NO. COA09-924

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN THE MATTER OF:

J.C.C.,
J.N.K.,
Juveniles:

Henderson County
Nos. 03 JT 47
07 JT 72

HENDERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

BROOKE DANIELLE K., mother
JOSEPH ELLSWORTH C., father
ANDY S., guardian *ad litem* for the juveniles, J.C.C. and J.N.K.,
Respondents.

Appeal by respondent father from judgment entered 15 May 2009 by Judge Athena F. Brooks in Henderson County District Court. Heard in the Court of Appeals 9 November 2009.

Susan L. Fosmire for petitioner-appellee.

Carol Ann Bauer for respondent-appellant.

N.C. Administrative Office of the Courts, by Appellate Counsel Pamela Newell Williams, for guardian ad litem.

GEER, Judge.

Respondent father appeals from a judgment terminating his parental rights to his children, J.C.C. and J.N.K. ("Jason" and

"Jenny").[1] On appeal, respondent father argues that the trial court erred in making findings of fact that were not supported by clear, cogent, and convincing evidence; erred in finding that grounds existed to terminate his parental rights; and abused its discretion in deciding that the children's best interests would be served by termination of his parental rights. We, however, hold that clear and convincing evidence did support the trial court's findings, which in turn supported the trial court's conclusion that grounds existed to terminate his parental rights. Further, the trial court did not abuse its discretion in terminating respondent father's parental rights. We, therefore, affirm.

Facts

The Henderson County Department of Social Services ("DSS") received a report alleging that Jason and Jenny were being neglected due to methamphetamine use by respondent mother and her boyfriend. A social worker visited the home and observed disarray and numerous hazards, such as knives within the children's reach; cigarette butts throughout the home, including on the floor and in a child's bed; and garbage, dirty dishes, and rotten food throughout the home. Witnesses informed DSS that they had seen the mother using drugs and had seen drugs within easy access of the

[1]The pseudonyms "Jason" and "Jenny" are used throughout this opinion to protect the minors' privacy and for ease of reading. Respondent mother has not appealed the termination of her parental rights.

children, including in Jenny's crib.[2] At the time, respondent father was incarcerated for a probation violation.

On 3 May 2007, DSS filed a petition alleging that the children were neglected and living in an environment injurious to their welfare. On 3 June 2007, the trial court entered an order adjudicating the children neglected as defined by N.C. Gen. § 7B-101(15) (2007). The trial court also entered a disposition order with a permanent plan for the children of reunification with respondent parents. Pursuant to the reunification plan, the court required respondent father, upon his release from incarceration, to contact the social worker to set up a case plan.

Respondent father was released on or about 1 August 2007 and met with the social worker approximately one week later to establish a case plan. Following a review hearing on 6 September 2007, the trial court entered an order continuing the permanent plan of reunification with both respondents and imposing a number of requirements upon respondent father. Specifically, the court required that respondent father promptly complete the following objectives:

> a. Father will abstain from all illegal drug use or non prescription [sic] drug use and will submit to random hair, blood, saliva, or urine drug screens.
>
> b. Father will sign releases of information so the HCDSS may know the results of the assessment and recommendations.

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[2]Jason had previously been in foster care for two years for similar reasons.

c. If the father test [sic] positive for any illegal substances or non-prescription substances he will cooperate with and complete a substance abuse assessment and actively cooperate and complete all recommendations.

d. Father will obtain housing and demonstrate stability by remaining there for a minimum of three months.

e. Father will provide [the social worker] with a valid address and telephone number where he can be reached. Father will make weekly person and /or phone contact with the Social Worker and notify Social Worker of any address, phone and contact information changes within 1 day of the changes.

f. Father will sign release of information forms.

g. Father will maintain income that is sufficient to meet the family's basic needs. Income sources include, but are not limited to: employment, public benefits such as Food stamps, WIC, Disability, Medicaid, Work First, and Social Security, Rent Assistance or unemployment benefits. Father will demonstrate his ability to support the family by cooperating with the Child Support Office and will advise the Social Worker of any income source changes.

h. Father will participate in family therapy sessions with the juvenile as recommended by a family therapist.

i. Father will cooperate and complete a mental health assessment, and will follow and actively participate in any treatment recommendations that may arise.

A permanency planning hearing was held on 6 March 2008. By this time, respondent mother was incarcerated, had not completed the requirements for reunification, and was still uncooperative with DSS. Respondent father had not completed his requirements

either, although the trial court found that he had "made progress toward completing those requirements." The trial court, therefore, changed the children's permanent plan to reunification with respondent father only.

