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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-575

Filed: 2 January 2018

Lee County, No. 15 JT 27

IN THE MATTER OF: L.D.

Appeal by respondent-father from order entered 9 March 2017 by Judge Paul A. Holcombe, III, in Lee County District Court. Heard in the Court of Appeals 14 December 2017.

Elizabeth Myrick Boone for petitioner-appellee Lee County Department of Social Services.

Mobley Law Office, P.A., by Marie H. Mobley, for guardian ad litem.

Leslie Rawls for respondent-appellant father.

ARROWOOD, Judge.

Respondent-father appeals from the trial court's order terminating his parental rights to his daughter A.A.L.D. ("Audrey")[1]. Respondent-father argues the trial court erred in terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-

[1] A pseudonym is used to protect the juvenile's privacy and for ease of reading.

1111(a)(2) because he had made significant progress in providing a suitable home for Audrey. For the following reasons, we affirm.

I. Background

On 11 March 2015, the Lee County Department of Social Services ("DSS") obtained nonsecure custody of 9-month-old Audrey and filed a petition alleging that she was a neglected and dependent juvenile. The petition alleged that on 10 March 2015, DSS received a report that the mother was abusing drugs and was homeless with the infant child. The report alleged that the mother was transient and had lived in five places in the past five months. It further alleged that the mother had an extensive mental health history, including five mental health commitments, and she was not on any medication or seeing a therapist. No father was listed on the birth certificate, but the mother identified respondent-father as the biological father of Audrey. At the time the neglect and dependency petition was filed, respondent-father was incarcerated in Randolph County jail for unrelated charges. He was served with the petition on 31 March 2015. Respondent-father was later released from jail sometime prior to 21 July 2015.

On 21 April 2015, the trial court entered an order adjudicating Audrey neglected and dependent, based on the stipulation of the parties. The court ordered respondent-father to cooperate with DSS to establish paternity, and if he was

determined to be the father, to cooperate in developing a service agreement and visitation plan.

Respondent-father was determined to be Audrey's biological father in October 2015. He signed an Affidavit of Parentage and a Voluntary Support Order agreeing to pay $110.00 per month as child support based upon his monthly income.

In a review order entered 5 February 2016, the trial court found that although respondent-father was anxious for the juvenile to come home, he had not developed case or visitation plans with DSS. The court further found that respondent-father was not making adequate progress within a reasonable period of time and was not making himself available to the court, DSS, or the guardian ad litem.

After a review hearing held on 19 July 2016, the trial court entered an order on 4 August 2016 ceasing reunification efforts with the parents. The court found that despite being allowed supervised visitation once per week, respondent-father had only visited with the child four times between October 2015 and February 2016 and had not visited since April 2016. The court further found that during the visits he did attend, respondent-father failed to interact with the child but deferred to the mother. Although, respondent-father had obtained housing, the court found that the home was not ready, safe, and suitable for the juvenile as there was no place for her to sleep and there were inadequate supplies to meet the juvenile's needs. The court again found that respondent-father was not actively participating in his case plan or

cooperating with DSS and the guardian ad litem, and was not making adequate progress within a reasonable period of time under the plan. The court changed the primary plan to adoption with a secondary plan of custody or guardianship with a court-approved caretaker.

On 27 September 2016, DSS filed a motion to terminate respondent-father's parental rights on the grounds of (1) neglect, (2) failure to make reasonable progress to correct the conditions that led to removal, and (3) failure to pay reasonable cost of care.[2] *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2015). After a hearing on 21 February 2017, the trial court entered an order on 9 March 2017 terminating respondent-father's parental rights on the grounds of failure to make reasonable progress and failure to pay a reasonable cost of care. The trial court also found that it was in the juvenile's best interest to terminate parental rights. Respondent-father appealed.

II. Discussion

Respondent-father argues the trial court erred in terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) because he had made significant progress in creating a home suitable for Audrey and the removal conditions no longer existed. We do not agree.

