NO. COA10-395

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

IN THE MATTER OF:

M.T.,	Guilford County
[A minor child.]	No. 06 JT 317

Appeal by Respondent from order entered 22 January 2010 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 2 August 2010.

Mercedes O. Chut for Petitioner-Appellee Guilford County Department of Social Services.

No brief filed for Guardian ad Litem.

Janet K. Ledbetter for Respondent-Appellant Mother.

STEPHENS, Judge.

For the third time this Court is tasked with reviewing an order terminating the parental rights of Respondent, the mother of Mika.[1] The underlying facts leading to the termination of Respondent's parental rights are stated in our first opinion, *In re M.T.*, No. 08-1183, 2009 N.C. App. LEXIS 236 (N.C. Ct. App. March 3, 2009), and will not be summarized except as necessary to address issues raised in the present appeal. By our first opinion, we remanded the matter to the trial court to make further findings

[1] A pseudonym will be used to protect the minor child's identity.

regarding Respondent's "ability, or capacity to acquire the ability, to overcome factors which resulted in [Mika] being placed in foster care[.]" *Id.* at *13 (citations and quotation marks omitted).

On remand, the trial court made additional findings of fact without receiving new evidence and entered an amended order. Respondent appealed this amended order. On 17 November 2009, this Court filed the opinion *In re M.T.*, No. 09-764, 2009 N.C. App. LEXIS 1850 (N.C. Ct. App. November 17, 2009), in which we found that "these additional findings also fail to address [R]espondent's age in terms of willfulness." *Id.* at *4. We again remanded the matter and directed the trial court to

> make specific findings showing that the trial court considered [R]espondent's age-related limitations in determining whether her actions were willful. Further, the trial court must determine how the re-appointment of a guardian *ad litem* for [R]espondent bears upon whether Respondent willfully left the juvenile in foster care for more than twelve months without showing to the satisfaction of the trial court that reasonable progress has been made in correcting the conditions which led to the removal of the juvenile.

Id. at *8-9.

In requiring the trial court to address the re-appointment of a guardian *ad litem* for Respondent, this Court pointed out that the trial court based its re-appointment on its concern before the termination hearing that Respondent "had diminished capacity or could not adequately act in her own interests." *Id.* at *8; *see* N.C. Gen. Stat. § 7B-1101.1 (2009) ("On motion of any party or on the court's own motion, the court may appoint a guardian *ad litem*

for a parent in accordance with [N.C. Gen. Stat. §] 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest."). This Court thus concluded that the trial court's re-appointment of a guardian *ad litem* for Respondent "bear[s] directly upon the issue of willfulness[,]" requiring findings of fact by the trial court on Respondent's mental capacity. *M.T.*, 2009 N.C. App. LEXIS at *8.

On second remand, the trial court received no new evidence and entered an "Order Pursuant to Remand from the North Carolina Court of Appeals" in which it made findings as to Respondent's birth date, age when Mika was born, age when Mika came into the care of the Guilford County Department of Social Services ("DSS"), age when Mika was adjudicated dependent, and age when the hearing on the petition to terminate her parental rights to Mika was held. The court also made the following findings of fact:

> 7. Prior to July 2007 when [Respondent] voluntarily left Guilford County and moved to Texas to be with a boyfriend, [DSS] made the following reasonable efforts to assist her: Community Support Services, foster home placement, transportation, referrals to Salvation Army, Family Services of the Piedmont, WIC, Medicaid, Greensboro Housing Authority, NC African Services, case management, transitional living program, Envisions for Life.
>
> > a. Community Support Services made arrangement to pick [Respondent] up and transport her to Wendy's Restaurant, where the manager had agreed to hire her. [Respondent] refused to [sic] with the Community Support worker. The simple task of cooperation with transportation to a

job was certainly within [Respondent's] ability to achieve if she wanted to put forth effort in making reasonable progress toward her case plan of reunification with [Mika].

b. [Respondent] also refused to go with Community Support workers to other appointments and at still other times would not be present at her residence when the Community Support worker came to meet with her. Again, the simple task of just being cooperative and being where she was supposed to be at the time she was supposed to be there was certainly within [Respondent's] ability to achieve.

c. [Respondent] ran away from foster home placement and from Act Together, refusing to stay at either place. She refused to follow the rules of the group home or of Act Together. [Respondent] had the ability to follow basic household rules as part of her case plan for reunification.

