violence Assessment and there was no evidence
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> * * *
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> 32. [Respondent] had not contacted Child Support to set up Child Support for the minor child.
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> 33. The Respondent Father entered into a Family Services Case Plan that was begun in December 2005. Prior to that time, [respondent] did not give the Department of Social Services an appropriate address for his residence.
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> * * *
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> 37. [Respondent] had been offered nine drug screens. He completed four of the nine drug screens. Three screens were urinalysis drug screens, which were negative. [Respondent] had one hair strand drug screen that was positive for marijuana during the spring of 2006.
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> 40. Since that time, the Respondent Father had been encouraged on numerous occasions by the Department of Social Services to complete his treatment. [Respondent] had not done so as of the date of the November 30, 2006 6-Month Permanency Planning Review hearing.
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> * * *
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> 62. During the period from March 14, 2005 until July 18, 2005, [respondent] did not cooperate with the Department of Social Services or contact the Department regarding visitation and did not visit with [H.N.B.] although visitations were offered to him. He stated he had been in jail and out of the States during this period of time and refused in July 2006 to cooperate with a Family Services Case Plan or to sign a Visitation Plan.

These findings of fact reflect the progress made by respondent over a period of time, and are ordered chronologically to that effect. They therefore must be considered as a whole and respondent's attempt to isolate particular findings from other,

uncontested findings is not persuasive enough to convince the Court that they were made in error. Finding 23 is taken from the 8 December 2005 ninety-day review hearing and reflects respondent's progress as of that date. Findings 30, 32, and 33 parallel findings made after the 23 February 2006 permanency planning review hearing, and similarly reflect respondent's progress to that date. With respect to finding 40, the trial court's observation reflects a similar finding made after the 30 November 2006 permanency planning hearing. Finding of fact 37 is based on social worker Ms. Bidwell's testimony regarding respondent's drug screens, and her testimony directly supports the finding. Concerning finding 62, Ms. Bidwell testified that respondent refused to cooperate with the agency or sign a case plan until December 2005, when he did sign a family services case plan. She stated that the agency did not know respondent's address from May until December 2005, and that he did not show up for visitation until July 2005. Respondent testified that he missed visits with H.N.B. in 2005 because he was in jail. Respondent has not shown how the trial court erred in including these findings, particularly because numerous other findings detail respondent's further progress regarding visitation and other aspects of his case plan. As we stated above, the trial court is permitted to rely on previous orders in the same case. *Byrd*, 72 N.C. App. at 279, 324 S.E.2d at 276. Because evidence exists to support the challenged findings, these assignments of error are overruled.

Respondent argues that the trial court erred in entering conclusions of law 4 and 5, stating that sufficient grounds exist to terminate parental rights based on neglect and on the failure to make reasonable progress to correct the conditions leading to the removal of the child. Respondent also challenges finding 89, that "[t]he Respondent Father has not corrected the conditions that led to the removal of the child from the home on March 2, 2005." We do not agree.

We first address the trial court's conclusion that sufficient grounds exist to terminate respondent's parental rights based on wilfully leaving the minor child in foster care for more than twelve months without making reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). The minor child was removed from her parents' home in 2005 due to her parents' drug use and domestic violence issues. Evidence was presented at the termination hearing that respondent father tested positive for illegal drugs at several points throughout this case, most recently in June 2007. Further evidence showed that respondent threatened Mr. Gernandt and his family with violence in March 2007, such that criminal charges were brought against respondent. Respondent specifically threatened Mr. Gernandt not to testify against respondent in this termination proceeding. Sufficient findings were made by the trial court in its order regarding respondent's lack of progress on his case plan and his failure to fully comply with the drug screens and other recommended treatment. The evidence is more than sufficient to support the trial court's findings of fact and conclusion that

respondent failed to make reasonable progress, particularly where respondent's continued behavior reflects the same problems that contributed to the juvenile's removal from her parents. Therefore, we find that respondent's arguments regarding this ground are without merit.

Aside from challenging conclusion of law 4 regarding the ground of neglect, respondent also challenges findings of fact 85 and 86 and conclusion of law 3 on the basis that they fail to show that H.N.B. continued to be neglected at the time of the termination hearing. Respondent argues that the evidence instead shows that he has made steady progress, that he has substantially complied with his case plan, and that he has a stable home life. We note that a trial court need only find one ground for termination of parental rights. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. In light of our previous conclusion that the trial court did not err in finding and concluding that respondent wilfully left the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the removal of the child, we need not address respondent's arguments regarding neglect. The assignments of error regarding neglect are therefore overruled.

IV. Best Interests

The trial court entered a separate order on 15 November 2007 finding that termination of respondent's parental rights was in H.N.B.'s best interest. Respondent challenges all of the findings in the order, as well as the ultimate conclusion. Respondent

contends that the trial court improperly repeated findings of fact from the adjudicatory order finding the existence of grounds for termination, many of which respondent argues are contradictory and erroneous, as well as being irrelevant to the determination of best interest. He asserts that the trial court failed to state whether the termination will aid in the accomplishment of the permanent plan for the juvenile as required by statute. We disagree with respondent's contentions.

The determination of whether termination is in the best interest of the minor child is governed by N.C. Gen. Stat. § 7B-1110, which states that the trial court shall consider the following factors:

> (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 other relevant consideration.

N.C. Gen. Stat. § 7B-1110(a)(2007). The decision of the trial court regarding best interest is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602.

Here, the trial court specifically stated in finding of fact 94 in the disposition order that it had considered the six factors enumerated in section 7B-1110(a), and proceeded to appropriately

address each factor in the next ten findings of fact. Among other things, the trial court found that (1) H.N.B. is very bonded to her foster parents; (2) the foster parents want to adopt H.N.B.; (3) that although H.N.B. shows affection for respondent, their relationship has not developed into a deep parental bond due to the limited amount of time spent together; (4) H.N.B. has overcome severe developmental delays and is currently functioning at age-appropriate levels; (5) respondent appears unable to provide for the child's well-being; and (6) H.N.B. needs a permanent plan of care as early as possible, a goal which may only be achieved by terminating respondent's parental rights. Based on these findings, the trial court determined that termination was in the best interest of the child.

Because the trial court properly considered the statutory factors, and came to a decision based on its findings, we find that the trial court did not abuse its discretion in determining that the best interest of the child are served by terminating respondent's parental rights. The fact that numerous findings appear in both the order finding grounds for termination and the order determining best interest is of no consequence. Respondent's assignments of error on this issue are overruled.

Affirmed.

Chief Judge MARTIN and Judge ARROWOOD concur.

Report per Rule 30(e).