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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-102

Filed: 19 November 2019

Durham County, Nos. 16 JT 69-71

IN THE MATTER OF: N.A., I.A., M.A.

Appeal by Respondent-Father from Order entered 28 August 2018 by Judge Shamioka Rhinehart in Durham County District Court. Heard in the Court of Appeals 31 October 2019.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, and Assistant County Attorney Robin K. Martinek for petitioner-appellee Durham County Department of Social Services.

Benjamin J. Kull for guardian ad litem.

Jeffrey William Gillette for respondent-appellant father.

HAMPSON, Judge.

Factual and Procedural Background

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Respondent-Father (Respondent)¹ appeals from “Amended Order Terminating [Respondent’s] Parental Rights” (Order) to his minor children N.A. (Nancy), I.A. (Ian), and M.A. (Miriam).² The Record before us on appeal tends to show the following:

On 2 July 2015, Wake County Human Services filed petitions alleging the minor children to be neglected. The petitions alleged mother and Respondent had an extensive history with child protective services in Florida, and that Nancy, Ian, and Miriam were in foster care from 2010 to 2014. In September 2014, upon their release from foster care, custody of the children was returned to the mother.

The petitions further alleged the mother, Respondent, and the children moved to North Carolina in late 2014 and “bounced from shelter to shelter[,]” eventually living in a Salvation Army shelter in Raleigh around April 2015. Respondent testified that he lived in a hotel while the mother and children lived at the shelter. Both Respondent and the mother are diagnosed with bipolar disorder, however the mother was not taking her prescribed medications at the time. Shelter staff observed Nancy, Ian, and Miriam frequently exhibiting oppositional behaviors, and the mother was unable to adequately control them. The mother also refused in-home mental health services for herself and the minor children. The mother and children were permitted to stay at the shelter until 13 June 2015. At that time, the mother and children

¹ The mother is not a party to this appeal. Thus, all references to Respondent are to Respondent-Father.

² Pseudonyms have been chosen by the parties to protect the identity of the juveniles.

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moved in with the Respondent's mother and Respondent in Durham, North Carolina, but were only permitted to stay with Respondent's mother until 2 July 2015.

The Wake County District Court held an adjudicatory and dispositional hearing on the petitions on 11 and 22 September 2015. On 13 October 2015, the trial court adjudicated Nancy, Ian, and Miriam to be neglected and ordered Respondent to obtain and maintain sufficient housing and income for him and the three children, complete psychological and substance abuse assessments and follow all recommendations, and complete a parenting education program and demonstrate skills learned. The trial court found that at that time, Respondent had "refused to receive treatment for himself or secure services for the children." In a three-month placement review hearing held 15 December 2015, the trial court found Respondent remained unemployed but had engaged in a psychological evaluation, the results of which recommended further treatment for depression and anger management before additional referrals for "parenting education or domestic violence classes[.]" The trial court also found Respondent had been late or missed entirely several supervised visits with the children.

By Order entered 22 April 2016, the trial court transferred the case to Durham County for the convenience of and with the consent of all parties. The Durham County District Court held a Permanency Planning Hearing on 9 August 2016, and established a primary permanent plan of reunification with a secondary plan of

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adoption. The trial court continued to find Respondent had not participated in a parenting education program, was not employed, and had not “followed through in acquiring a stable and sufficient living environment for [himself] and [his] children.” In a Permanency Planning Order, entered 3 April 2017, the trial court changed Ian and Miriam’s primary permanent plan to adoption with a secondary plan of custody with a court-approved caretaker. The trial court changed Nancy’s permanent plan to “concurrent plan[] of adoption, reunification and custody.” At this time, the trial court found Respondent “continue[d] to struggle in his efforts of adhering to the court orders.”

In a Permanency Planning Order entered 5 September 2017, the trial court changed Nancy’s primary permanent plan to adoption with a secondary plan of custody with a court-approved caretaker. Respondent was again ordered to obtain and maintain sufficient housing and income for him and the children, follow through with the recommendations from his psychological assessment—including maintaining consistent mental health treatment and services through his Assertive Community Treatment Team (ACTT), complete a substance abuse assessment and follow all recommendations, and continue to demonstrate skills learned in his parenting and domestic violence class.

