IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1168

Filed: 16 April 2019

Mecklenburg County, No. 16 JT 184

IN THE MATTER OF: F.M.C.

Appeal by respondent-father from order entered 20 April 2017 and appeal by respondent-parents from order entered 16 August 2018 by Judge Donald Cureton in Mecklenburg County District Court. Heard in the Court of Appeals 28 March 2019.

Senior County Attorney Stephanie Jamieson for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellant mother.

Sean P. Vitrano for respondent-appellant father.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for guardian ad litem.

ZACHARY, Judge.

Respondents appeal from an order terminating their parental rights to their minor child, "Fay."[1] After careful review, we affirm.

Background

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

Fay was born in April 2016. On 22 April 2016, the Mecklenburg County Department of Social Services, Division of Youth and Family Services ("YFS") filed a petition alleging that Fay was a neglected and dependent juvenile. According to the petition, Respondent-mother had another child who was adjudicated neglected and dependent in February 2015 as a result of Respondent-mother's homelessness, unemployment, and mental health concerns, and those issues remained unaddressed. While that child was in YFS's custody, Respondents got into an argument that ended when Respondent-father ran over Respondent-mother with a car. The petition further alleged that, nine days before Fay's birth, Respondent-mother went to a healthcare facility and threatened to harm herself and her unborn child if she were not given Xanax. The petition noted that although no father was listed on Fay's birth certificate, Respondent-father had indicated that he might be the child's father. When YFS filed its petition, Respondent-father was facing charges for possession of marijuana and possession of marijuana paraphernalia. YFS obtained nonsecure custody of Fay that same day. On or about 27 May 2016, testing confirmed Respondent-father's paternity.

Following a hearing, on 3 June 2016, the trial court entered an order adjudicating Fay to be a dependent juvenile; establishing a primary permanent plan of reunification with a secondary permanent plan of guardianship; and ordering Respondents to be assessed for substance abuse, mental health, and domestic

violence, and to follow all resulting recommendations. Additionally, Respondent-mother was ordered to obtain and maintain stable housing and income sufficient to meet her needs and those of Fay, while Respondent-father was ordered to have a home assessment completed and to enter into a case plan with YFS.

On 20 April 2017, the trial court held a permanency planning hearing and entered an order changing Fay's primary permanent plan to adoption with a secondary permanent plan of guardianship. YFS filed a petition to terminate Respondents' parental rights on 25 September 2017, alleging the following grounds for termination: (1) neglect; (2) failure to make reasonable progress under the circumstances to correct the conditions that led to Fay's removal; and (3) willful failure to pay a reasonable portion of Fay's cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017). The petition further alleged abandonment as an additional ground on which to terminate Respondent-mother's parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(7).

The trial court held a hearing on the petition on 22 February 2018. On 16 August 2018, the court entered an order adjudicating the existence of neglect and failure to make reasonable progress, and terminated Respondents' parental rights to Fay on those grounds. The trial court also adjudicated the existence of abandonment

as an additional ground justifying termination of Respondent-mother's parental rights. Respondents timely filed individual notices of appeal.[2]

Respondent-Father's Appeal

Respondent-father contends that the trial court erroneously determined that grounds existed to terminate his parental rights to Fay. We conclude that the trial court properly adjudicated the existence of the ground listed in N.C. Gen. Stat. § 7B-1111(a)(2).

"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) (internal quotation marks and citation omitted), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (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*,

[2] Respondent-father's notice of appeal states that he appeals "from the properly preserved Order To Cease Reunification Efforts that was filed on April 20, 2017 and the Order Terminating Parental Rights that was filed on August 16, 2018." However, Respondent-father's brief to this Court contains no arguments regarding the 20 April 2017 order. Accordingly, we deem his appeal of that order abandoned.

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.*, 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).

In order to find grounds justifying termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must perform a two-part analysis. *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

Id. at 464-65, 615 S.E.2d at 396.

"A finding of willfulness 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) (citation omitted). Indeed, "[a] finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the [juvenile]." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citation omitted). "Willfulness 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 (citation omitted), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

Furthermore, in order to establish "reasonable progress," a parent must demonstrate not just effort, but also positive results. *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 225.