[2] DSS also moved to terminate the parental rights of the mother. She relinquished her parental rights on 21 February 2017 and is not a party to this appeal.

"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." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.,* 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (internal quotation marks and citation omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Unchallenged findings of facts "are conclusive on appeal and binding on this Court." *Id.* at 532, 679 S.E.2d at 909. We review the trial court's conclusions of law *de novo*. *In re S.N.*, 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).

Parental rights may be terminated when "[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." N.C. Gen. Stat. § 7B-1111(a)(2) (2015). Willfulness does not merely imply fault on the part of the parent, but may be established " 'when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.' " *In re O.C. & O.B.,* 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (quoting *In re*

McMillon, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001)), *disc. review denied,* 360 N.C. 64, 623 S.E.2d 587 (2005). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen,* 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995).

To support its conclusion that respondent-father failed to make reasonable progress, the trial court made the following findings of fact.

> 21. The juvenile has been in the custody of [DSS] since March 11, 2015 for almost two years.
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> 26. The father has made minimal progress since the child has been placed in DSS custody. After his release from jail, the father initially lived in a one-room boarding house with the mother, which was inappropriate for the child. When he moved into his current residence on or about May 2016, he didn't get what he needed to adequately meet the needs of the child. He acknowledged and understood that he was supposed to furnish the home but during the social worker's home visit before the last court date in this matter on January 24, 2017 the father didn't even have a bed for the child.
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> 27. The agency entered into a plan with the father for him to develop a plan of care for the child while he was working. He lived with the mother of the child up until November 25, 2016 when she ended their relationship and moved out. The father knew that she was inappropriate to care for the child due to her mental health needs; however, he still did not secure suitable child care. The persons he has identified were either unavailable, unable, inappropriate and/or unwilling to assist in caring for the child. The father

> offered persons he didn't know their full names and/or circumstances without fully evaluating their appropriateness. He recently identified [Ms. G.] prior to the court date in this matter on January 10, 2017, who was his former neighbor he happened upon in a store in December 2016. He had not seen her in five years and asked her to care for the child without verifying her current situation. After having over a year to find a plan of care for the child, the father left the care of the child up to a chance meeting with a former acquaintance. The father has failed to provide a suitable child care arrangement for the child.
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> 29. The father has failed to make any reasonable progress in bonding with the child. Paternity was established for the child in October 2015. The mother was visiting weekly with the child and the father was aware of the visits and that he was allowed to attend her visits. The father only visited with the child four times from October 2015 through February 2016. During the visits, he mostly observed the mother and didn't interact with the child. The father then chose to work instead of visiting with the child while the mother visited with the child. He went for over five months without seeing the child at all, from February 2016 through July 2016. Since the review of custody and subsequent permanency planning hearing on July 19, 2016 when reunification efforts were ceased with him and he was allowed an opportunity to visit monthly with the child, the father has made some efforts by attending the monthly visits. The child has had limited contact and interaction with the father. The child cries and screams when she has to visit with the father. She stops crying when there is a toy in the room she wants to play with and when she listens to music.

Respondent-father contends that the trial court's findings do not support its conclusion that he failed to make reasonable progress under the circumstances to correct the conditions which led to the child's removal from the home. Respondent-father first challenges finding of fact 26. However, he does not challenge the factual support for the finding, but argues that it does not consider the conditions at the time of the termination hearing and relied on earlier conditions he has since corrected. He argues that he purchased a bed for Audrey in January 2017, and therefore he had established a household suitable for the child. However, the trial court acknowledged that respondent-father submitted evidence that he purchased a bed in finding of fact 16, finding that respondent-father admitted into evidence two photographs of his refrigerator and a bed for the child. Finding of fact 26, however, addresses respondent-father's failure to make reasonable progress in obtaining a safe suitable home by waiting over six months to purchase a bed for Audrey despite knowing that a furnished home was required in order to return custody of the child to him. The social worker testified at the hearing that in May 2016 when respondent-father obtained the home, it was not equipped to have a child, noting that "[t]here were no furnishings in the living room. There was no furnishings in [Audrey's] room. There was – there wasn't a kitchen table. There was food, but that was – that was the most – that was all they had." No evidence was presented that respondent-father purchased any other furnishings for the home or had provided any other necessities

aside from a bed in order to care for the child. Indeed, respondent-father testified at the hearing that the furnishings in the spare bedroom consisted of the child's "bed and her blanket. That's all. The pillow. Yeah, everything."