d. [Respondent] would not be present when DSS workers or other agency workers went to provide services. She had the ability to be available for transportation to things like medical appointments, psychological assessment appointments. All she had to do was show up. Her age or maturity or any cultural barriers would be no excuse for not complying with transportation assistance. The Department made arrangements for in-home therapy with Envisions for Life. [Respondent] had the ability to just be at home, and she would not even do that, knowing her case plan for reunification called for therapy. [Respondent] did not have to catch a bus, walk or even leave her home to get this service. Her lack of compliance was again willful.

e. [Respondent] consistently left her home and did not let anyone know her whereabouts, thwarting DSS efforts to assist her with working her case plan. She had the ability to phone her social worker and tell her where she was. She certainly did this each week when she ran away to Texas. There is no reason she could not have maintained that same contact when she was in Guilford County.

f. [Respondent] refused to participate in the psychological evaluation that was scheduled for her January 31, 2007 and February 7, 2007. She described throwing out the notices for the parenting assessments to *guardian ad litem* Nicholas Ackerman. She certainly had the ability to cooperate with this. School children of all ages and intellectual abilities participate in testing and evaluations. [Respondent] chose not to work toward cooperation with her case plan. She repeatedly told social workers she did not want to have custody of [Mika].

g. [Respondent] did not enroll in any school or any program to obtain her GED. She had been in school earlier and was certainly capable of cooperating with reenrollment. She chose not to.

h. [Respondent] chose to go to Texas in July 2007 and cease visiting [Mika] on a regular basis or working toward any goals of her case plan. She had the ability to meet with social workers and other support workers.

8. [Respondent] had the ability to reside in Guilford County and maintain visitation with her minor child [Mika]; she chose not to. She voluntarily left and went to Texas.

9. Any limitations on the part of [Respondent] appear not to be age-related but related to her unwillingness to participate in services offered to her, such as the parenting assessment, educational opportunities, etc.

10. The court considered age-related limitations of [Respondent] and whether her age diminished her ability to make reasonable progress toward her plan for reunification.

11. [Respondent] refused to enter into a case plan when she returned from Texas. By this time, the Department had concluded that [B.M.T.] (alleged mother of [Respondent]) was not a suitable placement for [Mika]. This is further evidence that [Respondent] did not want to have custody of [Mika] herself. Age limitations had nothing to do with [Respondent's] refusal to enter into a case plan with [DSS].

12. [Respondent] testified at the May 13, 2008 hearing that she knew she needed to get a job and an apartment to get her baby back. [Respondent] refused to go with her Community Support worker to Wendy's, where a manager had agreed to hire her. [Respondent] had also refused to go with the Community Support worker to volunteer assignments.

13. [Respondent] testified at the May 13, 2008 hearing about her social security card and her I-94 (immigration document). She also testified that she made the A honor roll in school.

14. The Court had an opportunity to observe [Respondent's] demeanor, tone, and ability to answer questions under examination and cross-examination and was satisfied she knew and understood what was being asked and what her own responses were.

15. The Court is satisfied that [Respondent] had the ability to understand what was expected of her by [DSS] and the Court and that she had the ability to act adequately in her own interests.

Based upon these findings, the court concluded that Respondent willfully left Mika in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made in correcting the conditions which led to the removal of the child pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Respondent first contends that the trial court failed to follow this Court's mandate by failing to make the requisite findings concerning Respondent's age and mental capacity. We disagree.

In its order, the trial court noted repeatedly that compliance with her case plan "was certainly within [Respondent's] ability to achieve." The trial court found that Respondent's "age or maturity or any cultural barriers would be no excuse" for not complying with her case plan and that Respondent's refusal to participate in the required psychological evaluation could not be attributed to her age or mental capacity as "[s]chool children of all ages and intellectual abilities participate in testing and evaluations." The trial court noted that Respondent had the ability to be enrolled in school, having been enrolled before, and that "[a]ny limitations on the part of [Respondent] appear not to be age-related but rather related to her unwillingness to participate in services offered her . . . ." Moreover, the court "considered age-related limitations" of Respondent and found that "[a]ge limitations had nothing to do with [Respondent's] refusal to enter into a case plan with [DSS]" after she returned from Texas.

