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NO. COA12-352  
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

IN THE MATTER OF:

S.K. & S.C.

Burke County  
Nos. 08 J 9-10

Appeal by respondent mother from order entered 5 January 2012 by Judge J. Gary Dellinger in Burke County District Court. Heard in the Court of Appeals 20 August 2012.

*Stephen M. Schoeberle for petitioner-appellee Burke County Department of Social Services.*

*Ryan McKaig for respondent-appellant mother.*

*Pamela Newell for appellee Guardian ad Litem.*

BRYANT, Judge.

Where the trial court's findings of fact are inadequate to support the termination of respondent mother's parental rights, we reverse the trial court's order.

*Facts and Procedural History*

Respondent is the mother of Sherry<sup>1</sup>, born in 2003, and Sonya, born in 2004 (collectively "the children"). On 9 January 2008, the Burke County Department of Social Services ("DSS") filed a juvenile petition alleging that the children were neglected and dependent juveniles.<sup>2</sup> DSS alleged that respondent mother had a history of assaultive behavior, substance abuse, and psychiatric hospitalizations and that there was no appropriate alternative child care arrangement available. After holding a hearing on 6 March 2008, the trial court adjudicated the children dependent based upon respondent mother's stipulation to the allegations of the petition. The trial court granted custody of the children to DSS and ordered respondent mother to: (1) abstain from alcohol, illegal drugs, and not abuse prescription medications; (2) maintain a stable residence; (3) complete parenting classes; (4) continue counseling through the Assertive Community Treatment (ACT) program; (5) comply with all treatment recommendations; and (6) submit to drug tests.

The trial court held subsequent review hearings. By permanency planning order filed 4 March 2009, the trial court found that it was not possible to return the children to

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<sup>1</sup> Pseudonyms have been used throughout to protect the identity of the juveniles.

<sup>2</sup> This case originally included two additional children, however only Sherry and Sonya are the subject of this appeal.

respondent mother due to her lack of progress. The trial court ceased reunification efforts and ordered the permanent plan for the children be one of adoption.

On 3 April 2009, DSS filed a "Motion/Petition to Terminate Parental Rights" and, after a 4 March 2010 hearing, the trial court terminated respondent mother's parental rights based upon the ground of willfully leaving the children in foster care for more than twelve months without showing reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2) (2011). Respondent mother appealed to this Court arguing that her children had not been "removed" from her home for the requisite twelve-month period of time before DSS filed the motion/petition to terminate parental rights. *In re J.K.*, \_\_\_\_ N.C. App. \_\_\_\_, 702 S.E.2d 553 (2010), *disc. review denied*, 365 N.C. 187, 707 S.E.2d 242 (2011). We agreed with respondent mother and vacated the trial court's order terminating respondent mother's parental rights. *Id.*

DSS filed another motion to terminate respondent mother's parental rights in July 2011. DSS alleged that grounds existed to terminate respondent mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) and (a)(6). On 8 December 2011, the trial court held a termination of parental rights hearing at which DSS called respondent mother as its only witness. By order filed 5

January 2012, the trial court made the following pertinent findings:

7. As a result of that dependency adjudication, [respondent mother] was ordered to: abstain from using drugs and alcohol, not abuse prescription medications, continue counseling through the ACT program, comply with treatment recommendations, and submit to random drug testing at least twice a month.

8. When the Court reviewed the matters on May 29, 2008, [respondent mother] had been compliant, but inpatient substance abuse treatment had been recommended due to the possibility that she had been abusing prescription medications.

9. When the Court again reviewed the matters on January 8, 2009, [respondent mother] had begun dating an individual with an extensive criminal history, including cocaine charges, and had taken the minor children to that individual's home after being warned that it would be inappropriate. She had tested positive for cocaine on November 20, 2008. She had left [a daughter] alone with [respondent mother's] father, who [respondent mother] had accused of making inappropriate sexual advances toward [respondent mother]. She had appeared to be intoxicated during a parenting class, had been evicted from her home and had lived at several places. She also had missed scheduled drug tests. As a result of her lack of progress, the Court ceased reunification efforts with her.

. . . .

11. [Respondent mother] has not completed the previously recommended inpatient

substance abuse treatment, recommended counseling or parenting classes.

12. Due to complications with diabetes, she recently had to have her legs amputated. Prior to that time, she had continued to demonstrate residential instability. Since her subsequent hospitalization and placement in a rehabilitation facility, she has established a residence with her son, [J.], who primarily is responsible for her care. Their residence has 2 bedrooms and their only source of income is [respondent mother's] disability benefits. She relies on others for transportation.

13. [Respondent mother's] mental health issues are serious and long-standing.

14. [Respondent mother] has not suggested an appropriate alternative arrangement, other than foster care, for the care of the minor children.

Based on these facts, the trial court concluded that grounds existed to terminate respondent mother's parental rights under sections 7B-1111(a)(2) and (6). The trial court further determined that termination of respondent mother's parental rights was in the best interests of the children. Respondent mother appeals.

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Respondent mother raises the following issues on appeal: whether the trial court erred (I) by terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-111(a)(2); (II) by

terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6); and (III) by determining that termination of respondent mother's parental rights were in the minor children's best interests.

*Standard of Review*

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (citation and quotations omitted). "When the court's findings . . . 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) (citation omitted).

*I*

Respondent mother argues that the trial court erred in terminating her parental rights when it failed to make findings of fact necessary to support the grounds for termination of

parental rights pursuant to section 7B-1111(a)(2) of the North Carolina General Statutes. As part of her contention, respondent asserts that findings of fact 11 through 14 are not supported by clear, cogent, and convincing evidence.

