

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-1086

NORTH CAROLINA COURT OF APPEALS

Filed: 1 February 2011

IN THE MATTERS OF:

A.R.P. and	Burke County
J.B.A.P.,	Nos. 08 J 154
Minor Children.	08 J 155

Appeal by respondent from order entered 17 June 2010 by Judge L. Suzanne Owsley in Burke County District Court. Heard in the Court of Appeals 10 January 2011.

Stephen M. Schoeberle for petitioner-appellee.

Levine & Stewart, by James E. Tanner III, for respondent-appellant.

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

GEER, Judge.

Respondent mother appeals from an order terminating her parental rights to her two children. The trial court found that grounds existed for termination under N.C. Gen. Stat. § 7B-1111(a)(2) (2009) (willfully leaving child in foster care for more than 12 months without making reasonable progress under circumstances to correct conditions that led to removal of child from parent's custody). Because the trial court failed to make any findings as to whether respondent mother's failure to make

reasonable progress was willful, we must reverse and remand for further findings of fact.

Facts

Respondent mother has two children, J.B.A.P. ("Joe"), born 21 April 2004, and A.R.P. ("Alice"), born 5 October 2006.¹ In February 2008, the Burke County Department of Social Services ("DSS") first became involved with the family after respondent mother was arrested and charged with driving under the influence of prescription drugs while her children were in the vehicle and not properly restrained.

On 18 September 2008, respondent mother was involved in an automobile accident in which she crossed the center line and struck an oncoming vehicle. The driver of the second vehicle was killed, and a passenger was critically injured. As a result, respondent mother was charged with felonious death by vehicle.

On 14 October 2008, DSS filed a petition alleging that Alice and Joe were neglected juveniles. A non-secure custody order was entered on 30 October 2008, and the juveniles were placed in the custody of DSS. At a hearing on the petition on 4 December 2008, respondent mother did not contest the allegations in the petition, and the trial court entered an order on 29 December 2008 adjudicating Joe and Alice to be dependent juveniles.

¹The pseudonyms "Joe" and "Alice" are used throughout this opinion to protect the minors' privacy and for ease of reading.

In the order, the trial court pointed to the criminal charges arising from the February and September 2008 instances of driving while impaired and further found that respondent mother "exhibits the symptoms of major depression, she has post-traumatic stress disorder which is partially in remission, and she may abuse narcotic pain killers. Her most recent substance abuse assessment recommends a program of inpatient treatment or 90 hours of intensive outpatient treatment." The trial court ordered that the children be placed with their paternal grandparents, that DSS continue reunification efforts with respondent mother, and that respondent mother comply with the recommendations of her most recent substance abuse assessment, as well as with any additional recommendations made by DSS or the guardian ad litem.

Following the initial adjudication, respondent mother continued to have issues with substance abuse. In an 18 June 2009 order resulting from a review hearing, the trial court found that respondent mother had "not complied with all of her requested drug screens." The trial court found in a permanency planning order filed 21 October 2009 that respondent mother "has tested positive for methadone and benzodiazepines for which she doesn't have prescriptions." She had also not yet submitted to inpatient substance abuse treatment and had been diagnosed with benzodiazepine dependence. In its order, the court further found that respondent mother "has a very serious substance abuse problem. It does not appear that she will be able to sufficiently address that problem and place herself in a position to appropriately

parent the juveniles." As a result, the trial court changed the juveniles' permanent plan from reunification with respondent mother to adoption.

On 16 November 2009, DSS filed a motion to terminate respondent mother's parental rights. The sole ground asserted by DSS for termination was N.C. Gen. Stat. § 7B-1111(a)(2) – that respondent mother had willfully left Joe and Alice in foster care for more than 12 months without showing that reasonable progress under the circumstances had been made in correcting those conditions that led to the children's removal from respondent mother's care. Specifically, DSS alleged that while the children had been removed from respondent mother's care due to her misuse of controlled substances, respondent mother had failed to meaningfully address that issue, as evidenced by her continuing to test positive for controlled substances for which she had no prescription.

On 20 May 2010, a hearing was held on the motion to terminate respondent mother's parental rights. The trial court made the following findings of fact. In 2007, respondent mother witnessed the murder of her husband and, as a result, exhibits symptoms of major depression and suffers from post-traumatic stress disorder that is partially in remission. After DSS became involved due to the February 2008 driving while impaired by prescription drugs arrest,² respondent mother entered a case plan that required her to obtain a substance abuse assessment and treatment, attend parenting

²The trial court found that respondent mother was convicted of the charges in district court but had appealed that conviction.

classes, and receive grief counseling as recommended. She completed the parenting classes, obtained grief counseling, and, in the words of the trial court, "almost completed substance abuse treatment."

