NO. COA12-283
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

IN THE MATTER OF:

	Pitt County
D.G.	Nos. 09 JT 53
C.G.	10 JT 54

Appeal by respondent from orders entered 30 November 2011 by Judge William C. Farris in Pitt County District Court. Heard in the Court of Appeals 14 August 2012.

Elizabeth Myrick Boone for petitioner-appellee.

Ryan McKaig for respondent-appellant.

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

GEER, Judge.

Respondent father appeals from orders terminating his parental rights to his son D.G. ("Dan") and daughter C.G. ("Cindy").[1] On appeal, respondent father argues that the trial court erred when determining that grounds for termination

[1]The pseudonyms "Dan" and "Cindy" are used throughout this opinion to protect the minor's privacy and for ease of reading. Respondent mother is not a party to this appeal.

existed and finding that termination of his parental rights was in the best interests of the children. Because the conclusions of law regarding the grounds on which respondent's parental rights were terminated are supported by clear and convincing evidence, and the trial court did not abuse its discretion by determining the best interests of the children were served by termination, we affirm.

Facts

On 13 April 2009, Pitt County Department of Social Services ("DSS") filed a petition alleging Dan was neglected due to his (1) not receiving proper care, supervision, or discipline; (2) not receiving necessary medical care; and (3) living in an environment injurious to his welfare. The trial court adjudicated Dan a neglected juvenile on 19 June 2009.

On 1 April 2010, DSS filed a petition alleging Cindy was neglected due to her (1) not receiving proper care, supervision or discipline and (2) living in an environment injurious to her welfare. The petition also alleged she was a dependent juvenile because her parents were unable to provide for her care or supervision and lacked an appropriate alternative child care arrangement. The trial court adjudicated Cindy neglected and dependent on 9 June 2010.

In an order filed 16 September 2010, the trial court ordered DSS to cease reunification efforts with both parents as to Dan. At a hearing on 2 December 2010, the trial court ordered DSS to cease reunification efforts as to Cindy. The permanent plan for both children was changed to guardianship with a concurrent plan of adoption. In an order filed 8 July 2011, the court ordered DSS to cease all visits between respondent father and his children and directed DSS to file a petition to terminate parental rights to both Dan and Cindy.

On 9 August 2011, DSS filed a petition in each of the two cases to terminate both parents' rights to the children. DSS alleged in each petition the following grounds as to respondent father: (1) neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2011); (2) failure to make reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); and (3) failure to pay a reasonable portion of the cost of care pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

The termination hearing occurred on 3 November 2011. In its adjudication orders entered in the two cases on 30 November 2011, the trial court found, as to each child, the existence of all three grounds to terminate respondent father's parental rights. In separate disposition orders, the trial court determined that termination of respondent father's parental

rights was in the best interests of the children and ordered that his parental rights be terminated. Respondent father timely appealed to this Court.

Discussion

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002).

"If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). "'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997)).

In reviewing both the adjudication and the disposition, findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings. *In re N.B., I.B., A.F.*, 195 N.C. App. 113, 116, 670 S.E.2d 923, 925 (2009). "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).

I

Respondent father first contends that the trial court's incorporation in the adjudication order of the findings of fact from other court orders was error because not all of those orders involved the clear, cogent, and convincing evidence standard of proof. In Dan's case, the relevant finding of fact reads:

> The Court further incorporates all of the Finding [sic] of Fact contained in the Court Orders in 09 JA 53 into this Order as if set forth fully herein.

The contested finding of fact in Cindy's case is identical.

This Court has repeatedly held that "'[a] court may take judicial notice of earlier proceedings in the same cause.'" *In re J.W., K.W.*, 173 N.C. App. 450, 455, 619 S.E.2d 534, 539 (2005) (quoting *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985)), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780

(2006). A trial court may take judicial notice of prior orders even where those orders are based on a lower evidentiary standard since "[i]n a bench trial, it is presumed that the judge disregarded any incompetent evidence." *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000). The only limitation is that the court may not terminate parental rights based solely on prior court orders and reports, but must have some oral testimony before it. *In re A.M., J.M.*, 192 N.C. App. 538, 541-42, 665 S.E.2d 534, 535-36 (2008).

Here, the trial court was allowed to take judicial notice of prior orders in the same case, and its decision to acknowledge findings made in previous proceedings is not error. While respondent concedes that prior orders may be judicially noticed, he argues that the prior orders "were subject to reasonable dispute" and, therefore, everything in them was incompetent evidence. However, respondent does not point to a single example or cite any authority that would support his position.

Our review of the order indicates that the trial court primarily relied upon those orders to set out the procedural history of the case. In support of the court's ultimate determination, the trial court made numerous additional findings of fact from evidence presented at the termination hearing. The

court, therefore, did not improperly rely solely on findings from prior orders in determining that grounds existed to terminate respondent's parental rights.

II

Respondent father next challenges the adequacy of the trial court's findings of fact to support the conclusions of law establishing the existence of grounds to terminate respondent's parental rights. We first address the trial court's determination that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(2), which provides that a trial court may terminate parental rights upon finding:

> 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. 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.

To terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must make findings of fact addressing "willfulness" and lack of "reasonable progress under the circumstances" following the initial removal. *In re Anderson*, 151 N.C. App. at 99, 564 S.E.2d at 603. The element of "willfulness" imports knowledge and a stubborn resistance, *In*

re Matherly, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002), and "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 (2001).

