

NO. COA14-597

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

A.W.

Mecklenburg County
No. 10 JT 762

Appeal by Respondent-Father from order entered 25 February 2014 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 20 October 2014.

Twyla Hollingsworth-Richardson for Mecklenburg County Department of Social Services, Petitioner-Appellee.

Kilpatrick Townsend & Stockton LLP, by John M. Moye, for guardian ad litem.

Robert W. Ewing for Respondent-Appellant.

McGEE, Chief Judge.

Respondent ("the Father") appeals from the trial court's order terminating his parental rights as to the minor child, A.W. ("the Child"). We affirm the trial court's order.

I. Background

Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") filed a juvenile petition on 30 December 2010, alleging that the Child was dependent. On that same date,

YFS obtained nonsecure custody of the Child. The Child's mother ("the Mother") was eighteen years old at the time and had entered into a Contractual Agreement for Continuing Residential Support ("CARS agreement") with YFS after she had aged out of foster care. This agreement allowed the Mother to remain in foster care with stipulations that she remain in school and comply with the rules and regulations of her placement. Paternity had not been established for the Child and there were no relative placement options. The trial court adjudicated the Child dependent on 10 February 2011.

The Mother identified the Father as the potential biological parent of the Child in December of 2011. The Father was contacted by YFS soon thereafter, and paternity testing confirmed that he was the Child's biological father. The Father was notified that he was the Child's biological father on 23 January 2012.

The YFS social worker conducted a home visit with the Father and his sister on 15 February 2012. The social worker inquired about the Father's willingness to work a case plan for reunification with the Child. The Father indicated that he was not able to at the time, but that his sister was interested. The social worker discussed the process with the Father's sister, letting the Father's sister know that she must fill out

paperwork and return it so that a home study could be done on her home. This paperwork was never submitted.

The social worker did not speak with the Father again until December 2012. At that time, the Father had learned that the Mother wanted to surrender her parental rights so that the Child could be adopted by his foster parents. The Father met with the social worker, and the social worker explained to him that he would need to submit to a Families in Recovery to Stay Together ("F.I.R.S.T.") assessment, and then a case plan could be developed. The social worker also explained that the Father would need to appear in court and state his wishes before they could move forward. The Father appeared in court for the first time on 25 January 2013, at a permanency planning hearing. The trial court appointed him counsel and continued the matter to allow the Father an opportunity to meet with counsel.

Subsequent permanency planning hearings were scheduled for 20 February 2013 and 3 May 2013 but had to be rescheduled. In continuance orders filed 12 April 2013 and 23 April 2013, the trial court noted that its determination regarding whether it would be in the Child's best interests to have visitation with the Father would have to occur at a later time. The trial court conducted the permanency planning hearing on 9 July 2013. The trial court found:

[The Father] was informed on January 23, 2012 that he would have to seek a court order authorizing him to receive custody and/or visitation of [the Child] but [the Father] did not take action until December 10, 2012. During those 11 months, [the Father] did not participate in a FIRST assessment as requested by the social worker, did not contact YFS to inquire about the [Child's] well-being, failed to provide consistent support or assistance, did not follow up with the social worker about having [the Child] placed with his sister, and did not take any other action toward gaining custody of [the Child]. From January 2012 to January 2013, [the Father] visited with [the Child] sporadically and has not seen [the Child] since January of 2013. Although [the Father] was employed with Fed Ex and worked 25-30 hours a week, he never inquired with the department about how to begin paying child support or made any payments, but he did buy [the Child] a few outfits during this time.

The trial court ceased reunification efforts, established adoption as the permanent plan, and ordered YFS to file a petition to terminate the Father's parental rights. However, the trial court also granted the Father visitation rights.

YFS filed a petition to terminate the Father's parental rights on 16 August 2013, alleging grounds existed to terminate his parental rights based upon (1) neglect, (2) failure to make reasonable progress, (3) willful failure to pay a reasonable portion of the cost of care, (4) failure to legitimate, and (5) willful abandonment. See N.C. Gen. Stat. § 7B-1111(a)(1), (2),

(3), (5), and (7) (2013). The termination hearing was held on 6 January 2014, after which the trial court found the existence of all grounds alleged by YFS. The trial court determined that termination of the Father's parental rights was in the Child's best interests and entered an order terminating the Father's parental rights ("the order"). The Father appeals.

II. Standard of Review

"We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

Moreover, the trial court's findings of fact are binding on appeal if they are supported by any competent evidence. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Where a respondent does not challenge the trial court's findings, those findings are presumed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

III. Analysis

During the termination hearing, which the Father did not attend, the trial court found that:

3. [The Child] came into [YFS] custody . . . [the day after he was born,] 30 December 2010. Given his mother's placement with Mecklenburg County YFS at that time[,] [and because she] was previously a minor in foster care and unable to provide care for the baby or for herself[,] [the Mother] had agreed to a CARS agreement, which allowed her to remain in a [YFS] placement beyond her eighteenth birthday.

