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NO. COA09-54

NORTH CAROLINA COURT OF APPEALS

Filed: 2 June 2009

IN THE MATTER OF:

L.S.C-W.,
a minor child

Mecklenburg County
No. 06 JT 1353

Appeal by respondent-mother from Order entered 29 October 2008 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 6 May 2009.

Managing County Attorney Edward Yeager, for petitioner-appellee Mecklenburg County DSS, Division of Youth & Family Services.

Pamela Newell Williams, for appellee Guardian ad Litem.

Duncan B. McCormick, for respondent-appellant mother.

ERVIN, Judge.

Respondent mother, Ebony. W. (Respondent Mother), appeals the trial court's termination of her parental rights with respect to her daughter, L.S.C-W. (Lisa).¹ We affirm.

The Division of Youth and Family Services of the Mecklenburg County Department of Social Services (YFS) initially became involved with Respondent Mother and her children in November 2004

¹ The minor child L.S.C-W. will be referred to throughout the remainder of this opinion as "Lisa" in order to protect the minor child's identity while rendering our opinion more readable.

based upon allegations that Respondent Mother was involved in drug use and had failed to provide proper care for Lisa's older siblings. Respondent's parental rights with respect to those children were terminated on 3 October 2006 after police "found the youngest child in a home with [Respondent Mother] where marijuana, cocaine and a shotgun were found."

On 12 December 2006, Respondent Mother gave birth to Lisa. Two days later, YFS filed a petition alleging that Lisa was a neglected and dependent juvenile and sought and obtained the entry of a nonsecure custody order authorizing YFS to take custody of Lisa after YFS learned that Lisa tested positive for cocaine. Upon gaining custody, YFS placed Lisa in a foster home, which has become a potential adoptive placement.

On 17 January 2007, Respondent Mother reached a mediated agreement with YFS in which she was given one year from the date of the 14 December 2006 petition to demonstrate compliance with an integrated case plan. The agreement provided, in pertinent part, that "[t]hroughout the year [Respondent Mother] need[ed] to show reasonable progress . . . towards compliance with the case plan." Respondent Mother also agreed to "successfully resolve any substance abuse or alcohol abuse issues and maintain sobriety on an ongoing basis." The mediated case plan provided that:

F.I.R.S.T. Assessment: The Department and Guardian ad Litem recommend[] [that Respondent Mother] complete an assessment through the F.I.R.S.T. program and [that] she follow through on all recommendations. . . . [Respondent Mother] is to sign all necessary releases for the social worker to be able to

monitor her progress in her treatment programs
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Substance Abuse: Substance abuse treatment is the first priority in this case plan. . . . [Respondent Mother] has completed a substance abuse assessment at the McLeod Center on December 18, 2006 and was recommended for inpatient treatment. [Respondent Mother] will research the best inpatient program available to her and take the necessary steps to enroll in the program. . . . She will participate in random drug tests within 24 hours of a request by the social worker. If [Respondent Mother] misses a drug screen, the drug test will be considered positive.

Domestic Violence: [Respondent Mother] has agreed to complete a domestic violence assessment at the Women's Commission and follow through on all recommendations.

Employment: [Respondent Mother] is to obtain legal, stable employment and have sufficient income to meet her child's basic needs for food, shelter, clothing, education and health care

Safe and appropriate Housing: [Respondent Mother] will obtain an appropriate, safe, and stable living environment for herself and her child.

Contact with social worker: [Respondent Mother] is to keep the social worker informed of any changes in [her] contact information including change of address and phone number.

[] Medical Appointments: [Respondent Mother] will attend [Lisa's] medical appointments when notified by the social worker and she is able to do so.

During a visit with Lisa on 20 February 2007, a YFS employee observed Respondent Mother "pacing and displaying paranoid behavior." Consequently, Social Worker Kimberlee Mitchell (Mitchell) asked Respondent Mother to submit to a urinalysis for the presence of controlled substances. Respondent Mother refused

to take the test, leading to the termination of the 20 February 2007 visit and the suspension of future visitations.

On 29 March 2007, Lisa was adjudicated neglected and dependent as to her mother pursuant to N.C. Gen. Stat. § 7B-901. The adjudication order stipulated that "visitation may be reinstated if [Respondent Mother] goes to Detox and complies with recommendations." The court specifically found that the "primary issue that need[ed] to be addressed [was] substance abuse" and that the issues that led to adjudication "included but [were] not limited to substance abuse and lack of proper care for juvenile." The court adopted the YFS recommendations and the mediated case plan initially agreed to among the parties in the dispositional portion of the 29 March 2007 order.