On 6 November 2017, the Durham County Department of Social Services (DSS) filed a Motion and Petition for Termination of Parental Rights (Motion and Petition),

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alleging as grounds: (1) neglect; (2) willful failure to correct the conditions leading to the children's removal from the home; and (3) willful failure to pay a reasonable portion of the children's cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017). The trial court held hearings on the Motion and Petition in May and June of 2018, and, on 28 August 2018, entered an Order terminating Respondent's parental rights to Nancy, Ian, and Miriam. Respondent timely appeals from this Order.

Issue

Respondent asserts that the trial court erred in concluding that grounds existed to terminate his parental rights. Thus, the issue on appeal is whether the trial court properly adjudicated a ground on which to terminate Respondent's parental rights.

Analysis

I. Standard of Review

“The standard for review in termination of parental rights cases is whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.” *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (citation and quotation marks omitted), *disc. review denied and appeal dismissed*, 353 N.C. 374, 547 S.E.2d 9-10 (2001). “[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings.” *In re*

Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Furthermore, “[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.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court’s conclusions of law are reviewed de novo on appeal. *In re S.N., X.Z.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff’d per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

II. Grounds for Termination of Respondent’s Parental Rights

A neglected juvenile is, in relevant part, one “who does not receive proper supervision, or discipline from the juvenile’s parent . . . ; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare[.]” N.C. Gen. Stat. § 7B-101(15) (2017). Generally, an adjudication of neglect under Section 7B-1111(a)(1) “must be based on evidence showing neglect at the time of the termination proceeding.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). However, if the juvenile is not in the parent’s custody at the time of the termination hearing, an adjudication of neglect may be based on “a showing of a past adjudication of neglect and . . . clear and convincing evidence [of] a probability of repetition of neglect if the juvenile were returned to [the] parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000). The trial court must look to evidence of changed circumstances and “the fitness of the parent to care for the child *at the time of the*

termination proceeding.” In re J.K.C., 218 N.C. App. 22, 29, 721 S.E.2d 264, 270 (2012) (citations and quotation marks omitted).

The trial court made the following relevant Findings of Fact in support of its Conclusion that neglect existed:

77. Throughout the course of the underlying neglect case, [Respondent] has been inconsistent in his participation in services. Despite more than two years passing since the children were removed from his custody, [Respondent] has willfully failed to complete the services and address the issues the court identified to correct the conditions that led to the child’s removal from the home.

78. . . . [Respondent] has intentions on leaving [his] temporary residence within 2 months. He moved to this residence because he was evicted due to the numerous allegations of altercations of his then girlfriend calling the police; he reports that he was current on his rent. The father was arrested due to the recent issues involving an assault and his girlfriend.

. . . .

81. [Respondent] is diagnosed with bi-polar and has a learning disability. He has issues with his memory. . . .

82. . . . [Respondent] has failed to address his own mental health needs due to inconsistent participation in mental health services. [Respondent] has failed to gain insight as to how his mental health impacts his children. [Respondent]’s mental health issues continue to add to his instability and impair his ability to provide appropriate care, supervision, and protection.

. . . .

84. The Court finds that [Respondent] did have housing,

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but that it was not stable. The court finds that his housing was unstable due to domestic violence and that it was so unstable that he was evicted because of it. Currently, the father is homeless and living with a friend. His current homelessness is not due to a lack of finances or poverty but goes to his inability to understand how domestic violence affected his household and a lack of decision-making on his part as it relates to his safety. The father has not participated in domestic violence counseling and because the father does not understand the effects of domestic violence, the children would not be safe in his care.

....

86. The father continues to have an ACT[T] and has not been stepped down from that high level of care involving his mental services.

87. The Court finds that [Respondent's] bipolar health condition does not prohibit him from working. He currently works and also receives disability income. He has not provided any financial support to Durham DSS for any of his three children. The Court finds that [Respondent] is able to pay a reasonable sum towards the care of the children and the reasonable cost means that he can pay more than the zero amount he has provided.

88. [Respondent] has not maintained stability with any specific treatment provider for his mental health issues, such that he has failed to address those underlying issues.

89. [Respondent] has failed to consistently comply with the recommendations of his psychological evaluation.

90. [Respondent] has not provided any confirmation that he has consistently been participating in mental health treatment since the Adjudication.

91. [Respondent] has an intellectual disability that renders him unable to provide appropriate care, supervision, and

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protection for his children.