In the present case, the trial court made the following findings of fact relevant to its determination that grounds existed to terminate Respondent-father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(2):

> 3. That the issues which caused [YFS] to remove the juvenile included, among other things, mental health, domestic violence, substance abuse, unstable housing and the parents' inability to meet [the] juvenile's needs.
>
> . . . .
>
> 7. . . . On January 14, 2017 (a day after court), a domestic violence incident occurred between the mother and the father. The respondent father struck the respondent mother while she was holding the juvenile. This caused the mother to fall to the floor. . . .
>
> . . . .
>
> 9. That after removal, a [case plan] was developed with the father to work toward reunification. The court adopted his case plan. The [case plan] outlined the steps the respondent father needed to take in order to be reunified with the juvenile. In order to be reunified with the juvenile, the case plan required the father to submit to a F.I.R.S.T[.] assessment and comply with any recommendations from that assessment; successfully complete a domestic violence treatment program; obtain/maintain legal and sufficient income to meet the juvenile's needs and obtain/maintain safe, stable, appropriate, and permanent living environment. The respondent father had to demonstrate skills learned in the

service programs. In addition, the father was to visit the juvenile on a regular and consistent basis and maintain consistent contact with the social worker.

10. That for over a year, the respondent father has not made sufficient progress for reunification to occur. The father . . . did submit to an assessment in his county that was equal to a F.I.R.S.T[.] assessment. He was not recommended for any services. On March 22, 2017, the father submitted to a drug screen and tested positive for methamphetamine. The father informed the social worker that the test was positive for meth due to kissing the respondent mother a week prior. This court does not find his explanation to be reliable or logical. At the April 20, 2017 hearing, the father admitted to this court that his positive meth screen was not due to kissing the mother. He reported he did not know how he tested positive for meth. At that hearing, the court ordered the father to submit to a substance abuse assessment and follow all recommendations. He was allowed to submit to that assessment after he completed domestic violence services. To date, the father has never submitted to a substance abuse assessment or engaged in any substance abuse services.

Early in the case, the father was not engaged in domestic violence services. . . . Even after the [14 January 2017 domestic violence] incident, the parents continued to live together until the father moved out in February 2017. As of April 2017, the father had not engaged in domestic violence services but had scheduled an assessment at NOVA (a local batterer's intervention program) for April 12, 2017. The father submitted to an assessment at NOVA on May 24, 2017 and was accepted for services. . . . The father never attended the NOVA orientations or sessions. As a result, he was terminated from the program twice . . . . As of August 2017, the father had not resumed participating in domestic violence services. On December 4, 2017, the father attended a session at NOVA. However, he had again been unsuccessfully terminated on November

20, 2017 due to excessive absences. The father failed to attend sessions on: 10-14-17; 10-21-17; 10-28-17 and 11-18-17. To date, he has not resumed or completed any domestic violence services. He also has not completed any anger management classes.

Due to the January 14, 2017 incident, the father was charged with contributing to the delinquency of a juvenile. He pled guilty to that charge and was placed on supervised probation. His probation conditions included a requirement for him to complete parenting classes. The father never completed the classes. On February 16, 2018, the father was found in willful violation of his supervised probation. . . . [T]he [violation] report alleged the father had been charged on October 27, 2017 in Union County for second degree trespass. The probation officer could not conduct a home visit with the father because he lived with an uncle that would not allow the probation officer to enter his home. At that time, the father did not have an alternate place to live and did not want to live at the shelter. On November 1, 2017, the father was convicted of Second Degree Trespass. During this incident, the father was at the home of the mother's male friend. The mother was also present. The father got into a heated argument with the friend and was asked to leave. He did not leave and the police were called. . . .

11. That from early on in the case to January 2017, the father had housing with the mother. He maintained housing with the mother until he moved out in February 2017. The father then moved in with his sister. As of August 2017, the father continued to reside with his sister. By December 2017, the father changed residences at least 5 times. To date, he is living with his father.

From early on in the case to January 2017, the father was employed working at least 40 hours weekly . . . . As of December 2017, the father maintained employment working several jobs. He currently has employment.