Prior to February 2007, Respondent Mother lived with Willie C. After moving out of the home she shared with Willie C., Respondent Mother began living in hotels and supporting herself by passing bad checks. On 28 April 2007, Respondent Mother was arrested and incarcerated in Mecklenburg County. She was subsequently transferred to Buncombe County in May 2007 to face additional charges, and to Haywood County in December 2007 to face even more charges. Respondent Mother has been continually incarcerated since 28 April 2007.

On 25 June 2007, Lisa was adjudicated neglected and dependent as to Willie C. On 5 July 2007, the court ordered that "[r]easonable [e]fforts to reunite the child with parents be suspended pursuant to" N.C. Gen. Stat. § 7B-507. On 25 July 2007,

the court conducted a permanency planning hearing and determined that the parents' rights should be terminated since they had "not remedied issues that led [Lisa] into custody." On 13 August 2007, YFS filed a petition seeking the termination of both Respondent Mother's and Willie C.'s parental rights as to Lisa. On 25 January 2008, a second permanency planning hearing was held at which the court continued to find that adoption would be in Lisa's best interest.

On 26 February 2008, an order terminating the parental rights of both Respondent Mother and Willie C. in Lisa was entered by Mecklenburg District Court Judge Lisa C. Bell. Subsequently, YFS filed a Motion for Relief From Order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) on the grounds that "there was no summons issued in juvenile's name and identifying the juvenile as a respondent." On 27 March 2008, the court vacated the 26 February 2008 order.

YFS filed a second petition to terminate the parental rights of Respondent Mother and Willie C. in Lisa on 30 April 2008. On 14 August 2008, Respondent Mother filed a handwritten response to the YFS petition. The termination petition came on for hearing before Judge Louis A. Trosch (the trial court) at the 26 September 2008 Juvenile Session of the Mecklenburg County District Court. On 29 October 2008, the trial court entered an order terminating the parental rights of both parents in Lisa (the termination order). The trial court found that grounds existed for the termination of Respondent Mother's parental rights in Lisa under N.C. Gen. Stat.

§§ 7B-1111(a) (1) (neglect); 7B-1111(a) (2) (failure to show reasonable progress despite the placement of the juvenile outside the home for more than 12 months); and 7B-1111(a) (9) (previous termination of parental rights and inability or unwillingness to establish a safe home). On 24 November 2008, Respondent Mother filed a notice of appeal from the trial court's termination order.²

Discussion

Proceedings involving requests for the termination of parental rights are decided using a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). First, during the adjudication stage, the trial court attempts to determine whether at least one of the grounds for terminating parental rights specified in N.C. Gen. Stat. § 7B-1111 exists. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). If the trial court determines that properly-supported grounds for termination exist, it then proceeds to the dispositional stage, at which it decides whether termination of the parent's parental rights is in the best interests of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908.

In any order terminating a parent's parental rights, the court must find facts and adjudicate the existence or nonexistence of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111. The court's findings of fact must be supported by clear, cogent, and convincing evidence. *In re Montgomery*, 311 N.C. 101,

² Willie C. did not seek appellate review of the termination of his parental rights in Lisa.

316 S.E.2d 246 (1984); *In re White*, 81 N.C. App. 82, 344 S.E.2d 36, *disc. rev. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). Any finding of fact to which an appealing party has not assigned error and challenged in his or her brief is binding on this Court. *In re J.D.S.*, 170 N.C. App. 244, 250-51, 612 S.E.2d 350, 354-55, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). Although a trial judge that finds the existence of one or more of the grounds for termination specified in N.C. Gen. Stat. § 7B-1111 is not required to terminate the parental rights of the parent in question, the court has the authority to do so in the exercise of its discretion upon making such a determination. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Neglect

Respondent Mother first contends that the trial court erred by finding that her parental rights were subject to termination on the grounds of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). After careful consideration of Respondent Mother's contentions, we disagree.

A "neglected juvenile" for purposes of N.C. Gen. Stat. § 7B-1111(a)(1) is a juvenile "who does not receive proper care, supervision, or discipline from the juvenile's parent . . .; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare" N.C. Gen. Stat. § 7B-101(15). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 485 S.E.2d 612, 615

(1997). "When the court's findings of neglect are supported by ample, competent evidence, they 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) (citing *In re Montgomery*, 311 N.C. 101, 112-13, 316 S.E. 2d 246, 252-53 (1984)).