By the time of a review hearing on 4 September 2008, respondent father had still not fulfilled the requirements set out in the September 2007 order. The trial court consequently changed the permanent plan from reunification with respondent father to adoption. Subsequently, on 10 October 2008, DSS filed a motion to terminate respondents' parental rights.

At the termination of parental rights ("TPR") hearing, the trial court heard testimony from two social workers, respondent parents, and the paternal grandmother. Following the hearing, the trial court entered a judgment on 15 May 2009, in which the court found the following facts. Respondent father tested positive for drugs — including opiates, methadone, and benzodiazepines — on seven occasions between 25 June 2008 and 22 April 2009, and on another occasion, he failed to report for his drug screen within the allotted time. Despite having been ordered to obtain a substance abuse assessment should he test positive for any illegal or non-prescribed substances, respondent father never obtained a substance abuse assessment.

Respondent father had been involved in an automobile accident in March 2006 in which he suffered four broken bones in his leg, as well as back and shoulder injuries, and he indicated that he needed pain medications in order to be able to work. Although respondent

father claimed, with respect to his positive drug screens, that he had a prescription for the substances causing his positive screens, he did not provide a copy of those prescriptions to DSS or to the facility that administered his drug screens because, he stated, it was "for them to find out" he was on prescription drugs.

On 9 May 2008, respondent father presented at Park Ridge Hospital at approximately 10:00 p.m. complaining of a shoulder injury from a mini-scooter accident, and he received a prescription for Percocet. The next morning, at approximately 8:00 a.m., respondent father presented at Pardee Hospital again complaining of a shoulder injury from a mini-scooter accident, and he received a prescription for Vicodin. Two days later, on 12 May 2008, he presented at Blue Ridge Bone and Joint complaining of a shoulder injury. He requested Vicodin, but the doctor refused and gave him Ultram.

Respondent father waited until November 2008 to obtain a mental health assessment. Since he did not inform DSS of the assessment before he completed it, there was no input from DSS as to the nature of the concerns that needed to be addressed in the assessment. Although respondent father signed releases so that DSS could obtain other information, he never signed a release for the mental health assessment. Respondent father claimed that his attorney told him not to sign the release.

Respondent father and Jason participated in therapy from 15 February 2008 until May 2008. Respondent father missed appointments on 27 May 2008 and 20 August 2008, and he did not

contact the therapist again until December 2008. At that time, the therapist could no longer provide services to respondent father and Jason, but told respondent father that he could help with referrals. Respondent father did not, however, contact another therapist.

Respondent father also failed to maintain suitable housing for at least three months. From the time of his release from the Department of Correction until February 2009, he lived with his mother. In February, he rented his current home, which needed repair. Progress had been made on the renovations, but home visits by the social worker in February and April 2009 revealed that the renovations were not complete.

In September 2008, respondent father began working for Action Plumbing. He started at 20 hours per week, but at the time of the hearing was working 30 hours per week. Respondent father had, however, paid no child support since September 2005.

The trial court concluded that these findings of fact established that grounds existed to terminate respondent father's parental rights: "He has willfully left the juveniles 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 juveniles." The trial court also concluded that termination of respondents' parental rights was in Jason's and Jenny's best interests. Respondent father timely appealed to this Court.

Discussion

On appeal, we review the order "to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusion of law." *In re S.C.R.*, ___ N.C. App. ___, ___, 679 S.E.2d 905, 910 (2009). "If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (2006).

Respondent father argues that the trial court's determination that grounds existed to terminate his parental rights is not supported by findings of fact that are in turn supported by clear, cogent, and convincing evidence. The trial court found that only the ground set out in N.C. Gen. Stat. § 7B-1111(a)(2) (2007) existed. Under N.C. Gen. Stat. § 7B-1111(a)(2), a trial court may terminate parental rights upon a finding that

> [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. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

"Willfulness" under § 7B-1111(a)(2) "does not require a showing of fault by the parent." *Oghenekevebe*, 123 N.C. App. at 439, 473

S.E.2d at 398. It may arise "where the parent, recognizing [his] inability to care for the child, voluntarily leaves the child in foster care." *Id.* at 440, 473 S.E.2d at 398. This Court has repeatedly held that a court will not be precluded from finding willfulness merely because a parent "has made some efforts to regain custody." *Id.*

Here, there is no dispute that the children were in placement outside the home for more than 12 months. Further, we hold that while respondent father may not have directly caused the conditions that initially led to the children being removed from the home, the trial court's findings of fact are sufficient to establish that respondent father did not make reasonable progress toward correcting the conditions — namely drug abuse and an unsafe living environment — that necessitated the children's removal.

