NO. COA10-704

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF:

N.M.J.I.

Randolph County
No. 08 JT 91

Appeal by respondent-father from order entered 13 April 2010 by Judge Avery Crump in Guilford County District Court. Heard in the Court of Appeals 1 November 2010.

Guilford County Department of Social Services, by Mercedes O. Chut, for petitioner appellee.

Lucas & Ellis, PLLC, by Anna S. Lucas, for respondent-father appellant.

HUNTER, JR., Robert N., Judge.

Respondent-father appeals from the trial court's 13 April 2010 order terminating his parental rights to juvenile N.M.J.I. (hereinafter "Ned").[1] Respondent-father contends that the evidence does not support the trial court's determination that two grounds existed to terminate his parental rights. We affirm the order terminating respondent-father's parental rights.

I. Factual & Procedural Background

[1] "Ned" is a pseudonym used to protect the identity of the juvenile who is the subject of this case.

Ned was born in February of 1998 and was eleven years old at the time of the hearing for the termination of parental rights. On 15 April 2008, the Guilford County Department of Social Services ("DSS") received a referral alleging that Ned was homeless and living with various relatives, and that respondent-mother was abusing drugs. Prior to this referral and DSS' involvement in this case, both of Ned's parents had been incarcerated and Ned was living with a maternal aunt. Upon her release from prison in February of 2008, respondent-mother did not take physical custody of Ned and he continued to live with the aunt. On or about 16 April 2008, a relative took Ned to live with his maternal great-grandparents.

Respondent-father has been in and out of prison since Ned's birth. He was incarcerated from December of 1998 through May of 1999; from May of 2001 through May of 2003; and, most recently, from March of 2007 through the time of the hearing to terminate his parental rights. The offenses for which respondent-father was incarcerated include assault with a deadly weapon with intent to inflict serious injury, common law robbery, manufacturing a Schedule II controlled substance, possession of a schedule II controlled substance, and manufacturing a Schedule VI controlled substance. His anticipated release date is 6 September 2010.

On or about 27 May 2008, DSS filed a petition alleging that Ned was abused and neglected. The petition alleged that respondent-mother admitted to using cocaine and marijuana, was addicted to drugs, was unemployed, had allowed her Medicaid

coverage to lapse, and did not have suitable housing for Ned because she was living with Ned's paternal grandmother. Ned suffered from asthma and respondent-mother had not given anyone authorization to seek medical care for him. At the time the petition was filed, respondent-father was still incarcerated. In an order entered 29 May 2008, the district court placed Ned in DSS custody.

On 12 August 2008, the district court entered an adjudication and disposition order in which it, with respondents' consent, adjudicated Ned neglected and dependent. The district court ordered that Ned remain in DSS custody, and ordered respondent-mother to enter into a service agreement with DSS to address her substance abuse. Respondent-mother was also required to attend weekly, one-hour, supervised visitation sessions with Ned after submitting three consecutive negative drug screens.

DSS also prepared a Family Services Agreement ("case plan") for respondent-father in September 2009 with the goal of unifying respondent-father with Ned after his release from prison. The signature page was signed by respondent-father on 21 October 2008, but was not returned to DSS until February of 2009. Respondent-father entered into an updated case plan with DSS, however, in May of 2009. The plan required respondent-father to: (1) write weekly letters to Ned through DSS; (2) enroll in and complete a parenting class and provide DSS with proof he had completed it; (3) enroll in and complete cognitive behavioral intervention classes; (4) enroll in and complete a vocational training program; (5) work toward his

projected release date by complying with the rules and regulations of the detention facility and by not receiving further disciplinary infractions; (6) complete any substance abuse treatment or educational program offered in prison and submit proof of completion to DSS; and (7) contact DSS monthly and keep his social worker updated regarding his incarceration status and compliance with the case plan.

In a permanency planning order rendered 10 August 2009 and signed 27 August 2009, the district court relieved DSS of reunification efforts with respondent-mother unless she contacted DSS and entered into a new case plan. The district court also set a concurrent permanent plan of adoption and reunification. Ned remained in DSS custody, and was placed with the maternal great-grandparents. The district court authorized DSS to pursue termination of parental rights based partly on respondent-father's lack of progress toward the goals established in his case plan.

On 9 October 2009, DSS filed a petition to terminate respondents' parental rights. As to respondent-father, the petition alleged grounds for termination of his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1),(2),(3), and (5)(2009). Respondent-mother relinquished her parental rights on 29 January 2010 and is not a party to this appeal.

The case came on for a termination hearing on 8 February 2010. Because a child support order had been entered prior to the hearing, DSS withdrew its allegation pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) that respondent-father had not either established

paternity, legitimatized the juvenile, or provided substantial financial support for the juvenile. The only witness to testify during the adjudication phase was social worker Sandra Hurley, who became involved in the case in October of 2008.

Ms. Hurley testified that at the time of the filing of the petition, respondent-father failed to comply with the goals established in his case plan in multiple ways. Respondent-father had not provided DSS with any evidence that he had completed any of the required cognitive and behavioral classes, although he completed two courses: "Character Education" in October 2008, and "Thinking for a Change" in April 2008. Respondent-father failed to complete any vocational training at the time the petition was filed, although he enrolled in a vocational program after the petition to terminate his parental rights was filed. Respondent-father also failed to enroll in the required substance abuse treatment programs, although he indicated he was on a waiting list for the programs. Ms. Hurley further testified that education and substance abuse programs were available to respondent-father during his incarceration.