In proceedings to terminate parental rights, "the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). "[W]hen a trial judge sits as 'both judge and juror,' . . . it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citing *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968)). As a result, although the sufficiency of the evidence to support a particular finding of fact is an issue for this Court, the trial court has the responsibility for making any needed credibility determinations, and those credibility determinations are binding on this Court as long as they have the requisite evidentiary support.

In this case, the trial court found Lisa to be a "neglected juvenile" on the basis of the following conclusions of law:

7. That pursuant to N.C. [Gen. Stat.] §7B-1111(a)(1), the respondents have neglected [Lisa] as that term is defined in N.C. [Gen. Stat.] §7B-101(15) in that they have failed to provide the proper care, supervision and discipline for [Lisa] and have abandoned [Lisa] as more specifically alleged in the above Findings of Fact. [Respondent Mother

failed to comply with the case plan objectives in order to be reunified with [Lisa]. . . . The respondent parents have neglected the juvenile because of their failure to correct the conditions that led to the removal of [Lisa]. The respondent parents have not demonstrated an ability to provide appropriate care for [Lisa] or an ability to meet [Lisa's] basic needs for items such as food, clothing and shelter. The respondent parents have not provided any monies to [YFS] to defray the cost of out of home placement for [Lisa]. . . . [Respondent Mother] failed to consistently visit [Lisa] and failed to take the required steps to reinstate visits with [Lisa]. She has not successfully completed substance abuse treatment and has not demonstrated an ability to maintain sobriety on an on-going basis. The respondent parents have not contacted [YFS] to inquire about [Lisa's] status. The respondent parents have abandoned [Lisa].

8. That the Court further concludes that the likelihood of ongoing or continuing neglect is substantially and significantly high if [Lisa] is returned to the respondent parents' care because the respondents have not addressed the issues that led to [Lisa's] placement in [YFS] custody. In light of the fact that there has been no continued and consistent involvement with the respondent parents and that the respondent parents have not shown an interest in addressing the issues that led to [Lisa's] placement in [YFS] custody, there is a substantial likelihood that that neglect will continue in the foreseeable future. The respondents have not properly availed themselves of any of the services necessary to enable them to properly parent [Lisa] either now or in the foreseeable future.

These conclusions are supported by extensive findings of fact that begin with a detailed description of the factors that led to the original 29 March 2007 adjudication decision:

12. That [Lisa] was adjudicated neglected and dependent on March 29, 2007 and June 25, 2007. The stipulated facts from March 29, 2007, supporting the findings and conclusions of neglect and dependency are as follows:

- a. DSS has been involved with the family [since] November 2004. The issues dealt with controlled substance abuse and lack of proper care for the juvenile. [Oliver]³ DOB 2004 was born cocaine positive. [Inez]⁴ DOB 1999 is the oldest child of the mother. On March 9, 2005, Charlotte-Mecklenburg Police found [Oliver] and [Respondent Mother] in a neighbor's house, where marijuana, cocaine, and a shotgun were found. [Respondent Mother] was arrested and the charges were later dismissed. [Respondent Mother] admitted to using drugs.
- b. [Respondent Mother] did not fully comply with her case plan or substance abuse treatment in the cases involving [Inez] and [Oliver]. She completed substance abuse treatment but subsequently relapsed. The substance abuse counselor had concerns about mental health issues. [Respondent Mother] states she had an assessment at Behavioral Health Center and she reports that no treatment was recommended. The Department has no independent verification of this.
- c. [Respondent Mother] tested positive for cocaine after her court hearing on February 27, 2006.
- d. The parental rights of the mother and fathers of these children were terminated on October 3, 2006; see 06JT409 and 06JT410 incorporated herein by reference.
- e. [Lisa] was born cocaine positive. [Respondent Mother] admits to recent

³ As was the case with "Lisa," "Oliver" is a pseudonym intended to protect the identity of the juvenile and facilitate ease of reading.

⁴ "Inez" is also a pseudonym intended to protect the identity of the juvenile and facilitate ease of reading.

cocaine use and stated she had used cocaine at least twice in December 2006.

- f. [Respondent Mother] admits that the father gave her a black eye prior to her pregnancy and to verbal altercations in the home.
- h. There are no family members in North Carolina known to DSS willing or able to care for [Lisa] at this time.