The trial court made findings that contrary to the court's order, respondent father failed to abstain from illegal drug use, as indicated by his positive drug screens and did not, despite those positive tests, obtain a substance abuse assessment. With respect to the requirement that respondent father obtain housing and remain there for three months to show stability, the trial court found that respondent father lived with his mother for most of the time the children were in DSS custody and only began to look for his own home three months after the TPR petition had been filed. Even then, at the time of the hearing, the house was still not appropriate for the children.

Although respondent father was required to maintain income that was sufficient to meet the family's basic needs and to demonstrate his ability to support the family by cooperating with the Child Support Office, the trial court found that he did not begin working or earning an income, other than food stamps, until September 2008, over a year after respondent father had entered into his case plan. By the time of the hearing, respondent father had been working for nearly eight months, but had yet to begin to pay the child support he owed.

In addition, the trial court made findings that even though respondent father had made some efforts to participate in family therapy sessions, he had allowed that therapy to lapse. Finally, with respect to the requirement that respondent father complete a mental health assessment, the trial court found that respondent father waited until after DSS filed the TPR petition to obtain that assessment and then refused to sign a release to allow DSS to see that assessment.

Respondent father has taken some steps toward regaining custody of Jason and Jenny, but "[e]xtremely limited progress is not reasonable progress." *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995). *Accord In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) ("As a respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, there was sufficient evidence to support the trial court's finding of respondent's lack of progress . . . ." (internal

quotation marks omitted)); *In re McMillon*, 143 N.C. App. 402, 409, 546 S.E.2d 169, 174 (holding that respondent's completion of only one item on her reunification plan was not reasonable progress), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

This case resembles *In re O.C. & O.B.*, 171 N.C. App. 457, 615 S.E.2d 391, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). In *O.C. & O.B.*, this Court upheld a trial court's conclusion that the respondent mother had willfully left her children in foster care and failed to make reasonable progress when she failed to achieve her case plan requirement of securing housing for herself and her children; "'failed repeatedly to address her substance abuse issues'" and did not timely complete treatment; failed to make progress on her educational and employment goals; and did not address domestic violence issues. *Id.* at 466-67, 615 S.E.2d at 397.

We, therefore, hold, in this case, that the trial court's findings of fact supported its conclusion that grounds existed under § 7B-1111(a)(2) to terminate respondent father's parental rights. Respondent father argues, however, that some of the trial court's findings of fact are not supported by clear, cogent, and convincing evidence.

"'Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.'" *In re C.C., J.C.*, 173 N.C. App. 375, 380, 618 S.E.2d 813, 817 (2005) (quoting *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320,

323, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338, 106 S. Ct. 385 (1985)). The trial court, however, has the power to determine the credibility of witnesses, assign weight to the evidence, and resolve any conflicts in the evidence. *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 397.

We note first that respondent father does not challenge the bulk of the trial court's findings of fact, including the findings regarding his positive drug screens, his failure to pay child support, his failure to obtain suitable housing, and issues regarding the mental health assessment. Any "findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court." *S.C.R.*, ___ N.C. App. at ___, 679 S.E.2d at 909.

Respondent father first argues that the record contains insufficient evidence to support finding of fact 21:

> A prior Order of this Court, ordered the father to obtain a Substance Abuse Assessment should the father test positive for any illegal substances or non-prescribed substances. The father has not obtained this assessment. *Father states he had a prescription for the substances listed below but states he did not provide a copy of those prescriptions to HCDSS or to Pardee Urgent Care, the facility that administered the screenings stating it was for them to find out he was on prescription drugs.*

(Emphasis added.) Respondent father does not take issue with the court's finding that he failed to obtain the required substance abuse assessment. Rather, he contests the last sentence of the finding, pointing out that the social worker testified at trial

that one of his doctors, Dr. Graff, had sent the social worker "doctor notes" that listed the medications he had prescribed for respondent father.

Respondent father, however, overlooks the fact that a "doctor note" is not a "copy of a prescription," even if it lists the prescribed medications. Additionally, as the social worker testified, her receipt of the "doctor notes" did nothing to alter the interpretation of the drug screens because she was "not a medical technician who [could] read the tests," and respondent father "never presented prescriptions to Pardee Urgent Care to verify the results."

Furthermore, respondent father testified that he had prescriptions from another doctor, Dr. Talman, and testified at trial that those were the "prescriptions for all the drug tests." Nothing in the record indicates that respondent father submitted copies of Dr. Talman's prescriptions either to DSS or to the hospital. Thus, evidence showed that although the social worker may have received copies of "doctor notes" from Dr. Graff, neither she nor the hospital received copies of respondent father's prescriptions from Dr. Graff or Dr. Talman. We hold, therefore, that this finding of fact is supported by competent evidence.

