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NO. COA08-727

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

IN THE MATTER OF:

J.C.

Brunswick County  
No. 07 J 176T

Appeal by respondent-father from orders entered 25 March 2008 by Judge Thomas Aldridge, Jr. in Brunswick County District Court. Heard in the Court of Appeals 24 November 2008.

# Court of Appeals

*Jess, Isenberg & Thompson, by Elva L. Jess, for petitioner-appellee Brunswick County Department of Social Services.*

*Pamela Newell Williams for appellee guardian ad litem.*

*The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for respondent-appellant father.*

# Slip Opinion

HUNTER, Judge.

Respondent-father appeals from orders terminating his parental rights as father of the minor child J.C. After careful review, we affirm the orders of the trial court.

The Brunswick County Department of Social Services ("DSS") first got involved with this family in April 2006 upon allegations of neglect due to substance abuse by both parents.<sup>1</sup> DSS filed a juvenile petition on 6 April 2006 and was granted nonsecure

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<sup>1</sup> J.C.'s mother voluntarily relinquished her parental rights and is not a party to this appeal.

custody.<sup>2</sup> Respondent-father was arrested the same day on charges of breaking and entering. He remained in jail until 7 July 2006. On 21 June 2006, the trial court adjudicated J.C. neglected and dependent with respondent-mother's consent.

On 11 July 2006, respondent-father entered into a case plan with DSS, which required him to: (1) have a substance abuse evaluation, (2) submit to random drug tests, (3) maintain a drug-free environment, (4) undergo a psychological evaluation, (5) obtain and maintain adequate housing, (6) maintain employment, and (7) pursue Medicaid benefits.

On 3 October 2007, DSS filed a petition to terminate respondent-father's parental rights based on the grounds of neglect, willfully leaving the child in foster care for more than twelve months without making reasonable progress, willful failure to pay a reasonable portion of the cost of care of the child for six months preceding the filing of the petition, and willful abandonment. DSS filed an amended petition on 8 February 2008. Respondent-father filed an answer to the amended petition on 12 March 2008.

The termination hearing was held on 8 November 2007, 29 November 2007, 25 February 2008, and 12 March 2008. In the adjudication phase, the trial court found grounds to terminate respondent-father's parental rights based on neglect and failure to

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<sup>2</sup> The record and transcript variously refer to either 6 April or 11 April 2006 as the day DSS filed a juvenile petition and the day respondent-father was arrested. The juvenile petition itself is not included in the Record on Appeal.

make reasonable progress to correct the conditions which led to the removal of the juvenile from the home. At disposition, the trial court determined that the juvenile is doing well in his foster placement, that the foster parents are willing and able to adopt J.C., that he wants to be adopted even though he would like to continue communicating with his father, and that termination of respondent-father's rights would aid in the permanent plan of adoption. The trial court thus concluded that termination is in the best interests of the juvenile and ordered that respondent-father's parental rights be terminated.

Respondent-father first challenges the trial court's grounds for termination and argues the trial court erred in finding and concluding that he: (1) failed to provide support, comfort and companionship to J.C.; (2) was financially able to pay some child support; (3) made minimal efforts to comply with or complete his case plan; and (4) was incarcerated due to probation violations. Respondent-father also contends the trial court terminated respondent-father's rights "for the sole reason that he was incarcerated[,] " and that the trial court failed to find that neglect was still continuing at the time of the termination hearing. We do not find merit in respondent-father's arguments.

Termination of parental rights cases are determined in two phases: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109 (2007); and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110 (2007). *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003). The petitioner has the burden of

proving by clear, cogent, and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1111(b) (2007); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The standard of review on appeal is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001). Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). A trial court only needs to find one statutory ground for termination before proceeding to the dispositional phase of the hearing. N.C. Gen. Stat. § 7B-1111(a); *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). In the disposition phase, the trial court determines whether termination of parental rights is in the best interests of the child. *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908.

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). 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 (quoting *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001)), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). 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.*

In this case, the trial court made the following findings regarding respondent-father's progress on the case plan he entered into with DSS and his contact and involvement with the minor child:

24. At the time of the execution of the case plan, [respondent-father] was given information to secure a drug assessment and to schedule substance abuse therapy.