After this recitation, the trial court provided a detailed discussion of the Respondent Mother's largely unsuccessful efforts to comply with the mediated case plan and the provisions of the 29 March 2007 order requiring Respondent Mother to "submit to Detox," "follow all detox recommendations," and, upon "release from Detox," "schedule [a] F.I.R.S.T. assessment and follow all recommendations including domestic violence, substance abuse, and mental health." Among other things, the trial court discussed the Respondent Mother's record of post-adjudication incarceration, her sporadic and somewhat less than coherent attempts to communicate with YFS personnel during her incarceration, her record of substance abuse, the Respondent Mother's refusal to submit to a drug screen as the result of her conduct at the 20 February 2007 visitation session and her resulting loss of visitation privileges, the absence of evidence tending to show that Respondent Mother had successfully addressed her substance abuse problems in the manner required by the mediated case plan and prior orders of the court, the absence of evidence tending to show that Respondent Mother had successfully completed domestic violence or mental health assessments or

treatment, the Respondent Mother's failure to obtain and maintain sufficient income and proper housing, and Respondent Mother's less than exemplary record of remaining in contact with YFS personnel and attending scheduled visitation sessions. As a result, based on these findings of fact, the trial court found that Lisa continued to be a "neglected" juvenile as defined in N.C. Gen. Stat. § 7B-101(15), rendering the Respondent Mother's parental rights subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

Finding of Fact No. 16

In attacking the trial court's finding that grounds for termination of her parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1), Respondent-Mother first challenges Finding of Fact No. 16, in which the trial court found:

16. That during [Respondent Mother's] incarceration, she had the opportunity to participate in some service programs such as domestic violence treatment and substance abuse treatment and substance abuse treatment identified in the mediated case plan. She failed to provide credible evidence of her participation in these programs.

According to Respondent Mother, Finding of Fact No. 16 lacks sufficient evidentiary support because Respondent Mother's "testimony is the only evidence of any opportunity to participate in any service programs while in the county jail." More particularly, Respondent Mother complains that "the trial court accepted [Respondent Mother's] testimony that she had the opportunity to participate in AA meetings and the Mecklenburg County domestic violence program and then rejected her testimony that she participated." According to Respondent Mother, "there is

simply no evidence that [she] had the opportunity to participate in intensive substance abuse treatment, an intensive domestic violence program, or a mental health program while in jail."

After carefully reviewing the evidence contained in the record, we conclude that Finding of Fact No. 16 is supported by clear, cogent and convincing evidence. The record reveals beyond contradiction that Respondent Mother's substance abuse problems were the root cause of her parenting (and other) difficulties and that she had a tendency by the time of the termination hearing to deny the existence of these problems. Other, unchallenged, findings of fact indicate:

21. That the primary issue to be addressed prior to reunification of [Lisa] and [Respondent Mother] was the [Respondent Mother's] chronic substance abuse problems. [Respondent Mother] has a severe chronic substance abuse problem.

22. That during this Termination hearing, the [Respondent Mother] testified that [Lisa] did not test positive for cocaine at birth and that she was not using illegal substances. The Court does not find this testimony credible. All the evidence before the Court indicates that one of the reasons [Lisa] was placed in [YFS] custody was due to [Respondent Mother's] substance abuse problems. [Respondent Mother] previously admitted at the March 29, 2007, Adjudicatory Hearing regarding [Lisa], that [Lisa] was born cocaine positive. During the Adjudicatory Hearing, she stipulated to recent cocaine use and stated she had used cocaine at least twice in December 2006.

23. That [Respondent Mother] previously testified that she was using illegal substances from December 2006 until April 2007. Today, the [Respondent Mother] testified that she was not using illegal substances but was abusing alcohol or Vicodin.

The Court does not find the [Respondent Mother's] testimony about abusing alcohol and Vicodin reliable.

. . .

26. That [Respondent Mother] testified that she is attending Alcoholics Anonymous (hereinafter "AA") while incarcerated. However, [Respondent Mother] has not presented evidence of her participation in AA. She has not provided any sign in sheets or certificate of participation in AA. She has not produced a chip verifying her participation in AA. The [Respondent Mother's] testimony describing her AA meetings does not fit any description or information of this Court's, with 15 years experience on the bench, knowledge of AA meetings. The [Respondent Mother's] testimony more appropriately describes a support group. Therefore, the Court cannot find that [Respondent Mother] is participating in AA meetings.

Similarly, the record contained ample evidence that domestic violence issues had, at least at one point, been an issue that Respondent Mother needed to address. In unchallenged findings of fact, the trial court found:

30. That for 12 days in April 2007, [Respondent Mother] was incarcerated in Mecklenburg County jail. [Respondent Mother] testified she participated in a mandatory domestic violence program while in the Mecklenburg County Jail. [Respondent Mother] did not provide a course description or other information detailing the curriculum of these programs. There is no evidence before the Court that [Respondent Mother] completed these programs while in the Mecklenburg County Jail. She did not provide a certificate of completion of this program. Even if [Respondent Mother] participated in this 12 day program, the program would be at a minimum a screening type program. The recommended domestic violence treatment outlined in the mediated case plan encompasses an extensive treatment program. There is no evidence that

[Respondent Mother] made efforts to obtain domestic violence counseling. [Respondent Mother] failed to participate in and successfully complete domestic violence treatment. She has not completed this aspect of her case plan.