Next, respondent father challenges finding of fact 22:

> Father went to Park Ridge Hospital on May 9, 2008 at approximately 10:00 pm complaining of a shoulder injury from a mini-scooter accident and was prescribed Percocet. On May 10, 2008 at approximately 8:00 am the father went to Pardee Hospital complaining of a shoulder injury from a mini-scooter accident and was prescribed Vicodin. On May 12, 2008 the

> father went to Blue Ridge Bone and Joint complaining that his shoulder hurt from moving a refrigerator and requested Vicodin. The doctor refused to prescribe him Vicodin and gave him Ultram.

Respondent father argues on appeal that the source of this finding was a review hearing report that was not admitted at the TPR hearing. A review of the transcript of the hearing reveals, however, that ample trial testimony was admitted at the hearing in support of this finding, including the testimony of a social worker and respondent father himself.

The third finding of fact challenged by respondent father is finding of fact 25: "Since September 2008 the father has worked for Action Plumbing. He started out working 20 hours per week. He is now working 30 hours per week, making *$10.00* per hour." (Emphasis added.) As to this finding of fact, respondent father only takes issue with the dollar amount of his hourly earnings. We agree and DSS concedes that this portion of the finding is not supported by the evidence — at the time of the hearing, respondent father was earning $12.00 per hour. Nevertheless, we do not believe that this error is sufficiently material in light of the trial court's other findings to warrant setting aside the TPR order.

Lastly, respondent father challenges finding of fact 29:

> Father participated in therapy with the oldest juvenile from February 15, 2008 until May 2008. Father missed a May 27, 2008 appointment and an August 20, 2008 appointment. Father did not reconnect with the therapist until December 2008. *Currently the therapist can not [sic] provide services to the father but told the father he could help him with referrals.* Father has yet to connect with another therapist.

(Emphasis added.) Respondent father contests only the portion of this finding of fact related to the therapist's offer to help with referrals. Respondent father argues, as he testified at trial, that the therapist made no such offer. Yet, respondent father also acknowledges that the social worker testified that the therapist "said he would help him seek a different therapist." Any conflict in the testimony was an issue to be resolved by the trial court.

In sum, we hold that the trial court's conclusion that grounds existed under § 7B-1111(a)(2) to terminate respondent father's parental rights is supported by the court's findings of fact. The material findings, in turn, are supported by clear and convincing evidence. The trial court, therefore, did not err in concluding that grounds existed to terminate respondent father's parental rights.

Respondent father next contends that the trial court erred in concluding that Jason's and Jenny's best interests would be served by terminating his parental rights. "The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interests. The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard." *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001) (internal citations omitted).

N.C. Gen. Stat. § 7B-1110(a) (2007) provides that in evaluating a child's best interests, the court must consider the following: (1) the age of the child; (2) the likelihood of adoption

of the child; (3) whether the termination of parental rights will aid in the accomplishment of the permanent plan for the child; (4) the bond between the child and the parent; (5) the quality of the relationship between the child and the proposed adoptive parent, guardian, custodian, or other permanent placement; and (6) any other relevant consideration. N.C. Gen. Stat. § 7B-1110(a)(1)-(6). In this case, the trial court made the required findings of fact.

The court specifically found that Jason was seven years old and Jenny was three years old; that "[i]t is extremely likely that the juveniles will be adoptive [sic] as the foster parents would like to adopt the juveniles should they be cleared from [sic] adoption"; and that the children's permanent plan is adoption, accomplishment of which would be aided by termination of respondent father's parental rights. Although the court found that the children "have good visits with their father who sees them on a weekly basis[,]" the trial court also found that the children "see him more as a playmate. [Jason] stated to the Social Worker[,] 'I like seeing my Dad but I want to stay where I am.' [Jenny] has never resided with her father. She is as bonded to him as she is to the Social Worker." With respect to the foster parents, however, the court found that "[t]he bond between the pre-adoptive placement (the foster parents) and the juveniles is strong. The juveniles have resided with this family for 23 months. The juveniles call the foster parents Mom and Dad. The juveniles have

stated their desire to remain with the foster parents. The foster parents provide a safe and stable home for these juveniles."

Considering the trial court's findings with respect to § 7B-1110(a), each of which is supported by the evidence, we cannot conclude that the trial court abused its discretion in concluding that termination of parental rights was in the children's best interests. Accordingly, we affirm the trial court's order.

Affirmed.

Judges McGEE and ROBERT HUNTER, JR. concur.

Report per Rule 30(e).