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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-845

Filed: 20 March 2018

Mecklenburg County, Nos. 14 JT 470-71

IN THE MATTER OF: I.J.A., I.R.A., Minor Children.

Appeal by Respondent-Father from order entered 2 May 2017 by Judge Donald R. Cureton, Jr., in District Court, Mecklenburg County. Heard in the Court of Appeals 22 February 2018.

Associate County Attorney Marc S. Gentile for Mecklenburg County Department of Social Services, Youth and Family Services, Petitioner-Appellee.

Steven S. Nelson for Guardian ad Litem.

David A. Perez for Respondent-Appellant Father.

McGEE, Chief Judge.

Respondent-Father appeals from an order terminating his parental rights to the juveniles I.J.A., born 2 December 2013, and I.R.A., born 25 January 2012. Respondent-Mother, whose rights were also terminated, is not a party to this appeal.

I. Background

Mecklenburg County Youth and Family Services ("YFS") obtained nonsecure custody of I.J.A. and I.R.A. (together, "the children") and filed a juvenile petition on

1 July 2014, alleging the children were neglected and dependent. The petition described reports of domestic violence episodes between Respondent-Father and Respondent-Mother (together, "Respondents") in 2013 and 2014, including an incident in March 2014 that resulted in Respondents' eviction from the hotel where they were living; and an incident on 4 June 2014 in which Respondent-Father assaulted Respondent-Mother in front of the children at a hospital. The petition further alleged Respondent-Father abused alcohol and tested positive for marijuana and cocaine, and that Respondent-Mother had untreated mental health issues. Respondents were alleged to be non-compliant with services offered by YFS.

Respondents engaged in mediation and signed a "Mediated Petition Agreement" on 4 August 2014. After a 20 August 2014 hearing, the trial court entered an order on 19 September 2014 adjudicating I.J.A. and I.R.A neglected and dependent, based on Respondents' agreement. The court maintained the children in YFS custody and ordered Respondents to comply with their YSF case plans.[1] As a condition of his plan, Respondent-Father agreed to (1) successfully complete the twenty-six-week New Options for Violent Actions ("NOVA") program for domestic violence offenders and follow any recommendations, (2) maintain appropriate employment and housing sufficient for himself and the children, (3) complete a

[1]Respondent-Father entered into his case plan on 25 August 2014, after the hearing but before the court entered its written order. The court reiterated the requirement that Respondent-Father comply with his YFS case plan in its ninety-day review order entered on 23 January 2015.

substance abuse assessment at the McLeod Center, and (4) maintain weekly contact with his YFS social worker. The court further ordered Respondent-Father to have no contact with Respondent-Mother.

At the initial permanency planning hearing on 30 June 2015, the trial court ceased reunification efforts as to Respondent-Mother and established a permanent placement plan for the children of reunification with Respondent-Father, with concurrent alternative plans of guardianship and adoption. After a hearing on 11 April 2016, the trial court ceased reunification efforts as to Respondent-Father, suspended his visitation, and directed YFS to pursue termination of Respondents' parental rights. Respondent-Father failed to attend the 11 April 2016 hearing. The court found Respondent-Father was "not making progress" and that he had been brought by Respondent-Mother to a scheduled visitation on 1 March 2016 while he was "impaired." The court further found Respondent-Father (1) had failed to attend a drug screen after that visitation, as requested by YFS, (2) had failed to provide verification of his employment, and (3) had been arrested on multiple marijuana-related charges since the previous hearing.

YFS filed a petition on 8 June 2016 to terminate Respondents' parental rights. The petition asserted the following statutory grounds for termination as to both Respondents: neglect; failure to make reasonable progress to correct the conditions that led to the children's removal from the home; failure to pay a reasonable portion

of the children's cost of care; and dependency.[2] N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6) (2015).

After hearing evidence on 23 August 2016, 4 October 2016, and 2 November 2016, the trial court announced its decision to terminate Respondents' parental rights immediately prior to a subsequent permanency planning hearing held 31 March 2017. The court entered its written termination order on 2 May 2017. The court found grounds for terminating Respondents' rights for neglect, failure to make reasonable progress, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6).[3] The court further determined that terminating the parental rights of Respondents was in the children's best interests. *See* N.C. Gen. Stat. § 7B-1110(a) (2015).

II. Standard of Review

On appeal, Respondent-Father claims the trial court erred in adjudicating grounds to terminate his parental rights under N.C.G.S. § 7B-1111(a). This Court reviews an adjudication to determine (1) whether the court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether its findings in turn support its conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "[T]he trial court's findings of fact supported by clear and convincing competent

[2] The additional ground of willful abandonment was alleged as to Respondent-Mother. *See* N.C.G.S. § 7B-1111(a)(7) (2017).

[3] The court also determined that Respondent-Mother had willfully abandoned the children under N.C.G.S. § 7B-1111(a)(7).

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). Moreover, "[w]hen the court acts as factfinder, it is for the court to determine which of differing reasonable inferences should be drawn from the evidence." *State v. Major*, 84 N.C. App. 421, 426, 352 S.E.2d 862, 865 (1987). Findings to which no exception is taken are presumed to be supported by the evidence and are binding on appeal. *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007).