. . . .

7. [The Father], the biological father of [the Child], . . . has never made himself available to set up a family service agreement (case plan) to address the issues that brought the child into care and to place himself in a position to parent [the Child].

8. [The Father] was told repeatedly that he was found to be the father of [the Child] and that he needed to establish a case plan. First when he spoke with [the social worker's] supervisor, and then later at a home visit in February 2012 [when he met with the social worker].

9. At that February 2012 meeting [the Father] was told that the first step toward reunification or being involved in [his] son's life was obtaining a F.I.R.S.T. (Families in Recovery Stay Together) assessment and setting up a case plan. He at the time and ever since that time has demonstrated the he was not or is not able nor interested himself in providing a placement or caring for [the Child's] needs.

10. [The Father] did indicate that his

sister ["Sister 1"] was a potential placement at the February 2012 meeting. Unfortunately, [Sister 1] never followed up nor submitted the paperwork provided by YFS to be considered for placement. [Sister 1] never contacted YFS to express any further interest in placement after the February 2012 meeting and YFS was unable to contact her regarding her willingness to be considered for placement.

11. [The Father] has a second sister["Sister 2"] that the paternal grandmother made [YFS] aware of in December 2012. [Sister 2] did participate in the completion of a home study to be considered for placement of [the Child].

12. [Sister 2] completed the home study as requested but was not approved for a variety of reasons for placement.

13. [The Father's] mother, [the Child's] paternal grandmother, indicated that she is not able to be a placement for the child.

14. No one else was ever identified by [the Father] as a possible permanent placement for [the Child].

15. No one else from [the Father's] family ever step [sic] forward to offer a relative placement for [the Child].

16. An appointment for an assessment with [F.I.R.S.T.] was scheduled in March 2012. [The Father] did not appear for the appointment and never completed the [F.I.R.S.T.] assessment.

17. There was no contact between [the Father] and YFS from February 2012 until December 2012 and early January 2013, although YFS made several attempts to contact [the Father] by telephone, by mail,

and by home visit.

18. In December 2012 and early January 2013, [the Father] had some contact with [YFS]. [YFS] made [the Father] aware that he needed to participate in the court proceedings and maintain contact with YFS if he wanted to be involved in his child's life. On 25 January 2013, [the Father] appeared for [a] court hearing that was continued to 20 February 2013. [The Father] appeared at the 20 February 2013 [hearing], however he did not avail himself during or following that court hearing to any plan or services to work towards reunification with [the Child].

19. [The Father] appeared again at a scheduled hearing on 9 July 2013. [The Father] was allowed visitation [at] that time. [The Father] has participated in seven visits since that time. He visited with [the Child] two times in August [2013], two times in September [2013], two times in October [2013], no visits in November [2013], and one visit around the holiday in December [2013].

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24. Although [the Father] was employed for a good portion of this case and he being aware since early 2012 that he is [the Child's] father, he has paid no support to YFS or to [the Child's foster parent] or to any placement where [the Child] has resided. [The Father] has apparently on some occasions provided some clothing items for [the Child]. That is the extent of the financial support of his child.

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38. [The Father's] absences in court speak volumes regarding his commitment to parent [the Child]. There have been numerous court

hearings and he has made three court appearances. He has just not been involved.

The Father does not challenge any of the above findings. Therefore, they are binding on appeal. See *M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

Instead, the Father challenges each of the five statutory grounds under N.C. Gen. Stat. § 7B-1111 on which the trial court terminated his parental rights. However, a "finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. [§] 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003) (citation omitted). The trial court may terminate parental rights under § 7B-1111(a)(2) 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 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.

We find it dispositive of the Father's appeal that the evidence supports termination of his parental rights on these grounds.

In his brief, the Father contends that his parental rights were not subject to termination under § 7B-1111(a)(2) because the "conditions" which led to the Child's placement in YFS custody were not within the Father's control. However, the Father's argument is unpersuasive.

First, in order for a trial court to terminate a parent's rights under § 7B-1111(a)(2), the parent must have willfully left the juvenile in YFS custody for more than twelve months. A finding of willfulness here does not require proof of parental fault. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996) (citation omitted). On the contrary, "[w]illfulness 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). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of [his child]." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (emphasis added).