Respondent-father argues that due to his poverty, it was reasonable for him to wait until he thought the child might be returned to his care before spending the money on a bed. However, respondent-father raises this argument for the first time on appeal. At the termination hearing, respondent-father testified that he waited to purchase a bed because he "was waiting for the court day. I was waiting to see if there were chances that I was going to have my daughter back, and then I was going to buy it." Respondent-father never raised any issue with not being able to afford a bed or not having assistance from DSS in obtaining furnishings. "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount. . . ." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal quotation marks and citation omitted). Because this argument is newly raised on appeal, under *Holliman* it is waived and we may not consider it.

In findings of fact 27 and 28, the trial court found that respondent-father failed to provide a suitable child care arrangement and failed to make any reasonable progress in bonding with Audrey. Respondent-father does not challenge the actual facts of these findings, but essentially asks this Court to reach a contrary result based

upon the evidence. First, respondent-father admits that child care was "not entirely resolved as of the termination hearing," but contends that his efforts to address the need for child care, despite his lack of success, shows that he did not willfully leave Audrey in care. Second, respondent-father contends the child was more used to the mother and that his deferral to the mother in matters of care for Audrey was consistent with his cultural background, which recognizes the father as the primary wage-earning parent and the mother as the primary caretaker. These arguments, however, go to the weight to be given to the evidence and the inferences to be drawn from the facts. It is up to the trial court, however, to make those determinations, so long as the inferences are reasonable. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). While respondent-father has argued that the trial court should have drawn different inferences from the facts, he has not demonstrated that the trial court's decisions were unreasonable.

Indeed, finding of fact 27 demonstrates that respondent-father provided only three names over the course of one year while Audrey was in custody; that he did not know the full names, contact information, or circumstances of the offered persons; and that he provided them without fully evaluating whether they were appropriate

to care for his child. The last name respondent-father provided was given to DSS one month before the January 2017 hearing and was a person he just happened to run into at a grocery store and had not seen for five years. Additionally, respondent-father argued at the termination hearing that his lack of visitation and interaction with the child was due to his cultural background regarding the different gender roles of each parent. It is the duty of the trial court to determine the weight to be given to the evidence, *see id.*, and "[i]t is not the function of this Court to reweigh the evidence on appeal." *In re Bullock*, 229 N.C. App. 373, 377, 748 S.E.2d 27, 30, *disc. review denied*, 367 N.C. 277, 752 S.E.2d 149 (2013). Respondent-father does not dispute the court's finding that he does not have a bond with the child and he has not shown that the trial court's inference from the facts was unreasonable.

In this case, the trial court ordered respondent-father to establish a safe suitable home for the child, establish child care for when he was working, and visit with the child in order to form a bond. The trial court's findings demonstrate that over the fifteen months Audrey was in custody, respondent-father had done little to relieve the conditions which led to her removal. At the time of the termination hearing, respondent-father had no bond with the child and had no plan for child care. Although respondent-father made some progress by purchasing a bed for the child, this is not reasonable progress under the circumstances.

For the foregoing reasons, we hold that the trial court's findings support its conclusion that respondent-father failed to make reasonable progress to correct the conditions that led to Audrey's removal from the home, and that the trial court did not err in concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate respondent-father's parental rights. The finding of this statutory ground alone supports termination of respondent-father's parental rights. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (citation omitted) ("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."). Respondent-father has not challenged the disposition portion of the order. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).