A careful reading of Finding of Fact No. 16 indicates that the trial court believed that Respondent Mother "had the opportunity to participate in some service programs such as domestic violence and substance abuse treatment identified in the mediated case plan" and "failed to provide credible evidence of her participation in such plans." The trial court's findings contain ample justification for its decision to deem Respondent Mother's claim to have attended AA meetings and domestic violence treatment to lack credibility. Perhaps for that reason, Respondent Mother focuses her attack on the portion of Finding of Fact No. 16 indicating that Respondent Mother had the opportunity, while incarcerated, to "participate in some service programs such as domestic violence and treatment and substance abuse treatment identified in the mediated case plan." Although Respondent Mother is correct in contending that the principal evidence of record relating to this aspect of Finding of Fact No. 16 is the Respondent Mother's own testimony, there is no logical reason or legal authority preventing a trial court, assuming the existence of adequate evidentiary support, from believing part of what a witness says and finding other parts to lack credibility. Similarly, as a result of his experience on the bench, the trial court had ample basis for knowing what programs are available in detention facilities operated in Mecklenburg

County, if not elsewhere. Thus, the record adequately supports Finding of Fact No. 16.⁵

Finding of Fact No. 42

Secondly, Respondent Mother challenges the adequacy of the evidentiary support for Finding of Fact No. 42, in which the trial court found:

42. That the [Respondent Mother] failed to maintain a relationship with the juvenile. She abandoned [Lisa]. The [Respondent Mother] did not inquire about [Lisa's] status. [Respondent Mother] did not provide cards, gifts or letters to or for [Lisa]. She has not acknowledged birthdays or holidays for [Lisa].

Once again, the trial court made a series of undisputed findings of fact that relate to the "abandonment issue." More particularly, the trial court found:

15. That on April 28, 2007, [Respondent Mother] was arrested and placed in the Mecklenburg County Jail. In May 2007, she was transferred to the Buncombe County Jail to

⁵ Even if Finding of Fact No. 16 does, for the reasons stated by Respondent Mother, lack adequate evidentiary support, we do not believe that there is any reasonable possibility that the outcome at trial would have been any different had the trial court not made this finding. Other, unchallenged, findings recite in considerable detail the trial court's reasons for concluding that Respondent Mother had not been candid with the court about her participation in substance abuse and other programs while in detention and her failure to seek and obtain adequate help for her substance abuse and domestic violence programs. The only information contained in Finding of Fact No. 16 that does not appear elsewhere in the termination order is the statement that the programs available to Respondent Mother in jail were the same sort of intensive programs contemplated by earlier court orders and the mediated case plan. As a result, even without Finding of Fact No. 16, the trial court's order would provide ample support for a determination that Respondent Mother failed to take advantage of such opportunities as were available to her after her incarceration began, effectively rendering any error in Finding of Fact No. 16 harmless.

face additional outstanding charges. After this, in December 2007, she was transferred to Haywood County and then to Hendersonville to address outstanding charges. At this time, [Respondent Mother] remains incarcerated. It is unclear to the Court when [Respondent Mother] will be released.

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17. That [Respondent Mother] had the ability to maintain some contact with [YFS]. In December 2007, she wrote a letter to [Mitchell]. She also wrote a letter to Mr. English [another social worker] in September 2008. The September 2008 letter is more coherent than the December 2007 letter. The Court was not able to understand the December 2007 letter.

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24. [YFS] questioned [Respondent Mother's] continuing use of illegal substances because of [Respondent Mother's] behavior during the supervised visit on February 2, 2007. . . . At the next visit, . . . [Mitchell] requested that [Respondent Mother] submit to a random urinalysis. [Respondent Mother] refused and stated "she would take the positive drug screen." At that point, Ms. Mitchell terminated the visit. After this, [Mitchell] asked [Respondent Mother] to submit to a random urinalysis prior to her next scheduled visit on February 22, 2007. [Respondent Mother] did not submit to the requested urinalysis. Based on the evidence before the Court, [Respondent Mother's] visits were suspended because [Respondent Mother] failed to submit to a required urinalysis in February 2007. The Honorable Lisa Bell ordered the following: "visitation may be reinstated if [Respondent Mother] goes to Detox and complied with rec[ommendation]s. [Respondent Mother] failed to comply with this order.