Significantly, respondent-father's conduct while incarcerated frustrated his ability to comply with his case plan. In March 2009, he was cited for disciplinary infractions for gang activity and was transferred to a higher security facility that offered fewer courses with which respondent-father could satisfy his case plan requirements. Following his transfer to the higher security facility, respondent-father received additional infractions in

April of 2009, resulting in an extension of his sentence by one month. The case plan established by DSS also required respondent-father to maintain contact monthly with Ms. Hurley, which he failed to do.

After hearing the adjudication-phase evidence and the arguments of counsel, the trial court continued the matter for further consideration. The case came on for hearing again on 8 March 2010 and the trial court rendered its adjudication order in open court. The trial court found that grounds existed to terminate respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2), but not N.C. Gen. Stat. § 7B-1111(a)(3). The case then moved to the disposition phase. After hearing the disposition-phase evidence——including testimony from Ms. Hurley, Ned's guardian ad litem, and respondent-father——the trial court concluded that it was in Ned's best interest to terminate respondent-father's parental rights. Respondent-father timely entered written notice of appeal.

II. Standard of Review

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2009) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2009). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the burden is on the petitioner to prove that at least one ground for termination exists by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f); *Blackburn*, 142 N.C. App.

at 610, 543 S.E.2d at 908. Review in the appellate courts is limited to determining whether clear and convincing evidence exists to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

"'[F]indings of fact made by the trial court . . . are conclusive on appeal if there is evidence to support them.'" *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (quoting *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987)). "'[W]here 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.'" *In re S.D.J.*, 192 N.C. App. 478, 486, 665 S.E.2d 818, 824 (2008) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

III. Analysis

Respondent-father's sole argument on appeal is that the trial court erred by concluding that grounds existed to terminate his parental rights. Respondent-father contends that the trial court's conclusion was improperly dependent on his incarceration. We disagree.

We note that although the trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) to terminate respondent-father's parental rights, we find it dispositive that there is clear, cogent and convincing evidence to support termination of respondent-father's parental rights pursuant

to N.C. Gen. Stat. § 7B-1111(a)(2). *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (a finding of one statutory ground is sufficient to support the termination of parental rights).

In terminating parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must conduct a two-part analysis:

> 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. Evidence and findings which support a determination of "reasonable progress" may parallel or differ from that which supports the determination of "willfulness" in leaving the child in placement outside the home.

In re O.C., 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's 'willfulness' in leaving a child in foster care may be established by evidence that the parents possessed the *ability* to make reasonable progress, but were *unwilling* to make an effort." *In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). The fact that respondent has made some efforts to regain custody does not preclude a finding of willfulness. *In re Shepard*, 162 N.C. App. 215, 224, 591 S.E.2d 1, 7 (2004). Finally, "incarceration, standing alone, neither precludes nor requires finding the respondent willfully left a child in foster care." *In re Harris*, 87 N.C. App. 179, 184, 360 S.E.2d 485, 488 (1987).

The North Carolina Supreme Court has held that N.C. Gen. Stat. § 1111(a)(2) prescribes that the relevant time period in which the petitioner must demonstrate respondent's lack of reasonable progress to correct the conditions that lead to the removal of the child is the 12 months prior to the filing of the petition to terminate parental rights. *In re Baker*, 158 N.C. App. at 494-95, 581 S.E.2d at 146-47 (citing *In re Pierce*, 356 N.C. 68, 565 S.E.2d 81 (2002)). Here, the petition for termination of respondent-father's parental rights was filed 9 October 2009. Thus, the pertinent time period for the trial court's assessment of respondent-father's progress is 9 October 2008 through 9 October 2009.

Although there is evidence that respondent-father made some progress in complying with his case plan——he participated in some classes while incarcerated, and made some effort to communicate with Ned and DSS——we conclude that the trial court properly determined that he failed to make sufficient progress toward completing his case plan. The trial court explicitly found that respondent-father had opportunities to make progress toward reunification while incarcerated, but failed to do so. The trial court also made specific findings addressed to respondent-father's failure to comply with the elements of his case plan, including: respondent-father wrote letters to Ned only once per month, as opposed to once per week as required by his plan; respondent-father failed to provide proof that he had completed a parenting class or vocational training; respondent-father failed to participate in

substance abuse treatment programs offered in prison; and respondent-father failed to maintain monthly contact with DSS. Significantly, respondent-father received multiple disciplinary infractions rather than complying with all prison rules and regulations. As a result of these infractions respondent-father was transferred to a higher security facility resulting in fewer options being available to satisfy his case plan objectives and increased his sentence by an additional month.

We acknowledge the trial court relied, in part, on respondent-father's incarceration in reaching its conclusion to terminate his parental rights. We do not agree, however, with respondent-father's contention that the trial court relied solely upon this fact. The record clearly demonstrates respondent-father had the ability to make reasonable progress to correct the conditions that led to the removal of the child, but his conduct evidences an unwillingness to make the necessary effort. *See In re Baker*, 158 N.C. App. at 494, 581 S.E.2d at 146.

IV. Conclusion

We hold the trial court's findings of fact that respondent-father failed to make reasonable progress to correct the conditions that led to Ned's removal from the home are supported by clear, cogent, and convincing evidence. These findings in turn support the trial court's conclusion of law that grounds existed to terminate respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we affirm the order terminating respondent-father's parental rights.

Affirmed.

Judges HUNTER, Robert C., and STROUD concur.

Reported per Rule 30(e).