First, we turn to respondent's argument that the findings of fact 11 through 14 are not supported by clear, cogent, and convincing evidence. The trial court found the following in its termination order:

11. [Respondent mother] has not completed the previously recommended inpatient substance abuse treatment, recommended counseling or parenting classes.

12. Due to complications with diabetes, she recently had to have her legs amputated. Prior to that time, she had continued to demonstrate residential instability. Since her subsequent hospitalization and placement in a rehabilitation facility, she has established a residence with her son, [J.], who primarily is responsible for her care. Their residence has 2 bedrooms and their only source of income is [respondent mother's] disability benefits. She relies on others for transportation.

13. [Respondent mother's] mental health issues are serious and long-standing.

14. [Respondent mother] has not suggested an appropriate alternative arrangement, other than foster care, for the care of the minor children.

As to finding of fact 11, the court found in previous

orders that as of August 2008, respondent mother had only partially completed parenting classes and that although respondent mother was recommended for inpatient treatment through the ACT program (includes counseling, medication management and substance abuse classes), respondent mother had been discharged early for threatening another patient. The trial court also found in previous orders that respondent was intoxicated and slept through a November 2008 parenting class. In addition, DSS's January 2009 review hearing report stated that respondent mother "has attended Parenting classes at Child Care Connections, but has not completed the program" and that respondent mother "did not set up family therapy with [Sonya.]" Accordingly, we conclude finding of fact 11 is supported by clear, cogent, and convincing evidence.

Finding of fact 12 is supported by respondent mother's testimony during her 8 December 2011 hearing. Respondent mother testified that: she had serious health problems due to her diabetes; both legs were amputated; she currently lived with her son; her only source of income was her disability benefits; she does not have available transportation and must rely on others for transportation. As to finding of fact 13, respondent mother stipulated at the 2008 adjudication and disposition hearing that



she was diagnosed with bipolar disorder, post-traumatic stress disorder, and poly-substance dependence and that she "has a history of psychiatric hospitalizations, including one for 5 days on January 11, 2007[.]" Further, psychologist Dr. Barry E. Rand noted in his 2007 evaluation report that respondent mother "has a severe history of mental health problems" and recommended respondent mother receive drug treatment, intensive case management to help respondent with her medication regimen, and weekly counseling sessions. Therefore, we hold that findings of fact 12 and 13 were supported by clear, cogent, and convincing evidence.

As to finding of fact 14, we conclude that the trial court's finding that respondent mother has not suggested an appropriate alternative arrangement, other than foster care, for the care of the minor children is not supported by clear, cogent, and convincing evidence.

Next, we turn to respondent mother's contention that the trial court erred by terminating her parental rights pursuant to section 7B-1111(a)(2) of the North Carolina General Statutes. Section 7B-1111(a)(2) (2011) provides that a court may terminate parental rights upon a finding (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.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (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 (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) (citation omitted).

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. Further, the trial court's conclusion of law does not state that respondent "willfully" failed to make reasonable progress. 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.*, 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" (citing *McMillon*, 143 N.C. App. at 410, 546 S.E.2d at 175)). Accordingly, the trial court erred in concluding that respondent's parental rights should be terminated under section 7B-1111(a)(2).

## II

In her next argument, respondent contends that the trial court's findings of fact do not support its conclusion that respondent is incapable of caring for her children pursuant to section 7B-1111(a)(6) of the North Carolina General Statutes because DSS did not present any evidence that suggests that her mental health impairs her ability to parent. Respondent cites *In re Scott*, 95 N.C. App. 760, 383 S.E.2d 690 (1989), to support her argument. We agree.

In *Scott*, the trial court terminated the parental rights of the respondent, who suffered from a personality disorder, based on the ground of dependency. This Court reversed for lack of clear, cogent, and convincing evidence to support that ground.

*Id.* The only evidence offered by the petitioner to show that the respondent was mentally incapable of caring for her children was the testimony of her treating psychiatrist. *Id.* at 763, 383 S.E.2d at 691. The psychiatrist, however, specifically testified that the respondent's pattern of behavior did not mean that she was incapable of caring for her children and that he could not predict within a reasonable probability that respondent's mental illness would continue throughout the minority of the children. *Id.*

Here, the medical evidence does not show that respondent was "incapable" of providing for the proper care and supervision of the children as the trial court concluded. Certainly there is evidence in the record of a significant history of mental health problems. However, the trial court's order does not contain findings regarding respondent mother's incapability due to mental health to support its conclusion. Dr. Rand's 2007 evaluation states that respondent's mental health and substance abuse issues "leave[] her highly inconsistent as a parent and [she] frequently leaves younger children caring for others in the family." Respondent mother, DSS's only witness, testified that she is in counseling and is taking her prescribed medication for her mental illness. Further, respondent

testified, "I'm capable of taking care of them." While it is true that respondent admitted to being a dependent person, respondent's incapability, as found by the trial court, was the result of respondent mother's mental health issues and not her substantial physical limitations, including her lack of independent mobility. Accordingly, the trial court erred in concluding grounds existed to terminate respondent's parental rights pursuant to section 7B-1111(a)(6).

Because the trial court erred in finding grounds existed to terminate respondent's parental rights, we do not address respondent's remaining argument that the trial court abused its discretion in concluding that the termination of her parental rights was in the best interest of the children.

In sum, we conclude the facts found by the trial court in its order are inadequate to support termination of respondent's parental rights on either of the grounds found to exist by the trial court. As such the order must be reversed.

Reversed.

Judge Hunter, Jr. Robert N., and Beasley concur.

Report per Rule 30(e).