From the time the Father was notified on 23 January 2012 that he was the biological parent of the Child to when his parental rights were terminated by court order two years later, the Father made no meaningful effort to remove the Child from YFS custody. YFS engaged with the Father repeatedly over that

time in an attempt to put together a case plan to reunify the Child and the Father. These efforts by YFS were met almost universally with inaction by the Father. Indeed, the Father made essentially no effort to involve himself with the Child until the Mother indicated in December of 2012 that she was voluntarily terminating her parental rights.

It is true that the Father was not actually granted visitation rights with the Child until 19 July 2013, one month before this action to terminate his parental rights was filed by YFS. Moreover, it is uncontested that the Father visited the Child seven times between July and December 2013. However, these facts alone are not dispositive of the trial court's conclusion that, by making almost no effort to get the Child placed in his custody, the Father willfully left the Child in YFS custody for more than twelve months.

The Father's willfully leaving the Child in YFS custody is also directly tied to the second requirement for terminating his parental rights under § 7B-1111(a)(2): that the parent has not made reasonable progress under the circumstances in correcting the conditions which led to his child being placed in YFS custody. Notably, the Child was placed in YFS custody as a result of being adjudicated dependent. In order to be adjudicated dependent, a child either must have "no parent,

guardian, or custodian responsible for the juvenile's care or supervision" or, as in the present case, the child has a parent, guardian, or custodian, but that caretaker "is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2013). "[T]he determinative factors [when adjudicating a child abused, neglected, or dependent] are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (emphasis added). This Court has admonished that the adjudication of a child's dependency "should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). In other words, the "conditions" which led to the Child being placed in YFS custody are not necessarily tied to the "fault" of either biological parent. Instead, those "conditions" were based entirely on "circumstances and conditions surrounding" the Child at the time he was adjudicated dependent.

Thus, what is required of a parent to avoid the termination of his or her parental rights under § 7B-1111(a)(2) is that the parent make "reasonable progress under the circumstances" towards correcting those conditions that led to the child being

placed in YFS custody, irrespective of whoever's fault it was that the child was placed in YFS custody in the first place. *Cf. In re D.N.W.*, __ N.C. App. __, __ S.E.2d __, COA12-765, slip op. at 12-14 (Dec. 18, 2012) (unpublished) (terminating a respondent father's parental rights under § 7B-1111(a)(2) even though the child was removed from the mother's home and placed in DSS custody before the father's paternity had been established); *but cf. In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) (briefly noting that the respondent father did not cause children to be placed in foster care when analyzing § 7B-1111(a)(2), although the trial court's termination order broadly lacked clear, cogent, and convincing evidence to support termination). In the present case, the Father could have completely cured the Child's dependency by establishing himself as a parent who could "provide for [the Child's] care or supervision," or by arranging for an "appropriate alternative child care arrangement" for the Child. See § 7B-101(9). As previously discussed, the Father made almost no effort to do so.

The Father does not present this Court with an argument under § 7B-1111(a)(2) that his parental rights were terminated solely because he might have been in poverty. We do note that the Father challenges the trial court's ground for termination

under § 7B-1111(a)(3), which relates to a parent's willful failure to pay a reasonable portion of the cost of care for his child in spite of being physically and financially able to do so. The trial court found that the Father "was employed for a good portion of this case" and that he "has paid no support to YFS or to [the Child's foster parent] or to any placement where [the Child] has resided" since discovering he was the Child's biological parent. However, the trial court did not make an express finding that the Father was physically and financially able to pay for the Child's care. Nonetheless, for the purposes of examining § 7B-1111(a)(2), there was a sufficient basis in the record for terminating the Father's parental rights that had nothing to do with poverty. Indeed, the Father's failure to obtain custody of the Child appears primarily to have been the result of his own inaction, and thus poverty could not have been the "sole reason" for terminating the Father's parental rights. Therefore, the trial court had sufficient grounds to terminate the Father's parental rights under § 7B-1111(a)(2).

Lastly, the Father argues the trial court erred by relying on trial counsel's concession that grounds may have existed to terminate his parental rights. During closing arguments, the Father's trial counsel stated: "My argument to the Court is that obviously there have been some statutory elements in here

that probably have been met[.]” The trial court found: “Mr. McKnight, counsel for [the Father], has conceded that the grounds for termination including neglect and abandonment have been met, but requested that the Court consider whether it be in [the Child’s] best interests for [the Father’s] parental rights to be terminated.” This finding by the trial court does not prejudice the Father. See *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006) (“[When] ample other findings of fact support [the trial court’s conclusions of law] . . . , erroneous findings unnecessary to the determination do not constitute reversible error.”). As discussed above, there are unrelated findings of fact that sufficiently support the trial court terminating the Father’s parental rights under § 7B-1111(a)(2). Accordingly, we affirm the trial court’s order.

Affirmed.

Judges HUNTER, Robert C. and ELMORE concur.