25. That contact was made by [respondent-father] with Mr. Edwards to comply with one of the terms requiring a psychological exam to be administered.

26. The case plan was reviewed on August 10, 2006 and it was determined that there had been partial achievement by [respondent-father] in that he had contacted Mr. Edwards to schedule a psychological exam.

27. There was no evidence that he had maintained a drug free environment since he was at the same residence with [J.C.'s mother] and there was no evidence of employment.

28. On July 3, 2006, while he was incarcerated, he had a drug screen which was negative. The Department requested a drug screen on July 31, 2006 and he was a "no show" for the drug screen.

29. At the initial evaluation with Evergreen Behavioral Management, [respondent-father] acknowledged that he had had a cocaine

problem for about a year, although he had used for about two months when he was 35. It was recommended that he secure individual therapy one to two times a month for a period of six months.

30. Records of Evergreen indicated [respondent-father] had appointments scheduled on October 4, 2008 and October 18, 2008 for follow-up. He was a "no-show" since he was incarcerated.

31. [Respondent-father] was not incarcerated from July 7, 2006 until August 21, 2006. He was released on August 30, 2006 and arrested on September 29, 2006. The reason for the incarceration is not included in the evidence.

32. That at the review hearing on September 5, 2006, a hearing attended by [respondent-father,] the Court required child support to be provided to the Department of Social Services for the benefit of [J.C.]. [Respondent-father] provided \$10.00 to [J.C.] on September 6, 2006 for his book club, \$10.00 on September 25, 2006 to the foster mother, and \$20.00 on September 26, 2006 to the Department.

33. [Respondent-father] did not complete the terms of the case plan.

The trial court then made findings that respondent-father was in jail from 29 September 2006 through 30 January 2007, when he was released and placed on probation. Although he enrolled in a substance abuse program after his release, he did not stay with the program more than a week. He was directed to see a doctor to treat his diabetes and then to return to the substance abuse program. Respondent-father did not return to the program, nor did he contact his probation officer or anyone at DSS regarding his location. On 13 February 2007, he was arrested and taken into custody. Because

of the arrest, respondent-father failed to attend a permanency planning review hearing on 13 February 2007.

Other relevant findings made by the trial court are:

42. Prior to October 2007, [respondent-father] sent three pieces of correspondence to [J.C.]: a letter on March 21, 2007, a letter and card were delivered on April 27, 2007.

43. No gifts were provided by [respondent-father] to his son between January and October of 2007. [Respondent-father] did not provide a letter or gifts to the child on or near his birthday in February, 2007.

44. [Respondent-father] represented that he sent letters either once a week or every other week to his son. He also testified that he drew pictures for him. The evidence does not support this representation and the Court finds that other than the correspondence cited in paragraph 42 above, [respondent-father] did not maintain regular contact with his child.

45. While incarcerated, [respondent-father] earned \$5.00 a week for three months during the summer of 2007. His mother also provided him with funds from time to time. When he was not earning monies, he was supplied with stamps and could write and send letters.

46. [Respondent-father] did visit on a regular basis from September 2006 through December 2006 due to the fact that the social worker made arrangements for [J.C.] to visit with [respondent-father] in jail with the last visit being December 28, 2006.

. . .

48. There was no contact between [respondent-father] and the social worker between January 2007 and the filing of the petition. No inquiry was made of the Department regarding the welfare of [J.C.]

. . .

50. While in the Department's custody, the Department placed [J.C.] in relative

placement for a period between April 12 and June 28, 2006. At all other times the child has been in foster care, where the monthly stipend of \$440.00 was advanced to provide for his monthly needs of clothing, food, transportation and lodging. [Respondent-father] did not pay or make any contribution toward these expenses or costs after September 2006.

51. [Respondent-father] made minimal efforts to comply with the terms and conditions of the plan and did not complete the plan. [Respondent-father's] incarceration was due to his failure to comply or to make reasonable efforts to comply with probation terms. His incarceration prevented his ability to maintain a suitable residence for the minor child.