From early on in the case to September 2016, the father visited with the juvenile. On October 15, 2016, the juvenile was placed in the home with respondent parents via a trial home placement. After the trial home placement ended in January 2017, the father resumed visiting the juvenile. Due to the incident, his visits were supervised. He was appropriate during the visits. As of April 2017, the father was still visiting the juvenile. By August 2017, the father was inconsistently visiting the juvenile. He had only visited her twice (4-24-17 and 7-10-17). As of December 2017, the father continued to visit [the] juvenile but inconsistently attended or sometimes arrived late.

. . . .

13. . . . Domestic violence was a part of [Respondent-father's] case plan due to an incident in which he ran over the mother with a car. Employment/income was included in the case plan because the father needed employment/income to meet the juvenile's as well as his basic needs including food, clothing and shelter. Housing was recommended because the father needed to secure and maintain a stable home for the benefit of the child. He was to maintain contact with the social worker in order for [YFS] to track his progress and provide assistance as needed. [YFS] recommended visitation in order for there to be an ongoing bond between the father and his child.

14. That the [YFS] worker provided reunification efforts to the parents; however, the parents have not consistently complied with the case plan from the time the juvenile entered custody. Parents afforded efforts by [YFS] but the parents have not taken full advantage of the services in place. The parents have not made sufficient progress to address the issues that led [to] the juvenile being brought into the custody of [YFS]. The parents did not maintain consistent contact with the social worker throughout the life of this case. [The social worker] has consistently made efforts to communicate with the parents regarding the juvenile and their case plans. Respondent parents have

> not demonstrated an ability to consistently meet the juvenile's needs. It is not foreseeable that they are able to provide a safe and permanent home for the juvenile.

Respondent-father contends that the trial court's findings of fact "failed to establish willfulness or a lack of reasonable progress to justify termination" of his parental rights to Fay; rather, these findings "showed that he made *substantial* progress toward th[e] objectives" identified in his YFS case plan. (Emphasis added). We disagree.

Respondent-father first challenges the statement in finding of fact 10 that he "has not completed any anger management classes." For support, Respondent-father cites (1) a statement in the Court Summary filed by YFS prior to a 24 August 2017 permanency planning review hearing that, in March 2017, Respondent-Father "participated in 3 sessions through the [Employee Assistance Program] at his previous job," and (2) Respondent-father's testimony at the termination hearing that he had attended anger management classes at the Shelby Wellness Center. In his brief, Respondent-father describes his participation in the Employee Assistance Program as "three counseling sessions." However, the evidence identified by Respondent-father does not establish that counseling—of any variety—was the purpose for these sessions, nor does it contradict the trial court's finding that he "has not completed any anger management classes." Moreover, although Respondent-father testified at the termination hearing that he "did take some anger management

classes[,]" he never provided YFS with documentation to support his claim. The trial court was therefore free to discredit Respondent-father's unsupported testimony that he completed anger management classes. *See In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (quotation marks, citation, and brackets omitted)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). This portion of finding of fact 10 is supported by the trial court's findings.

Respondent-father next contends that the statement in finding of fact 10 that he had never "engaged in any substance abuse services" was "partially unsupported" by the evidence. In support of his contention, Respondent-father cites (1) a statement in the YFS Reasonable Efforts Report submitted prior to the 20 April 2017 permanency planning hearing that, on 28 March 2017, Respondent-father notified the YFS social worker via text message that he had "just completed the assessment at McCleod Center that was recommended after his positive drug screen[,]" and (2) Respondent-father's testimony at the termination hearing that he had completed a F.I.R.S.T. assessment. Again, however, Respondent-father never provided YFS with documentation to support these claims. To the contrary, the YFS social worker testified at the termination hearing that Respondent-father had *not* submitted to court-ordered substance abuse services. The trial court was again free to discredit

Respondent-father's unsupported testimony. *See id.* The challenged statement in finding of fact 10 is also supported by the evidence.