The trial court's unchallenged findings of fact also indicate that Respondent Mother "attended 7 out of 12 scheduled visits" with Lisa; that Respondent Mother missed at least one scheduled visit

due to "personal business;" that Respondent Mother last visited with Lisa on February 20, 2007, "when [Lisa] was 2 months old;" that Respondent Mother "failed to attend any of [Lisa's] medical appointments;" and that Respondent Mother "did not maintain consistent contact with" the social worker assigned to Lisa's case.

Respondent Mother challenges Finding of Fact No. 42 on the grounds that the record simply does not support a determination that Respondent Mother abandoned Lisa.⁶ In essence, Respondent Mother argues that the record evidence shows that she "attended seven out of twelve scheduled visits," attended hearings in this proceeding on a regular basis, wrote at least two lengthy letters to social workers, and provided YFS "with the names of relatives" as potential placements.⁷ Although the record does contain evidence tending to support Respondent Mother's factual assertions, the evidentiary record also contains evidence tending to show, as noted by the trial court, that Respondent Mother missed almost half of her scheduled visits, failed to take the steps necessary to

⁶ As best we can tell from an examination of her brief, Respondent Mother does not challenge the more specific factual determinations contained in Finding of Fact No. 42 on appeal.

⁷ Respondent Mother further points out that the trial court, in another portion of its order, refused to find that grounds for termination of her parental rights existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) ("The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . .). However, a finding of "willful abandonment" for purposes of N.C. Gen. Stat. § 7B-1111(a)(7) does not preclude a finding of "abandonment" for purposes of N.C. Gen. Stat. § 7B-1111(a)(1) given the absence of any necessity for proving "willfulness" as a prerequisite for terminating a parent's parental rights under the latter statutory provision.

resume the visitation process after it was suspended, only remained in sporadic contact with YFS after her incarceration, and made little or no effort to use any of the channels of communication available to incarcerated individuals, such as cards or small presents, to reach out to Lisa.⁸ As a result, the record evidence contains clear, cogent, and convincing evidence that supports the trial court's finding of fact that Respondent Mother abandoned Lisa.⁹

Sufficiency of the Trial Court's Findings to Support a Conclusion
That Lisa Faces a Substantial Risk of Future Neglect

Finally, Respondent Mother contends that the trial court erred by determining, in Conclusion of Law No. 8, that "the likelihood of ongoing or continued neglect is substantially and significantly high if [Lisa] is returned to the respondent parents' care . . .

⁸ Although Respondent Mother correctly points out that she provided YFS with the names of two relatives, the record does not reflect that either of them were willing to assume responsibility for Lisa.

⁹ As was the case with Finding of Fact No. 16, we also note (as we noted in the body of this opinion) that the Respondent Mother merely challenged the finding that she "abandoned" Lisa without challenging the more specific factual determinations found in that portion of the trial court's order and did not challenge the trial court's other findings dealing with Respondent Mother's inadequate visitation record, her refusal to submit to a drug assessment despite the fact that having such an assessment was necessary to restart the visitation process, and her failure to show any particular interest in Lisa during the period of her incarceration. In light of these unchallenged factual findings, we do not believe that there is any reasonable possibility that the outcome at trial would have been any different had the trial court not found that Respondent Mother had abandoned Lisa. As a result, even if the trial court erred by making the "abandonment" finding to which the Respondent Mother objects, that error was not prejudicial.

.¹⁰ According to well-established law, if the juvenile has been removed from the parent's custody prior to the determination hearing and the petitioner presents evidence of neglect, the trial court must consider any evidence of changed conditions and the probability that the neglect will recur. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984); *In re Beasley*, 147 N.C. App. 399, 404, 555 S.E.2d 643, 647 (2001). Although a parent's incarceration is relevant to the issue of whether a particular juvenile is neglected within the meaning of that term as defined in N.C. Gen. Stat. § 7B-101(15), *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007), it is not determinative. As Respondent Mother points out, "[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), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006) (quoting *In re Yocum*, 158 N.C. App. 198, 207-208, 580 S.E.2d 399, 405 (2003) (Tyson, J., dissenting)). As a result, this Court's decisions in cases involving efforts to terminate the rights of incarcerated parents under N.C. Gen. Stat. § 7B-1111(a)(1) focus on the extent, if any, to which the incarcerated parent took advantage of any available opportunities to provide love, care, and support for the child. See *C.W.*, 182 N.C. App. at 220-221, 641 S.E.2d at 730 (2007) (parental rights of incarcerated father improperly terminated where