III. Analysis

The adjudication of a single ground for termination under N.C.G.S. § 7B-1111(a) will support an order terminating parental rights. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). Therefore, if we are able to uphold any of the grounds adjudicated by the trial court, we need not review the remaining grounds. *Id.* at 9, 618 S.E.2d at 246.

N.C.G.S. § 7B-1111(a)(2) authorizes the termination of a respondent's parental rights if:

> The 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.

N.C. Gen. Stat. Ann. § 7B-1111(a)(2). To satisfy this provision, the petitioner must demonstrate that the respondent-parent (1) willfully left the child in placement outside the home for more than twelve months, and (2) as of the time of the termination hearing, failed to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. *In re O.C. & O.B.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005). A finding of "willfulness" under N.C.G.S. § 7B-1111(a)(2) "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). Rather, "a respondent's prolonged inability to improve [his] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [his] good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (quoting *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004)) (internal quotation marks omitted), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006).

The trial court made the following findings of fact regarding Respondent-Father's progress in addressing these conditions:

> 14. As part of his case plan, [R]espondent[-F]ather was required to obtain and maintain safe, stable and appropriate income and housing, attend and complete New Options for Violent Actions (NOVA)[](for domestic violence), maintain consistent contact with [the] YFS social worker, and participate in substance

abuse treatment.

. . .

17. Respondent[-F]ather did not begin to consistently attend NOVA until mid-2016. As of the last date of testimony within this TPR proceeding, he had attended ten NOVA sessions, missed the maximum number possible of three, and still needed to attend sixteen sessions to complete the program. Prior to that, he started NOVA at least four times, but never completed more than half the program before being terminated. As of the last date of testimony, [Respondent-Father] never established stable housing or income and he had two pending drug-related felonies, but he could not provide the name of his attorney or state when the matters would next be in Superior Court. Respondent[-F]ather, at all times relevant to this matter, never provided YFS personnel with any evidence supporting his testimony that he was employed (e.g. paystubs, Form W2, Form 1099). Indeed, all NOVA intake forms completed by [R]espondent[-F]ather indicate that he was unemployed.

. . .

19. With regard to [Respondents'] history of domestic violence, . . . [i]n March 2013, [] [R]espondent[-M]other was issued a 50-B, domestic violence protective order (DVPO) against [] [R]espondent[-F]ather; Respondent[-F]ather was in jail during the non-secure custody hearing in July 2014 for allegedly assaulting [] [R]espondent[-M]other; maternal grandmother would not agree to supervise visits for [him] because she had seen how violent he could get with [] [R]espondent[-M]other; [t]he Court during the adjudication hearing (on August 20, 2014) issued a no-contact order between [Respondents] . . .; [t]his no contact order was never lifted by the [c]ourt; [i]n the

> summer of 2015, the police were called to an observed domestic violence issue between [Respondents] but when the police arrived, [Respondents] denied the incident, [R]espondent[-M]other declined to press charges, and [Respondents] were then seen walking down the sidewalk together; Respondent[-F]ather denies that he is still in a relationship with [Respondent-Mother], but acknowledges that they are friends and speak when they see one another in public; [n]either [Respondent] appeared in court for the April 2016 hearing, yet, soon thereafter they appeared together at the office of YFS SW Jonathan Kelley to explain their absence. . . . [A]lthough [R]espondent[-F]ather is in a new relationship, he has not shown that he can or will cease contact with [R]espondent[-M]other. . . .
>
> 20. . . . [I]t has cost approximately $[89,522.00] to maintain the juveniles in an out of home placement. No portion of this cost of care was paid for by [] [R]espondents. Nor have they contributed any money to defray the cost of out of home placements. There is no evidence they were physically and/or financially unable to do so.

Except as contested by Respondent-Father, these findings are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384.

Respondent-Father challenges as "erroneous" the portion of Finding 17 that he "never established stable housing and income." Our review of the record reveals substantial evidence to support this finding.

The two YFS social workers assigned to Respondent-Father's case[4] attested to

[4] Jennifer Holston was assigned to Respondents' case from July 2014 until February 2016 and was succeeded by Jonathan Kelley.

his ongoing lack of stable housing. After a brief period living with his mother in an apartment, Respondent-Father became homeless when they "lost" the apartment. He then "lived on and off with his aunt" for some period thereafter, but never obtained independent housing. Respondent-Father requested housing assistance from YFS and reportedly sought assistance from the Charlotte Housing Authority. The social worker made a referral for Respondent-Father, but explained Respondent-Father never complied with her request for proof of income, which was required for "any voucher for housing."

In his own testimony on 2 November 2016, Respondent-Father told the trial court he had been living with his girlfriend in a three-bedroom, two-bathroom house for "about two months." Prior to obtaining this residence, he "was living in a motel – with [his] aunt and then . . . was back-and-forth at the motel." Asked whether he had leased his current residence, Respondent-Father replied: "No it's my girlfriend's."