Respondent-father has not specifically assigned error to any of the above findings of fact, except arguably for findings 45 and 51. The remainder of the findings cited above are therefore deemed binding on appeal if supported by competent evidence, even if there is evidence to the contrary. *Lumbee River Electric Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983).

We find that sufficient competent evidence was presented to support the trial court's findings of fact, including findings 45 and 51, and that the court's findings were sufficient to support its conclusion that respondent-father failed to show to the satisfaction of the court that he made reasonable progress in correcting the conditions which led to the removal of the minor child. Finding of fact 45 stated that respondent-father earned money while in prison, that he was sent money by his mother, that he was supplied with stamps, and that he could write and send letters. Respondent-father himself testified that he earned \$4.00 a week in July 2007 and \$5.00 a week for August and September 2007, and that his mother sent



him \$20.00 one time and \$10.00 another time. He also testified that when he was not working while incarcerated, stamps were provided to him.

Finding of fact 51 references respondent-father's minimal efforts to comply with his case plan and attributes his incarceration to probation violations. The finding also states that incarceration prevented respondent-father from maintaining a suitable residence for the minor child. Testimony was elicited supporting each of these items. Respondent-father testified that he had violated probation and that his sentence was re-activated in February 2007. DSS social worker Nicole Smithers testified regarding respondent-father's incomplete attempts to comply with the plan. Although respondent-father had an initial substance abuse evaluation, he did not follow up with any of the recommendations from that evaluation, including outpatient individual treatment one to two times a month. In addition, he did not obtain and maintain adequate housing, did not participate in random drug screens when requested, and he did not maintain contact with his social worker nor visitation with the minor child. Evidence was presented that respondent-father was incarcerated after violating probation. Finally, it is self-evident that respondent-father's incarceration prevented him from maintaining housing for the juvenile.

Although respondent-father argues that the trial court improperly based termination solely upon the fact that he was incarcerated for much of the time DSS had custody of the minor child and that he is being unfairly punished for not being able to comply

with requirements beyond his control, this Court has said, “[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003)), *affirmed per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). Further, even though some evidence was presented showing that respondent-father made some progress toward his case plan, such limited progress is not enough to show that the trial court erred in finding that respondent-father willfully left his child in foster care for more than twelve months without making reasonable progress. See *In re O.C. & O.B.*, 171 N.C. App. at 465, 615 S.E.2d at 396. We find that the trial court properly based termination on the ground of failure to make reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); therefore, we need not address respondent-father’s arguments regarding the remaining ground for termination of neglect. *In re Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 406. Respondent-father’s assignments of error regarding these issues are therefore overruled.

By respondent-father’s second argument, he contends the trial court abused its discretion by terminating his rights with respect to the minor child because no evidence in the record or findings of fact show that the trial court considered the statutory factors as required by N.C. Gen. Stat. § 7B-1110(a). By statute, the trial court is required to consider these factors when determining whether termination is in the best interests of the minor children:

- (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). The determination by the trial court that termination is in the best interests of the children will not be overturned absent an abuse of discretion. *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. Defendant argues none of these factors were considered by the trial court. We disagree.

The trial court made findings in its disposition order from the termination hearing that J.C. is in third grade, that he is thriving in his placement with his foster parents with whom he has developed a strong bond, that his foster parents are committed to adopting J.C., that J.C. does not want to be moved, and that respondent-father has not been a consistent participant in J.C.'s life since J.C. was removed from the home. Finally, the trial court noted that J.C.'s mother relinquished her rights to J.C. and that termination of respondent-father's parental rights as to J.C. would aid in the permanent plan of adoption. We find that these findings are amply supported by the record: (1) in the form of a report admitted into evidence written by J.C., which showed his wishes to stay with his

foster family and be adopted by them, and (2) by evidence presented at the hearing through the testimony of foster father William Ward and guardian *ad litem* Rose Bleich. Since the trial court properly considered the statutory factors listed in section 7B-1110(a), we find no abuse of discretion. Respondent-father's assignments of error on this issue are overruled.

Affirmed.

Judges GEER and ARROWOOD concur.

Report per Rule 30(e).