Here, the trial court found that respondent parents had been "ordered to submit to random drug screens; sign medical releases; demonstrate that they are capable of providing medical care; obtain housing; advise DSS of any change of address; pay $50 per month in child support; have no contact with collaterals; participate in visitation with the juvenile; participate in budget counseling and provide a written budget; be present for all medical appointments; reinstate their drivers' licenses; and submit documentation regarding their mobile home." Respondent father was also "ordered to attend the SAFE and/or GREAT program to address domestic violence." Respondent father was later ordered to "attend parenting classes; submit verification of income; [and] attend substance abuse counseling and follow all therapist recommendations."

The findings of fact contested by respondent deal with his failure to make progress with respect to these requirements. The court made the following pertinent findings in Dan's and Cindy's orders:

> [33, 28] Respondent Parents were provided supervised visitation with this juvenile

> when this juvenile was placed into the custody of DSS. During the pendency of this case, Respondent Parents never made sufficient progress to be able to have unsupervised visitation with this juvenile.
>
> [34, 29] Since this juvenile was taken into custody, Respondent Parents have not had a consistent or sustained period where they were not abusing controlled substances.
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> . . . .
>
> [39, 34] Over the last [27, 19] months, the Respondent Parents have willfully failed to comply with the orders of this court; and have willfully failed to adequately address or correct those conditions which led to the removal of this juvenile from the home. Particularly, Respondent Parents have continued to abuse controlled substances; have not obtained stable housing or employment; have not addressed issues related to domestic violence; and have not demonstrated an ability to safely and appropriately parent this juvenile . . . .

Respondent also has contested the following findings in Cindy's adjudication order:

> 26. As of this day, Respondent Mother continues to abuse controlled substances; Respondent Parents are not participating in substance abuse treatment; have not participated in a program to address domestic violence; do not have drivers' licenses; have not obtained stable housing or employment; have not presented a written budget; and have not demonstrated that they are able to parent this juvenile in a safe or stable home.
>
> . . . .

> 32. Respondent Father has been gainfully employed in various capacities since this juvenile was placed into foster care. Particularly, Respondent Father has worked at Garris Construction, for Pastor Walston; as a property manager; and in his own scrap metal business. Respondent Father has never paid child support for this juvenile.

After reviewing the record, we hold that all of these findings are supported by clear and convincing evidence. Ms. Phyllis Holmes, a DSS placement worker, testified regarding the lack of progress regarding supervision; respondent father's continued drug use, including while participating in a methadone program; respondent father's failure to comply with orders of the court regarding stable housing, employment, domestic violence, necessary medical care, obtaining a driver's license, and presenting a written budget; and respondent father's failure to pay child support for Cindy.

Respondent father presents no specific basis for his assertion that the findings are unsupported other than a claim that the trial court did not take into account his circumstances during his recent incarceration. Respondent father contends that during his incarceration he was drug-free, but "unable to meaningfully participate in the children's lives or cooperate with DSS." According to respondent father, the findings made by the court, therefore, did "not reflect the state of affairs at the time of the termination hearing."

"[A] respondent's 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), *superseded by statute on other grounds as stated in In re D.J.D.*, 171 N.C. App. 230, 615 S.E.2d 26 (2005). The record in this case reflects that respondent was not incarcerated at the time of a permanency planning review hearing held on 8 June 2011, when the trial court found that respondent had absconded from his probation and was in hiding. Since the petitions to terminate were filed in August 2011, only a few months after respondent was deemed an absconder, it is apparent that for most of the time period after the children were taken into custody, respondent was free and should have been able to work on his court-ordered obligations. Instead, the record is replete with examples of respondent's failure to comply with various aspects of his case plan.

Given respondent's demonstrated lack of progress over a significant period of time, he cannot now insist that his relatively brief period of incarceration, which forced him to be drug-free, from the middle of 2011 to the termination hearing in November 2011 suggests either that he was making progress or that any inability to comply with his plan was due to the incarceration.

We hold the trial court's findings of fact are supported by competent evidence. Therefore, we conclude the trial court properly determined that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Since we have held that the trial court did not err in concluding that grounds exist to terminate respondent's parental rights on the basis of a failure to make reasonable progress, it is unnecessary to address the other grounds for termination. *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).

III

Respondent lastly contends that the trial court abused its discretion in determining that the termination of respondent's parental rights was in the best interests of the children. Once a trial court adjudicates that one or more grounds exist upon which to base termination, the court must then determine whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2011). "In each case, the court shall consider the following criteria and make written findings regarding" those factors deemed relevant, including the likelihood of adoption of the juvenile, the bond between the

juvenile and the parent, and the relationship between the juvenile and the prospective adoptive parent. *Id.*

Here, the trial court made written findings addressing each of the factors contained in N.C. Gen. Stat. § 7B-1110(a), a point conceded by respondent. Respondent argues instead that the evidence presented regarding his sobriety and stable employment is a significant factor that should not be overlooked. He contends that his progress, coupled with the bond and love between himself and the children, makes it "likely that he could achieve reunification with the children within a reasonable time."

The trial court, however, found that the likelihood of adoption of each child is high, termination of respondent's parental rights will aid in the accomplishment of the permanent plan of adoption, there is a minimal bond between respondent and Dan and no bond between respondent and Cindy, and the relationship between each juvenile and the respective adoptive parents is "excellent." Based on the court's findings, we conclude the trial court did not abuse its discretion in deciding that termination of respondent's parental rights is in the best interests of Dan and Cindy.

Affirmed.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).