IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1209

Filed: 17 September 2019

Alleghany County, Nos. 17 JT 12-16

IN THE MATTER OF: C.T.D., B.R.D., L.H.D., M.R.D., M.D.D.

Appeal by respondent-father from order entered 13 September 2018 by Judge William F. Brooks in Alleghany County District Court. Heard in the Court of Appeals 5 September 2019.

*Reeves Divenere & Wright, by Anné C. Wright and John Benjamin "Jak" Reeves, for petitioner-appellee Alleghany County Department of Social Services.*

*Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.*

*Ewing Law Firm, P.C., by Robert W. Ewing, for respondent-appellant father.*

ZACHARY, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights to his five minor children. We affirm.

**Background**

Respondent-Father is the biological father of five children of whom he had sole custody. On 29 March 2017, Respondent-Father was arrested for possession of methamphetamine, which was found "in the home of the family in a dresser that

could have been easily accessed by the minor children." At the time of his arrest, Respondent-Father indicated that "there were no family members to care for [the] children in his absence." Accordingly, that same day, Petitioner Alleghany County Department of Social Services ("DSS") filed a petition alleging the children to be neglected and dependent. The minor children have remained in the custody of DSS since Respondent-Father's arrest.

Respondent-Father was released from jail shortly after his arrest on 29 March 2017. Thereafter, on 11 April 2017, Respondent-Father entered into an Out-of-Home Family Services Agreement with DSS. Respondent-Father agreed, *inter alia*, to comply with all recommendations made by Daymark Recovery Services, Inc. ("Daymark") following its initial assessment of Respondent-Father, which included attending "Mood and Anxiety Group" classes and substance abuse classes, "demonstrat[ing] sobriety by clean drug screens," and refraining from criminal activity that would adversely affect the minor children.

By order entered 12 May 2017, the trial court adjudicated the five children to be neglected and dependent, and ordered that they remain in DSS's custody and that Respondent-Father continue to comply with the terms of his Out-of-Home Family Services Agreement. Two weeks later, on 29 May 2017, Respondent-Father pleaded guilty to possession of methamphetamine, the charge that triggered DSS's initial

involvement in the case. Respondent-Father was incarcerated for the next eleven months, from May 2017 until 2 April 2018.

Ten days after Respondent-Father was released from incarceration, on 12 April 2018, the trial court entered an order relieving DSS of reunification efforts. The trial court also changed the permanent plan to termination of Respondent-Father's parental rights, and ordered DSS to file termination petitions, which DSS filed on 17 April 2018. The petitions to terminate Respondent-Father's parental rights came on for hearing before the Honorable William F. Brooks during the 3 August 2018 juvenile court session.

By order entered 13 September 2018, the trial court ordered that Respondent-Father's parental rights to his five children be terminated. Specifically, the trial court terminated Respondent-Father's parental rights based upon grounds of (1) neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); (2) having willfully left the children in placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions that led to the removal of the children, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); and (3) incapability of providing for the proper care and supervision of the children, such that they are dependent juveniles, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Respondent-Father appeals.

On appeal, Respondent-Father argues that the trial court erred in concluding that each of the above grounds existed to terminate his parental rights. We conclude, however, that sufficient evidence was presented at the termination hearing to support the trial court's determination that grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we affirm the trial court's order.

**Discussion**

On appeal from a trial court's order terminating parental rights, "this Court considers whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether those findings support the trial court's conclusion that grounds for termination exist pursuant to N.C. Gen. Stat. § 7B-1111." *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007).

In the instant case, the trial court found that grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2),[1] which provides that an individual's 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

[1] As previously noted, the trial court also found that grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (6). However, because we affirm the trial court's determination as to section 7B-1111(a)(2), we need not address the evidence to support the additional grounds found by the trial court. *In re Baker*, 158 N.C. App. 491, 497, 581 S.E.2d 144, 148 (2003).

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) (2017). Here, the conditions that led to the children's placement in DSS's custody on 29 March 2017 were Respondent-Father's substance abuse issues and his lack of an alternative placement for the children.

"The relevant time period for measuring 'reasonable progress under the circumstances' begins after 'removal of the juvenile' from the home." *In re C.W.*, 182 N.C. App. at 225-26, 641 S.E.2d at 733. "Evidence showing [the] parents' ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach." *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002). A trial court's finding under N.C. Gen. Stat. § 7B-1111(a)(2) will be supported when the evidence clearly shows that "the respondent had the ability to show reasonable progress but was unwilling to make the effort." *In re Shermer*, 156 N.C. App. 281, 289, 576 S.E.2d 403, 409 (2003).