92. [Respondent] has not arranged a child care plan that would allow the children to be returned to his care and would support their needs because of his intellectual disability and mental health issues.

93. The Court has previously found that [Respondent] has substance abuse issues that interfere with his ability to appropriately care for, protect, supervise, and discipline the child, and has failed to complete a substance abuse evaluation. [Respondent] has not received the treatment he needs to address his substance abuse issues.

....

95. [Respondent]'s failure to consistently participate in his mental health, domestic violence, and substance abuse treatment is willful.

....

97. [Respondent]'s failure to adequately address his mental health, domestic violence, and substance abuse issues create a reasonable probability that the children would be neglected should the children be returned to his care.

....

99. [Respondent] has not participated in any services to learn how to manage anger.

....

102. [Respondent] lacked suitable housing for the children throughout the underlying neglect case and has failed to obtain suitable housing for the children prior to the filing of this motion. . . .

....

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104. [Respondent] was ordered to participate in a parental capacity evaluation. While he went to the first session, he failed to follow through and complete the evaluation. While he rescheduled a missed appointment, he did not attend the missed appointment.

105. [Respondent] has failed to demonstrate an ability or willingness to meet the children's needs.

106. [Respondent] has been relatively consistent with visitations; however, the visits have had many issues. [Respondent reportedly threatened] physical abuse during a visitation [with Nancy]. [Respondent] has been unable to assist with [Nancy]'s meltdowns. [Respondent] has also brought his prior girlfriend [to visitation,] who he reported was domestically violent towards him

107. The children have been previously adjudicated neglected, and should the children be returned to [Respondent]'s care, there is a reasonable probability of a repetition of neglect.

108. The Court finds that [Respondent] has not corrected the conditions that led to the removal of [his] children. [Respondent] has not participated in vocational rehabilitation, mental health treatment, domestic violence counseling, anger management counseling, and substance abuse treatment. [Respondent] does not have suitable housing. The Court finds that [Respondent] is incapable of appropriately caring for the children. Because, [Respondent] has not complied with the court order services, the Court is confident that the conditions causing these children to be removed from [his] care will continue to be present and because of this there is a reasonable probability of repetition of neglect if these children were to be returned to [his] care.

. . . .

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111. The Court finds that [Respondent]’s lack of understanding how domestic violence impacts his life and instability or lack of maintaining therapy are still prevalent as they were when the children entered into the custody of Durham DSS. . . . [Respondent] is currently homeless and goes from job to job.

Respondent argues the trial court erred in making Findings 77, 82, 96, and 108 related to his inconsistent participation in mental health services because the trial court ignored uncontroverted evidence that the inconsistencies were due to his loss of Medicaid coverage. In support of this argument, Respondent mistakenly cites to testimony from the *mother* that she lost her Medicaid coverage. Respondent specifically testified that he did have Medicaid coverage; there is no indication in the Record that he was without health insurance at any point during the case. Respondent does not otherwise challenge the evidentiary support of the trial court’s Findings of Fact regarding his lack of success in working on his mental health issues, and we hold they are binding on this Court on appeal.

Respondent also specifically challenges the trial court’s statements in Findings of Fact 93, 95, 97, and 108 that he had a substance abuse issue and willfully failed to participate in substance abuse treatment. We agree the evidence for these Findings is lacking. Respondent took a substance abuse assessment in August 2015 in which he disclosed that he occasionally used marijuana, cocaine, and heroin in his teens but had stopped using by the time he was eighteen. He further disclosed he used cocaine

for about a month three years prior to taking the assessment but had not used any drugs since then. There was no evidence of recent drug use, and Respondent testified without contradiction that he never tested positive on any of his random drug screens. Furthermore, there was no evidence that Respondent had been recommended for substance abuse treatment. Therefore, these Findings are disregarded in our analysis. *See In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) (“[E]rroneous findings unnecessary to the determination do not constitute reversible error’ where an adjudication is supported by sufficient additional findings grounded in competent evidence.” (quoting *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006))).

Respondent next argues that the trial court erred in Finding 108, stating that he had not participated in vocational rehabilitation, because he received some vocational services through his ACTT. These services are distinct from participating in vocational rehabilitation courses, which Respondent admitted he did not do. Thus, Finding 108 is supported by clear, cogent, and convincing evidence.