Finally, Respondent-father contends that the trial court failed to consider all visits leading up to the termination hearing when it made findings regarding Respondent-father's visitation with Fay. *See In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006) ("[T]he nature and extent of the parent's reasonable progress . . . is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights." (citation and emphasis omitted)). Although the trial court made findings regarding Respondent-father's visitation up to December 2017, Respondent-father notes that record evidence establishes that he also attended visits on 11 and 26 December 2017, 22 and 29 January 2018, and 5 February 2018. However, the evidence cited by Respondent-father was submitted to the trial court approximately three months *after* the termination hearing, in preparation for a subsequent permanency planning hearing. Indeed, the YFS Court Summary that contains this evidence also states that "the Termination of Parental Rights hearing has occurred." Thus, Respondent-father fails to demonstrate that the trial court did not consider evidence introduced at the termination hearing.

The trial court's remaining findings of fact are unchallenged and are therefore binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. The trial court's findings establish that Fay was removed from the home for issues related to domestic

violence, substance abuse, unstable housing, and Respondents' inability to meet Fay's needs. YFS developed a case plan with Respondent-father to address these issues. Respondent-father made *some* progress toward resolving these issues: he submitted to his county's equivalent of a F.I.R.S.T. assessment; maintained stable employment and income; and "provided some diapers . . . during some visits" with Fay. However, in light of its other findings, the trial court properly concluded that Respondent-father failed to make *reasonable* progress. *See Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25 ("Extremely limited progress is not reasonable progress. . . . It is clear that [the] respondent has not obtained positive results from her sporadic efforts to improve her situation.").

On 22 March 2017, Respondent-father tested positive for methamphetamine, and the trial court found his explanation—that the positive test resulted from kissing Respondent-mother a week prior—neither "reliable [n]or logical." Following the positive drug screen, the trial court ordered Respondent-father to submit to a substance abuse assessment and follow all recommendations. However, as of the termination hearing on 22 February 2018, Respondent-father had not yet completed an assessment or engaged in any substance abuse services. Furthermore, after committing an act of domestic violence against Respondent-mother in January 2017, Respondent-father failed to complete court-ordered domestic violence services, and he was terminated from domestic violence programs three times due to excessive

absences. Respondent-father also failed to (1) maintain stable housing, (2) regularly visit with Fay, and (3) maintain consistent contact with YFS, all requirements of his case plan.

In light of these findings evidencing a willful failure to make reasonable progress, we conclude that the trial court properly determined that Respondent-father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Having so concluded, we need not address Respondent-father's challenge to the trial court's adjudication of neglect as an additional ground for termination. *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." (citation omitted)).

Respondent-Mother's Appeal

Respondent-mother's appellate counsel has filed a "no-merit" brief on her behalf, stating that after a conscientious and thorough review of the transcripts and record on appeal, he is unable to identify any issue of merit on which to base an argument for relief. Pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, counsel requests that this Court conduct an independent examination of the case for possible prejudicial error. N.C.R. App. P. 3.1(e).

Counsel has demonstrated his compliance with Rule 3.1(e). Specifically, counsel informed Respondent-mother of his inability to find error in her appeal,

advised Respondent-mother of her right to file her own written arguments with this Court, and provided her with the necessary materials to do so. Respondent-mother has not submitted her own written arguments, and a reasonable period of time for her to do so has passed.

In our discretion, we have carefully reviewed the transcript and record, and we are unable to find any prejudicial error in the trial court's order terminating Respondent-mother's parental rights. *See In re I.B.*, __ N.C. App. __, __, 822 S.E.2d 472, 477 (2018) (explaining that although "an independent review is not *required*" by the plain text of Rule 3.1, that "does not mean we cannot conduct one"). The termination order contains sufficient findings of fact supported by clear, cogent, and convincing evidence to support the conclusion that Respondent-mother willfully left Fay in a placement outside the home for more than twelve months without making reasonable progress toward correcting the conditions that led to Fay's removal. Furthermore, the trial court made appropriate findings in determining that the termination of Respondent-mother's parental rights was in Fay's best interest. *See* N.C. Gen. Stat. § 7B-1110(a).

Conclusion

Upon careful review of the record, we conclude that the trial court did not err in terminating Respondents' parental rights to Fay based on their willful failure to make reasonable progress toward correcting the conditions that led to her removal,

pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and INMAN concur.

Report per Rule 30(e).