With regard to Respondent-Father's income, the social workers testified that Respondent-Father claimed "he was being paid under the table" by his uncle's drywall company but failed to comply with repeated requests by the social workers for proof of employment. Though YFS was willing to accept a letter from the uncle of Respondent-Father confirming his employment, Respondent-Father never provided a letter. Furthermore, as noted by the trial court, Respondent-Father repeatedly represented himself as unemployed on his NOVA intake forms, most recently on 16

July 2016.

Respondent-Father testified he had been employed by his uncle's drywall company for approximately sixteen years and was paid "probably . . . [$]10.50" per hour.[5] He estimated his present monthly earnings to be "about $1700." Although he had not provided YFS with proof of this employment, he told the court that his uncle would be providing the documentation the following Friday. Respondent-Father did not know how much he had earned in 2015 but was "aware of all my hours and stuff like that."

To the extent the parties presented conflicting evidence about Respondent-Father's employment, the trial court was entitled to resolve this conflict by crediting YFS's evidence. *See generally In re D.M.O.*, __ N.C. App. __, __, 794 S.E.2d 858, 866 (2016) (explaining trial court's duty to "resolve material conflicts in the evidence" in its findings of fact). We note that Respondent-Father's characterization of his work history tends to conflict with his testimony that he "got kicked out of [NOVA] due to lack of funds" – although he did attribute this occurrence to periods when "work had got slow with my uncle, so I couldn't pay for the classes." Respondent-Father's account is also inconsistent with his persistent difficulties with housing, his reliance on YFS for bus passes, and his failure to contribute any money toward the children's cost of care. His exception to the trial court's finding lacks merit.

[5] Respondent-Father also reported having previously worked for a hotel for six to eight months before being laid off, and also having worked for "a couple of staffing companies" during 2015.

Respondent-Father next challenges the portion of Finding 19 that "he has not shown that he can or will cease contact with [R]espondent[-M]other." This finding is amply supported by the uncontested portions of Finding 19, which recount Respondents' ongoing contact in defiance of the court's orders. YFS adduced evidence of additional contacts between Respondents that are not included in the court's findings. Indeed, Respondent-Father acknowledged his ongoing casual contact with Respondent-Mother as "friends" but averred they had not been romantically involved for "about a year."

Respondent-Father also objects to the trial court's statement in Finding 19 that it lacked confidence Respondent-Father "would prevent [] [R]espondent[-M]other from making contact with the [children]" if he were allowed ongoing contact with the children. While a court's concern about a hypothetical future occurrence is not an evidentiary fact *per se*, we are satisfied that the court's self-assessment reflects a reasonable inference drawn from its other findings. We are also satisfied that this finding is unnecessary to the trial court's adjudication under N.C.G.S. § 7B-1111(a) and may thus be disregarded for purposes of our review. *See generally In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (holding that "erroneous findings unnecessary to the determination do not constitute reversible error" where the adjudication is supported by other proper findings).

Having addressed each of Respondent-Father's objections to the trial court's findings of fact, we turn to the court's conclusion of law under N.C.G.S. § 7B-1111(a)(2) that Respondent-Father:

> [W]illfully left the [children] in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress was being made towards correcting the conditions that led to the removal of the [children] from the care of [] [R]espondents[.]

Respondent-Father concedes the children had resided in an out-of-home placement for more than twelve months when YFS filed its petition on 8 June 2016. He does not deny that he "failed for a substantial period of time to make a great deal of progress in addressing the conditions which brought the juveniles into care." However, Respondent-Father contends "that as of the termination hearing, he had made reasonable progress under the circumstances[.]" We disagree.

As articulated by Respondent-Father in his appellate brief: "The principal reasons leading to removal of the children included domestic violence between [Respondents], substance abuse on the part of [Respondents], and instability as to Respondents." At the time Respondent-Father testified at the termination hearing, the children had been in YFS custody for twenty-eight consecutive months. Respondent-Father had yet to complete domestic violence treatment through the NOVA program or establish stable employment or housing. Nor had he ceased his contact with Respondent-Mother as ordered by the trial court. Although the trial

court made no findings with regard to Respondent-Father's substance abuse treatment – perhaps due to the witnesses' lack of clarity about his compliance with random drug screens – the court did find he had two pending felony drug charges at the time of the hearing.

At the time of the termination hearing, Respondent-Father was undertaking his sixth attempt to complete the NOVA program. He acknowledged having been discharged from the program "about four or five times" since signing his case plan but ascribed his lack of success to "new [criminal] charges and money issues" rather than the excessive absences documented in the program's records. Petitioner's evidence showed Respondent-Father had been granted a two-week leave from NOVA in early 2015 in order to perform community service in lieu of paying the fee. He was terminated from the program after failing to perform the required community service or attend the next program session after the leave period. In any event, Respondent-Father's "sporadic efforts" over a period of more than two years yielded no meaningful improvement in his situation. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995). Under these facts, the trial court properly found a failure by Respondent-Father to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *See In re B.S.D.S.*, 163 N.C. App. at 545-46, 594 S.E.2d at 93; *In re O.C.*, 171 N.C. App. at 467, 615 S.E.2d at 397.

Because we uphold the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2), we need not review the remaining grounds for termination found by the trial court. *In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246. The order terminating Respondent-Father's parental rights is hereby affirmed.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).