Next, Respondent argues the trial court erred in Findings 84 and 95 with regards to his failure to address his domestic violence issues because the failure was not willful on his part. He contends that he completed a domestic violence class and that DSS did not make referrals for additional services or advise his ACTT to include domestic violence as part of its case plan for him. He further reasserts his misplaced

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argument that he lost his Medicaid coverage and was unable to receive services through his ACTT after his admitted domestic violence incident in 2018. Although Respondent completed a domestic violence class earlier in the case, the court ordered him to continue to demonstrate skills learned in the class. Nevertheless, at the termination hearing, Respondent admitted domestic violence is an ongoing issue for him and that he had not received any counseling related to domestic violence, which was recommended in his initial psychological assessment. Respondent thus knew that he was required to further address his domestic violence issues and did not do so. Respondent further admitted that he was being evicted from his home because the police had been called multiple times due to domestic violence, for which he was charged and arrested. Despite the previous incidents of domestic violence with his ex-girlfriend, including those that led to his arrest, Respondent testified that the “last straw” did not come until she attacked him less than two weeks prior to the termination hearing. We conclude the trial court’s Findings 84 and 95—that Respondent failed to address the domestic violence requirement in his case plan and that he does not understand the effects of domestic violence—are supported by clear, cogent, and convincing evidence.

In challenging Finding 86, Respondent argues the trial court’s finding that his ongoing need for ACTT services was an indication that he was unprepared for his children to return to him is wholly unsupported by the evidence. Finding 86,

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however, merely states Respondent continues to have an ACTT and has not been stepped down from that high level of care. There is no “indication” asserted by the trial court in Finding 86, and Respondent admitted he has not been released from therapy and had not been stepped down from the ACTT level of care. Finding 86 is thus supported by clear, cogent, and convincing evidence.

Respondent additionally challenges the portions of Finding 85, wherein the trial court found that he had “not been consistent in his participation with [Nancy’s] IEP” and “is not demonstrating to this court that he understands the depth of [Nancy’s] mental health diagnosis.” Respondent contends his lack of consistency in participating in meetings about Nancy’s IEP has been primarily due to his work schedule and other child-care responsibilities, with which the trial court agreed as shown by the following sentence in Finding 85: “[Respondent] was inconsistent due to having to work.” Respondent thus admits that his participation has not been consistent for the very reason stated by the trial court. Similarly, Respondent concedes the trial court “was likely correct that [he] lacked a deep understanding of Nancy’s mental health issues,” but argues that this was not his fault. Attribution of fault is not made in Finding 85.

Respondent also makes a blanket assertion that Findings 77, 81, 82, 86, 87, 89, 90, 91, 92, 95, 97, 108, and 111 are not based on clear, cogent, and convincing evidence. These Findings, however, are supported by Respondent’s own testimony,

testimony of a DSS social worker, and documentary exhibits admitted at the hearing. The remaining of the above-listed Findings are not specifically challenged by Respondent, and those Findings are therefore binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

The trial court's Findings of Fact show that, since the children were adjudicated neglected in October 2015, Respondent had not engaged consistently in mental health treatment, followed the recommendations of his mental health services providers, or shown improvement with his mental health issues. Respondent was not able to attain stability in his own life—going from job to job and being unable to maintain appropriate housing. Respondent's continued issues with domestic violence led to his arrest and eviction from his housing, and further demonstrate that he had not received the domestic violence treatment he needed and that he did not understand the effects of domestic violence on his life or his children. Respondent did not provide financial support to DSS for the children's care and did not develop an appropriate plan of care for the children for their possible return to his care. All of these Findings support the trial court's ultimate determination that there was a reasonable probability of a repetition of neglect if the children were returned to Respondent's care. Accordingly, we hold the trial court did not err in adjudicating the existence of the ground of neglect to terminate Respondent's parental rights to the children.

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Finally, given our determination that the trial court correctly adjudicated the existence of neglect as a ground to terminate his parental rights, we need not review Respondent's challenges to the trial court's adjudication that grounds also existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) and (3). *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) ("A finding of any one of the enumerated grounds for termination of parental rights under [N.C. Gen. Stat.] § 7B-1111 is sufficient to support a termination.").

Conclusion

Accordingly, based on the foregoing reasons, we affirm the trial court's determination that grounds existed to terminate Respondent's parental rights.

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).