Finally, the court found that, based on its "opportunity to observe [Respondent's] demeanor, tone, and ability to answer questions[,]" the trial court was satisfied that Respondent had the mental capacity to understand what was being asked of her and to understand what DSS expected of her in order for her to gain custody of her child.

We conclude that the above-quoted findings demonstrate that the trial court complied with this Court's mandate by making adequate findings of fact regarding Respondent's age-related limitations and her mental capacity in determining that Respondent's actions with regard to Mika were willful. Respondent's argument is thus overruled.

Respondent also contends that the trial court erred in terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) because the findings of fact which support this conclusion are not supported by clear and convincing evidence. Again, we disagree.

The standard of our review of a termination of parental rights order is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9 (2001). A trial court may take judicial notice of prior orders in a termination of parental rights proceeding and base findings of fact upon those orders. *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273

(2005); *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991).

Parental rights may be terminated 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.

N.C. Gen. Stat. § 7B-1111(a)(2) (2009). To find grounds to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), a trial court must perform a two-part analysis. *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396.

"A finding of 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). "Willfulness is established 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). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the

child[]." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995).

"With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress, . . . evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights." *O.C.*, 171 N.C. App. at 465, 615 S.E.2d at 396.

We apply the foregoing principles to Respondent's challenges of findings of fact 7a through 7h and 8 through 15, set forth *supra*.

The record shows that Respondent entered into a case plan with DSS in order to be reunified with her child. The plan required Respondent to do the following: (1) participate and cooperate with individual and family counseling and follow recommendations; (2) continue to attend high school and obtain her high school diploma or GED; (3) submit to unannounced and announced visits by DSS; (4) refrain from arguing with her mother and brothers and sisters in the home; (5) refrain from having contact with Respondent's stepfather, the suspected father of the child; (6) demonstrate the ability to meet the psychological, academic, and medical needs of Mika; (7) cooperate with community support and services; and (8) provide stable housing for Mika.

Gail Spinks, a foster care social worker for DSS, testified at the termination hearing as follows: Respondent was non-compliant with almost every component of her case plan. Respondent did not

participate in family or individual counseling. She did not obtain her high school diploma or obtain her GED and is not employed. Respondent was unable to comply with announced and unannounced visits from DSS because she was "in and out of her mother's home throughout the case and then moved to Texas in June of '07 and returned to North Carolina in January of '08" and thus was unavailable for DSS visits. Respondent was compliant with the visitation schedule until she left for Texas. While she was in Texas, she did not visit the child. She did not comply with the requirement that she cease fighting with her mother, and Respondent never established stable housing for Mika. Additionally, Respondent never fully cooperated with the in-home and community services that DSS arranged for her.

As part of Respondent's goal to "meet the psychological, academic[,] and medical needs of [Mika]," DSS scheduled a psychological assessment for Respondent. The doctor who performed the assessment "would not make recommendations" without first giving Respondent an I.Q. test. However, Respondent moved to Texas before her I.Q. test was scheduled, and she had not completed the testing at the time of the termination hearing. When Ms. Spinks spoke to Respondent about completing her psychological testing, Respondent told her "that she wants her daughter to go with family members, either it be her mother or her aunt." In fact, "[f]rom the very beginning of the case[,]" Respondent indicated that she wanted her mother to raise Mika. Respondent never demonstrated a desire to raise Mika herself.

DSS offered Respondent the following services to help alleviate the conditions that brought Mika into DSS custody:

> community support services, foster home placement, transportation, working with the Guilford County School System, referrals to Salvation Army, Family Services Piedmont for therapy, Guilford Child Health for psychological assessment, WIC, Medicaid, applications to Greensboro Housing Authority, North Carolina [African] Services, Lab Corp case management, transitional living program for [Respondent] and Visions for Life for [Respondent].

Respondent testified that she was not attending school at the time of the termination hearing but when she did attend school, her grades ranged from "A" to "C" and she was on the honor roll. Respondent further acknowledged that she told Ms. Spinks that she did not want to raise Mika herself and that she wanted her own mother to raise Mika.