In September 2008, however, respondent mother drove while impaired by prescription drugs, crossed the center line, and struck another vehicle, killing the driver and injuring the passenger. The trial court noted the charge of felonious death by motor vehicle was still pending.

Respondent mother had first begun taking benzodiazepines for anxiety when she was 18 and had developed a dependency on those drugs, as she recognized. She also obtained methadone legally for approximately one year, but, after losing her driver's license, she stopped going to the methadone clinic and began to obtain methadone illegally. She also had taken Xanax and hydrocodone. Since losing custody of her children, respondent mother was hospitalized twice (seven days each time) for detoxification, once in February 2009 and once in September 2009. Although extended inpatient follow-up was recommended, respondent mother had not obtained that treatment.

The court determined, with respect to respondent mother's efforts to address her substance abuse: "[Respondent mother] has been verbally cooperative, but she has failed to seek and obtain recommended inpatient treatment. After obtaining outpatient treatment, she has continued to use benzodiazepines and methadone, in spite of such drug use impairing her relationship with the minor children, since, due to her substance abuse issues, she has not

seen the minor children since October of 2009." Respondent mother claims that she last used benzodiazepines three weeks before the hearing and illegally-obtained methadone three months before the hearing.

The trial court concluded that respondent mother's history of drug use demonstrated that she would remain dependent on these drugs until she completed the appropriate inpatient treatment. The court observed that although DSS had made efforts for two years and three months to assist respondent mother in addressing her drug dependency, respondent mother continued to be dependent on prescription drugs and had failed to address the problem in a meaningful way. The court found that until she addressed her drug dependency, she would remain unable to care for her children.

Based on these findings of fact, the trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate respondent mother's parental rights. The court further concluded that it was in the juveniles' best interests that respondent mother's parental rights be terminated. Respondent mother timely appealed from the order terminating her parental rights.

Discussion

A proceeding to terminate parental rights has two stages: an adjudicatory phase followed by a dispositional phase. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication stage, the petitioner must show through "clear, cogent, and convincing evidence that one or more of the statutory

grounds set forth in section 7B-1111 exists." *In re D.J.D., D.M.D., S.J.D, J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005). In the dispositional stage, the trial court determines whether termination of parental rights is in the best interests of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908.

When this Court reviews an order terminating parents rights, we must determine whether the trial court's findings of fact are based on 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), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). When the trial court's findings of fact 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). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In order to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must determine (1) that a child has been willfully left by the parent in foster care or placement outside the home for over 12 months; and (2) that the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review*

denied, 360 N.C. 64, 623 S.E.2d 587 (2005). A parent is shown to have "willfully" left the child when "the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Willfulness "does not require a showing of fault by the parent." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996).

In this case, the trial court made findings that the children were left outside the home for more than 12 months and that respondent mother failed to make reasonable progress under the circumstances. The trial court failed, however, to make a specific finding of fact that respondent mother *willfully* left the children in foster care or other placement outside the home or even that she had the ability to show reasonable progress, but was unwilling to make the effort. This Court has previously held that a trial court's failure to make findings regarding willfulness requires reversal of an order based on N.C. Gen. Stat. § 7B-1111(a)(2). See *In re C.C., J.C.*, 173 N.C. App. 375, 383-84, 618 S.E.2d 813, 819 (2005) (reversing when order included no finding of willfulness and was "devoid of any finding that respondent was 'unwilling to make the effort' to make reasonable progress in remedying the situation that led to the adjudication of neglect" (quoting *McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175)).

While the trial court did find that respondent mother "ha[d] not availed herself of the opportunities to meaningfully address

her substance abuse issues," that finding – even though close – is not the same as a finding that she was able to do so, but was unwilling to make the effort. Because of the significance of these decisions to the children as well as the parents, it is critical that we ensure that the trial court considered the issues in the correct legal light. Evidence exists in the record that would permit a finding of willfulness, but any such finding cannot be made in the first instance on appeal. Consequently, we must remand for further findings of fact regarding whether respondent mother willfully left her children in foster care for over 12 months. Because we are remanding for further findings of fact, we need not address respondent mother's remaining arguments.

Reversed and remanded.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).