¹⁰ This Court reviews challenges to the sufficiency of the trial court's findings of fact to support a conclusion of law *de novo*. *In re D.S.*, 177 N.C. App. 136, 138, 628 S.E.2d 31, 33 (2006).

father wrote letters to the children and sent them birthday and Christmas cards, including some money); *In re Bradshaw*, 160 N.C. App. 677, 682-683, 587 S.E.2d 83, 86-87 (2003) (parental rights of incarcerated father properly terminated where father failed to provide financial support for the child, seek personal contact with the child, or attempt to convey love, affection, or concern for the child).

In seeking to persuade the Court that the trial court incorrectly concluded that there was a substantial risk of continued neglect in the event that Lisa was returned to Respondent Mother's care, Respondent Mother claims that her incarceration has prevented her from finding housing, obtaining employment, pursuing and obtaining mental health and substance abuse treatment, and visiting with Lisa. In addition, Respondent Mother contends that there has been no evidence of domestic violence since she parted ways with Willie C. in February 2007. As a result, Respondent Mother vigorously argues that trial court's findings do not support a conclusion that there is a substantial risk of continued neglect in the event that Lisa is returned to her custody.

A careful examination of the trial court's extensive findings of fact demonstrates, however, that they amply support its conclusion that "the likelihood of ongoing or continued neglect is substantially and significantly high if [Lisa] is returned to [Respondent Mother's] care" The trial court's findings, which are, for the most part, unchallenged on appeal, indicate that Respondent Mother suffered from ongoing difficulties with substance

abuse which she essentially denied at the time of the termination hearing and which she has done very little to address prior to or during her incarceration. The trial court's findings further reflect that, during the time before her incarceration, Respondent Mother had difficulty maintaining a stable and suitable residence, supported herself by engaging in illegal activities, and did not adequately comply with the mediated case plan in a number of respects. In addition, the trial court's findings reflect with unmistakable clarity that Respondent Mother only took limited advantage of the visitation opportunities that were afforded to her in late 2006 and early 2007 and that she simply failed to comply with a perfectly reasonable condition for the restoration of her visitation rights after that process was suspended. Finally, although Respondent Mother's opportunities for direct contact with Lisa during her incarceration have necessarily been somewhat limited, the trial court found that Respondent Mother had not adequately taken advantage of the opportunities available to her for "provid[ing] cards, gifts or letters" or to "acknowledge[] birthdays or holidays." As a result, we conclude that the trial court appropriately determined, based on adequate findings of fact, that there is a substantial risk that Lisa would suffer from additional neglect in the event that she is returned to Respondent Mother's care.

Thus, after careful consideration, we conclude that the challenged findings of fact are supported by clear, cogent, and convincing evidence and that the trial court's findings of fact

adequately support the trial court's conclusion that Respondent Mother's parental rights in Lisa were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Respondent's assignments of error addressed to this issue are, therefore, overruled.

Wilfully Leaving the Juvenile in Foster Care

Although we need not address Respondent Mother's additional challenges to the trial court's termination order in light of our decision to affirm the trial court's determination that Respondent Mother's parental rights in Lisa were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), *In re D.B.*, 186 N.C. App. 556, 561, 652 S.E.2d 56, 60 (2007) ("Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to any one of the statutory grounds is supported by valid findings of fact."), *aff'd per curiam*, 362 N.C. 345, 661 S.E.2d 734 (2008), we will briefly discuss Respondent Mother's remaining challenges to the trial court's termination order in the interest of completeness. First, Respondent Mother challenges the trial court's conclusion that her parental rights in Lisa were subject to termination because she "willfully left [Lisa] in foster care . . . 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). According to Respondent Mother, the trial

court's findings of fact do not support its conclusion that her parental rights in Lisa were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). After careful consideration, we disagree with Respondent Mother's contention.

In order to support a decision to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the petitioner must demonstrate that the parent (1) left the child in foster care or some other placement outside the home for more than twelve months and (2) willfully failed to make reasonable progress under the circumstances toward correcting the conditions that resulted in the juveniles's placement outside the home. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 456 (2006). The necessary "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.N.*, 180 N.C. App. 169, 178, 636 S.E.2d 316, 321 (2006) (quoting *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)).

