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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-367

Filed 07 February 2023

Yancey County, Nos. 13-JT-36, 19-JT-19, 19-JT-20

IN THE MATTER OF: T.M.R., J.W.R., N.Z.R.

Appeal by Respondent-father from order entered 31 January 2022 by Judge Rebecca Eggers-Gryder in Yancey County District Court. Heard in the Court of Appeals 11 January 2023.

*Daniel M. Hockaday for petitioner-appellee Yancey County Department of Social Services.*

*Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant father.*

*Alston & