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NO. COA10-225

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

IN THE MATTER OF:

J.D.A.,
Child

Randolph County Minor
No. 08 JT 22

Appeal by respondent-father from order entered 20 November 2009 by Judge Don W. Creed, Jr., in Randolph County District Court. Heard in the Court of Appeals 5 July 2010.

Erica Glass McDoe for Randolph County Department of Social Services petitioner-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson Wyatt Moore, Jr., and Katherine Y. Lavoie, for guardian ad litem appellee.

Sydney Batch for respondent-father appellant.

HUNTER, JR., Robert N., Judge.

Respondent-father appeals from the trial court's order terminating his parental rights as father of the minor child J.D.A. on the grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable cost of care.¹ After careful review, we affirm the order of the trial court.

BACKGROUND

¹ The parental rights of the child's mother were also terminated; however, she did not appeal from the trial court's order and therefore is not a party to this appeal.

On 14 February 2008, Randolph County Department of Social Services ("RCDSS") filed a juvenile petition alleging that J.D.A. was neglected and dependent. J.D.A. tested positive for marijuana when he was born in late 2007. The child's mother admitted that she had injected herself with heroin during her pregnancy with J.D.A., and she admitted using marijuana to reduce her craving for heroin. At the time RCDSS filed the juvenile petition, the mother was in the hospital after an apparent suicide attempt from an overdose of heroin, and respondent-father was in jail on pending charges including possession of a schedule I controlled substance and driving while license revoked. Although the juvenile was placed temporarily with relatives in a kinship placement, RCDSS had concerns about the respondent-father's stated intention to take J.D.A. and move to another county at the earliest opportunity. RCDSS obtained non-secure custody the same day it filed the juvenile petition. The child was placed with his maternal aunt and uncle.

In March 2008, respondent-father and the child's mother moved to Buncombe County to live with respondent-father's mother. Thereafter, RCDSS requested that Buncombe County Department of Social Services ("BCDSS") assist in providing services, and both agencies remained involved in the case.

On 30 April 2008, J.D.A. was adjudicated dependent with the consent of both parents. In the adjudication order entered, the trial court ordered respondent-father to do the following: (1) obtain a substance abuse assessment and follow all recommendations;

(2) attend Narcotics Anonymous ("N.A.") meetings and provide proof of attendance to RCDSS; (3) submit to random drug screens at the request of RCDSS; (4) obtain and maintain stable housing; (5) obtain and maintain stable employment; and (6) attend parenting classes. The trial court ordered that custody of the juvenile remain with RCDSS, and approved continued placement with the maternal aunt and uncle. The court also gave instructions that the parents were to have supervised visitation with the child for a minimum of one hour per week, to be arranged between the aunt and uncle and the parents.

At a 23 July 2008 review hearing, the trial court found that respondent-father had not maintained contact with RCDSS; the social worker discovered that respondent-father's employment had ended but that he had started a new job; respondent-father was receiving services for substance abuse but had not signed a release to allow the social worker to confirm his attendance; and the social worker was uncertain where respondent-father was living due to not having any contact with him. The court found that respondent-father had been visiting with the minor child, although the visits became less frequent over time, with respondent-father only visiting once in May, once in June, and once in July prior to the review hearing. The court again ordered respondent-father to comply with the previously ordered requirements, and included an order for respondent-father to sign a release to allow the social worker to obtain information about services respondent-father was engaged in.

Due to having moved to another county, respondent-father was ordered to maintain contact with both RCDSS and BCDSS.

A permanency planning hearing was held on 21 January 2009. The trial court found that RCDSS had had minimal contact with respondent-father and that the Buncombe County social worker had not been able to contact respondent-father regarding drug screens and her calls were not returned. The court also found that respondent-father was not maintaining stable employment; that although respondent-father indicated he had completed parenting classes, he had not provided documentation of completion; he had received substance abuse treatment, but his case was terminated due to non-compliance; he was not attending N.A. meetings; he had not provided any support for the minor child; and he had visited the child only four times since the previous court hearing in July 2008. Although respondent-father continued to reside with his mother, at the time of the hearing his mother was in jail and the court did not consider the housing situation suitable for a child. Further, respondent-father had pending criminal charges in three counties. He did comply with a request to take a paternity test, the results of which confirmed his paternity of the minor child. The trial court ordered reunification efforts with the father to cease, and changed the permanent plan for the juvenile to adoption. The court repeated instructions for respondent-father from previous orders, and ordered visitation to continue.

On 23 February 2009, RCDSS filed a motion in the cause to terminate the parental rights of both parents. With respect to

respondent-father, RCDSS alleged the following grounds to support termination: (1) neglect, N.C. Gen. Stat. § 7B-1111(a)(1) (2009); (2) willfully leaving the minor child in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the removal of the child from the home, N.C.G.S. § 7B-1111(a)(2); and (3) willful failure to pay a reasonable cost of care for the child, N.C.G.S. § 7B-1111(a)(3).

At a permanency planning hearing held on 10 June 2009, the trial court found that respondent-father continued to fail to comply with the trial court's orders to work toward reunification with the minor child, and that DSS had had no contact with respondent-father since the previous court hearing. The trial court ordered that respondent-father's visitation cease, and reiterated that adoption remained the permanent plan for the child.