The trial court concluded in that portion of the termination order addressing YFS's request for termination of Respondent Mother's parental rights in Lisa pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) that:

9. [Lisa] has been in the Petitioner's custody since December 2006. [Respondent Mother] failed to successfully comply with the mediated case plan. . . . [Respondent Mother,] although referred to various programs, failed to successfully comply with the mediated case plan [Respondent Mother,] although referred to various programs, failed to complete substance abuse treatment, domestic violence treatment, mental

health treatment; and obtain and/or maintain housing and employment. The respondents have not demonstrated an ability to meet the juvenile's needs. The issues and/or concerns that existed at the time when [Lisa was] placed in the Petitioner's custody, continue to exist at the time of the Termination of Parental Rights Trial.

Respondent-Mother argues that YFS could not show that Respondent Mother failed to participate in intensive substance abuse, domestic violence, and mental health treatment opportunities given the absence of evidence tending to show that such opportunities were available to her during her incarceration or that Respondent Mother failed to take advantage of such opportunities as existed during her period of incarceration. Furthermore, Respondent Mother argues that the evidence of her conduct prior to her incarceration does not suffice to support the trial court's conclusion. However, despite the vigor with which Respondent Mother has argued her position, we are constrained, after a careful review of the trial court's findings, to conclude that they support a determination that Respondent Mother failed to make adequate progress toward addressing the conditions that led to Lisa's placement in YFS custody.

The record clearly establishes that Lisa has been in YFS custody for considerably more than twelve months. For that reason, our examination of Respondent Mother's contention necessarily focuses on the "reasonable progress" issue. As we noted in connection with our discussion of the "neglect" issue, the trial court's findings of fact provide a substantial basis for concluding that, during the time prior to Respondent Mother's incarceration,

she failed to make any significant progress toward compliance with her case plan and the prior court orders. More particularly, Respondent Mother missed nearly half of her visitation opportunities with Lisa and ultimately refused to comply with reasonable conditions for the restoration of visitation after that process was suspended. Similarly, the trial court's findings reflect Respondent Mother's continued problems with controlled substance abuse and her failure to do much, if anything, about it either before or after her incarceration. In fact, the trial court's findings of fact reflect that, as late as the termination hearing, Respondent Mother was essentially denying that she had even had a substance abuse problem. Moreover, the trial court's findings of fact document Respondent Mother's failure to establish a stable residence or to develop a lawful source of income prior to her incarceration. After her incarceration, the trial court's findings of fact demonstrate that Respondent Mother showed very limited concern for Lisa's welfare and that Respondent Mother had not provided any evidence that she had taken advantage of available opportunities to address her substance abuse, domestic violence, and mental health problems. As a result, the trial court's findings of fact provide more than adequate support for its conclusion that Respondent Mother's parental rights in Lisa were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Termination of Parental Rights in Other Children Coupled with Failure to Provide Juvenile with a Safe Home

Finally, Respondent Mother challenges the trial court's conclusion that her parental rights in Lisa were subject to

termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) because her parental rights in Oliver and Inez were terminated and because she "lacks the ability or willingness to establish a safe home ." The trial court reached this conclusion because Respondent Mother currently lacks housing due to her incarceration, "has not successfully addressed her substance abuse issues or the other issues that led to [Lisa's] placement in [YFS] custody" and "continues to exhibit an inability to meet [Lisa's] needs." After careful consideration of Respondent Mother's arguments, we find no error in the trial court's conclusion addressing the grounds for termination specified in N.C. Gen. Stat. § 7B-1111(a)(9).

A court may terminate the parental rights of a parent when "the parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(9). The record clearly demonstrates that Respondent Mother's parental rights in her two older children were terminated on 3 October 2006. Furthermore, as has been previously noted, the trial court's findings of fact adequately demonstrate that Respondent Mother was unable or unwilling to obtain safe housing during the period between Lisa's birth and her incarceration and that, since her incarceration, Respondent Mother has done little to demonstrate the "ability or willingness to establish a safe home." On the contrary, the issues that led to Respondent Mother's loss of Lisa in December 2006 remain essentially unaddressed, and Respondent

Mother has failed to adequately take advantage of her limited opportunities to develop some sort of a relationship with Lisa or to demonstrate a change in her approach to parenting issues while incarcerated. As a result, we conclude that the trial court's conclusion that Respondent Mother's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) is amply supported by the unchallenged and adequately supported findings of fact set out in its order.

Conclusion

____As a result, for the reasons set forth above, we conclude that Respondent Mother received a fair trial that was free from prejudicial error. For that reason, we affirm the trial court's termination order.

AFFIRMED.

Judges Elmore and Stroud concur.

Report per Rule 30(e).