The trial court took judicial notice of all prior orders entered in this matter. In its order following a review hearing on 9 March 2007, the trial court found:

> 3. Since the adjudication [of Mika as dependent], . . . [Respondent] has resided in her mother's home. That home has not been a suitable home for [Respondent]. There is a lot of fighting in the home and the police are going to the home on a fairly consistent basis. . . . The home environment is not suitable for [Respondent] and definitely not suitable for [Mika].
>
> 4. [Respondent] was in the custody of [DSS] from April 2006, to August 2006. While in [DSS's] custody, she was not cooperative and very difficult to place. She did not follow any of the rules and regulations of the placements.
>
> . . . .

> 8. [Respondent] has not fully cooperated with [DSS as demonstrated by the following:]
>
> - She has visited on a fairly consistent basis . . . ;
> - She does have a community support person that she is somewhat cooperative with;
> - She does have a tendency to come and go as she pleases, and many times [is] not available for appointments or services;
> - She is not currently enrolled in school and has not made a decision as to what she plans to do in regards to school;
> - A parenting assessment was scheduled for January 13th, and February 7th, and she refused to attend those sessions.

At the same review hearing, the trial court ordered DSS to attempt a voluntary placement of Respondent outside her mother's home and, if that failed, to "file a petition bringing [Respondent] back into [DSS] care."

By the next review hearing held 1 June 2007, DSS had assumed custody of Respondent. In the order entered following that hearing, the trial court found:

> 3. At our last court hearing on March 9, 2007, the Court requested [DSS] file a dependency petition on [Respondent], and [DSS] did so. However, [Respondent] refused the services of [DSS].
>
> 4. [Respondent] was placed at Act Together and ran away; from March 9, 2007, when she was placed in care until May 5, 2007, when the case was dismissed. She spent, almost, the entire time on the run. She would not stay at any placement provided for her from [DSS], would not stay at home, and did not comply with any service agreement during that period of time.

> 5. [Respondent's] case was dismissed on May 4, 2007, and [she was] placed back into her mother's custody. She stayed home until May 10, 2007, and her whereabouts have been unknown since then. She is present today in court.
>
> 6. She is not cooperating with any family or individual counseling or following any of their recommendations. She is not in school; not cooperating with [DSS]. . . .
>
> 7. [Respondent] was ordered to refrain from arguing and fighting with her mother, but she continues to verbally attack her mother. An altercation occurred on May 28, 2007.
>
> . . . .
>
> 9. [Respondent] was ordered to have a psychological evaluation and parenting assessment. She missed the first appointment, attended the second but needs to have another appointment to complete that.
>
> 10. She has not maintained any stable residence. She comes and goes as she pleases and when not at home, she does not let anyone know her whereabouts.
>
> 11. There is no longer a community support person working with her due to being unable to locate her for services.
>
> . . . .
>
> 13. [Respondent] is not cooperating with [DSS] and is not working toward[] reunification.
>
> . . . .
>
> 17. The Court does not consider the grandmother . . . a suitable placement for [Mika] . . . .

Following the next review hearing on 21 November 2007, the trial court entered an order wherein the trial court made the following relevant findings:

> 4. Since the last court date, [Respondent] turned 18 years of age . . . .
>
> 5. Prior to turning 18, [Respondent] left her home in June and lived from place to place until July. On July 22, 2007[, DSS] was notified by [Respondent] that she was going to Texas to visit with her boyfriend for two to three weeks. [Respondent] remains in Texas. She is maintaining weekly contact with her social worker, however, she has not seen her child since July 23, 2007, and has not complied with her case plan, other than keeping in contact with [DSS].
>
> . . . .
>
> 8. [Respondent] is not cooperating with [DSS] and is not working toward[] reunification.
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> 9. It is unlikely that this child will return to [Respondent] within the next six months. [Respondent] has been unable to take care of herself and less [sic] of her daughter.

Following a review hearing on 27 February 2008, the trial court made the following findings of fact:

> 5. Since the last court date [21 November 2007], [Respondent] has returned from Texas. [Respondent] left for Texas in July 2007. . . .
>
> 6. [Respondent] has not entered into a new case plan since her return to Greensboro. She states that she does not want custody but would like for custody to be given to her mother . . . .
>
> 7. [DSS] is not in agreement with that plan due to the history of domestic violence between [Respondent], the grandmother and the grandfather.