The termination matter came on for hearing on 22 July, 14 August, and 16 September 2009. Respondent-father appeared on the first date, but did not show up on 14 August or 16 September, and no explanation was provided for his failure to attend the last two days of the termination proceedings. After hearing the evidence in the adjudication phase of the hearing, the trial court determined that RCDSS had proven by clear, cogent, and convincing evidence that grounds existed to terminate respondent-father's parental rights on the bases of neglect, failure to make reasonable progress, and failure to pay a reasonable cost of care for the child. After considering the evidence offered at disposition, the trial court determined that the termination of respondent-father's

parental rights was in the best interest of the child, and ordered that his rights be terminated. From the order entered, respondent-father appeals, and challenges each of the three grounds for termination as not being supported by sufficient evidence.

ANALYSIS

Proceedings to terminate parental rights are conducted in two parts: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109 (2009), and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110 (2009). See *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Upon review of an order terminating parental rights, this Court must determine (1) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether the court's findings of fact support its conclusions of law that one or more statutory grounds for termination exist. *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); see also N.C. Gen. Stat. § 7B-1111(a). Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. See *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Once a trial court has determined at the adjudication phase that at least one ground for termination exists, the case moves to the disposition phase where the trial court decides whether a termination of parental rights is in the best interest of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908; N.C.G.S. § 7B-1110(a). The trial court is not required to

terminate parental rights, but has the discretion to do so. *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985). Therefore, this Court reviews the determination for abuse of discretion. *Id.*

Turning to grounds for termination, we first address the ground of failure to make reasonable progress. Pursuant to the Juvenile Code, a parent's rights to a child may be terminated upon finding that:

The 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.G.S. § 7B-1111(a)(2). When determining willfulness, the court must consider whether "respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re Nesbitt*, 147 N.C. App. 349, 360, 555 S.E.2d 659, 666 (2001). Evidence of some progress does not preclude a finding of willfulness. *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989).

Here, the trial court based its conclusion that respondent-father failed to make reasonable progress to correct the conditions which led to the removal of the child in numerous detailed findings, which may be summarized as finding that respondent-father failed to: (1) maintain contact with RCDSS, BCDSS, or the guardian *ad litem*; (2) submit to requests for drug screens on twelve separate occasions; (3) obtain and maintain stable employment; (4)

comply with recommendations of a substance abuse assessment (DSS workers were unable to confirm respondent-father's compliance with substance abuse treatment); (5) attend N.A.; (6) obtain and maintain stable housing; (7) provide adequate support for the benefit of the minor child; or (8) maintain regular visitation with the child, since respondent-father only visited the child thirteen times between 21 February 2008 and 13 December 2008, despite being ordered to maintain weekly visitation; and that respondent-father did not visit the child after 13 December 2008. In addition, the trial court found that respondent-father had incurred criminal charges which were pending at the time of the termination hearing.

Respondent-father specifically contends that the trial court erred by considering factors which he maintains were irrelevant to the reasons stated in the juvenile petition for why the child was removed from the home. Respondent-father argues that the trial court erroneously based its conclusion that he failed to make reasonable progress on factors such as maintaining contact with DSS, obtaining and maintaining stable employment and housing, providing adequate support for the child, and maintaining regular visitation with the child. He also states that the trial court should not have based its conclusion on his pending criminal charges, as he was never actually ordered by the trial court not to incur further criminal charges as part of his case plan, and because at the time of the termination hearing, he had not actually been convicted of the pending charges. Finally, he contends that the evidence does not support a finding of willfulness, since he

was actively engaged in addressing his substance abuse problem, and there was no evidence at the termination hearing that he was an active user. We are not persuaded by respondent-father's arguments.

After reviewing the record and transcripts, we conclude that ample evidence was presented to support each finding regarding respondent-father's lack of progress with the requirements first set forth by the trial court in the 30 April 2008 order adjudicating the minor child dependent. Testimony from Buncombe County DSS social worker Wanda Lester, October Road, Counselor Jason Whisnant, Randolph County DSS Social Worker Lynette Wellons, and the child's caretaker all support the findings summarized above. Further, the findings are more than sufficient to support the trial court's conclusion that a ground existed to terminate respondent-father's parental rights for failure to make reasonable progress.

We are unable to give any credence to respondent-father's contention that he need not have complied with the trial court's repeated orders to complete certain tasks in order to effect reunification with the minor child. It is clear from the evidence that respondent-father simply refused to cooperate with DSS or the trial court on most aspects of the plan created for him. Although he claims his failure to maintain contact with DSS is irrelevant to the determination of progress made, his failure to maintain contact thwarted the efforts of DSS to monitor whether he was making any progress. This failure is particularly relevant with regard to the

requirement that he address his substance abuse issues, which respondent-father acknowledges is one of the main reasons the child was removed from the home. Despite respondent-father's contention that he made reasonable progress by attending substance abuse treatment, the evidence shows that he was terminated from treatment due to non-compliance, and that he never provided any information to DSS of attendance at N.A. meetings. Further, he failed to make himself available for random drug screens, which was a requirement specifically designed to test respondent-father's progress.

With regard to the remaining findings regarding employment, housing, visitation, and support, we do not find that the trial court inappropriately relied on these factors in determining whether respondent-father made reasonable progress. Respondent-father was ordered to comply with these requirements, and failed to do so. Taken together, all of the findings regarding the ground of reasonable progress indicate a lack of effort on respondent-father's part rising to the level of willfulness. Therefore, we conclude that the trial court did not err in finding that clear, cogent, and convincing evidence was presented to support its conclusion that respondent-father's parental rights may be terminated for failure to make reasonable progress.

Since we conclude that the trial court did not err in terminating respondent-father's parental rights on the basis of failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2), we need not address respondent-father's arguments regarding the other two grounds for termination.

Affirmed.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).