Respondent-Father argues that although he "did not meet all of the requirements of his case plan[,] the trial court could not find that his failure was willful since [his] incarceration in part prevented him from participating in his case plan." Respondent-Father thus maintains that the trial court erred in concluding that grounds existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We disagree.

It is true that "[a] parent's incarceration is a circumstance that the trial court must consider in determining whether the parent has made reasonable progress toward correcting those conditions which led to the removal of the juvenile." *In re C.W.*, 182 N.C. App. at 226, 641 S.E.2d at 733 (quotation marks omitted). In this case, however, there was ample evidence to support the trial court's challenged finding that Respondent-Father nevertheless "had the ability to make reasonable progress on his case plan when he was *not* incarcerated and he failed to do so." (Emphasis added).

In challenging the sufficiency of the evidence to support the trial court's findings under N.C. Gen. Stat. § 7B-1111(a)(2), Respondent-Father directs our attention to the fact that, after his release from incarceration, he completed a parenting course, obtained a new assessment from Daymark, and returned two clean drug screenings in connection with his probation. However, although Respondent-Father had indeed made "some progress" toward correcting the conditions that led to the removal of his children, "such progress has been extremely limited." *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989).

After his children were removed from the home on 29 March 2017, Respondent-Father attended an initial assessment with Daymark concerning his substance abuse and mental health issues. As a result of that initial assessment, Daymark recommended that Respondent-Father attend weekly substance abuse treatment classes, "Mood and Anxiety" treatment classes, and "med management" classes.

During the next two months preceding his incarceration, however, Respondent-Father attended only one substance abuse group class. Respondent-Father also admitted that he continued to use methamphetamine during those first two months: he tested positive for methamphetamine on five occasions between 29 March and 2 May 2017, refused to submit to a sixth screening on 2 May 2017, and did not appear for a seventh screening on 24 May 2017.

Nevertheless, Respondent-Father notes that he took it upon himself to attend another assessment at Daymark after he was released from incarceration on 2 April 2018. The record reveals, however, that Respondent-Father waited to do so until 12 July 2018, more than three months after his release. As a result of that assessment, Daymark recommended that Respondent-Father attend forty hours of "substance use group," attend "Mood and Anxiety group" each Friday, attend "Peer support" at least twice a month, and attend "individual therapy for relapse prevention." As of the 3 August 2018 termination hearing, Respondent-Father had not complied with any of Daymark's recommendations.

Respondent-Father also does not challenge the following finding by the trial court:

> The Father testified that he has tried to distance himself from the Mother due to her continued drug use and criminal activity. However, they have been spotted together on numerous occasions. The Father's explanation was that these were coincidences and at one point she was giving him an appliance for his home. The Court is

> concerned that the Father has a history of not being able to maintain sobriety when around the Mother.

This unchallenged finding of fact is binding on appeal, *In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012), and further supports the trial court's conclusion.

In light of this evidence, the fact that Respondent-Father attended two initial assessments, completed a parenting course, and returned two clean drug screenings in connection with his probation following his release[2] does not negate the trial court's conclusion that Respondent-Father had nevertheless failed, to the satisfaction of the court, to make reasonable progress under the circumstances toward correcting the conditions which led to his children's removal from the home. *See In re J.S.L.*, 177 N.C. App. 151, 160, 628 S.E.2d 387, 393 (2006) ("Extremely limited progress is not reasonable progress." (quotation marks and citation omitted)); *In re Baker*, 158 N.C. App. at 496, 581 S.E.2d at 147 ("Attendance at a one-day workshop was not evidence of any real effort on the respondent's part."); *see also In re C.R.B.*, 245 N.C. App. 65, 68, 781 S.E.2d 846, 849 ("If parents were not required to show both positive efforts and positive results, a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose." (quotation marks omitted)), *disc. review denied*, 368 N.C. 916, 787 S.E.2d 23 (2016).

[2] There was some indication that Daymark had reported a failed drug screening following Respondent-Father's release from incarceration, but no documentation in support of that claim was admitted into evidence.

Accordingly, although there was evidence that Respondent-Father had made some efforts following his children's removal from the home toward correcting the conditions that led to their removal, we conclude that there was clear, cogent, and convincing evidence to support the trial court's determination that such efforts did not amount to reasonable progress under the circumstances. We therefore affirm the trial court's order terminating Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).