In evaluating Respondent's challenge to certain findings of fact in the order currently being reviewed, first, we find no record evidence to support the portion of finding 7.a. which states, "Community Support Services made arrangement to pick

[Respondent] up and transport her to Wendy's Restaurant, where the manager agreed to hire her. [Respondent] refused to [sic] with the Community Support worker." Likewise, we find no support for the portion of finding of fact 12 which states, "[Respondent] refused to go with her Community Support worker to Wendy's, where a manager had agreed to hire her." Ms. Spinks testified that she did not think Respondent had ever been employed, but that Respondent "has a problem getting a job because she doesn't have identification at this time." When Respondent was asked if she ever had a job, she replied, "Well, no. I was supposed to go to work. I applied for a job and they called me and I was supposed to go; and, I went there, and so they tell me to bring my social security card and my ID; and, I bring my ID to [inaudible] if I don't get it, then I can't do my ID." While Ms. Spinks testified that Respondent has not been compliant with in-home services and community support since she returned from Texas in January of 2008, there is no record evidence to support the trial court's finding that Respondent refused to go to Wendy's Restaurant with a community support worker.

Additionally, there is no record evidence to support that part of finding of fact 7.b. which states, "[Respondent] also refused to go with Community Support workers to other appointments and at still other times would not be present at her residence when the Community Support worker came to meet with her." Likewise, there is no evidence to support the part of finding of fact 12 which states, "[Respondent] had also refused to go with the Community

Support worker to volunteer assignments." Ms. Spinks testified that Respondent was generally "non-compliant" with most of the objectives in her case plan. As stated above, Ms. Spinks testified that Respondent has not been compliant with in-home services and community support since she returned from Texas in January of 2008. Ms. Spinks further testified that Respondent was "non-compliant" with her objective to submit to unannounced and announced visits because she was "in and out of her mother's home throughout the case and then moved to Texas in June of '07 and returned to North Carolina in January of '08." However, there is no evidence that Respondent refused to go with community support workers to appointments or was not present at her residence when a community support worker arrived to meet with her.

Furthermore, there is no record evidence to support the portions of finding of fact 7.d. which state that "[Respondent] would not be present when DSS workers or other agency workers went to provide services" or that Respondent was not home to receive in-home therapy from Envisions for Life. Again, while Ms. Spinks testified that Respondent has not been compliant with in-home services and community support since she returned from Texas in January of 2008, there is no evidence to support the trial court's specific finding that Respondent was not present when agency workers arrived to provide services.

Finally, there is no evidence of record supporting the part of finding of fact 7.f. which states that Respondent "described throwing out the notices for the parenting assessments to *guardian*

ad litem Nicholas Ackerman." Although Mr. Ackerman filed a report on 12 May 2006 for the nonsecure custody hearing, the report does not support this finding of fact. Furthermore, Mr. Ackerman did not testify at the termination hearing and Respondent's testimony did not provide support for this finding.

Nonetheless, we conclude that even excluding the portions of the findings of fact which are unsupported by the evidence, the testimony of Ms. Spinks and Respondent, along with the findings from the previous court orders recited, *supra*, details Respondent's pervasive non-compliance with her case plan and provides clear, cogent, and convincing evidence to support the remaining findings of fact. These findings, in turn, support the trial court's conclusion of law that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

However, in light of the unsupported findings in the order at issue on this appeal as well as the unsupported findings in the trial court's previous two termination orders in this case, we caution the trial court to make only those findings of fact which are supported by competent record evidence. Furthermore, while the burden is initially placed upon the appellant to commence settlement of the record on appeal, *see* N.C. R. App. P. 3.1(c)(2) ("[T]he appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9."), we point out that an appellee has an affirmative duty to ensure that the record contains all documentation necessary to support the appellee's position. *See id.* ("[T]he appellee may serve upon all

other parties . . . specific objections or amendments to the proposed record on appeal, or . . . a proposed alternative record on appeal."); N.C. R. App. P. Rule 9(b)(5)(a) ("[I]f the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief . . ., the [appellee] may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9."). We make these observations because (1) the existence of unsupported findings of fact provided a basis for the third appeal of this case and thereby contributed to the inordinate delay in giving this child stability and permanence, and (2) if evidence to support the challenged findings of fact was presented to the trial court, the parties are equally at fault in failing to make certain that the record before this Court is complete.

The order of the trial court is

AFFIRMED.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).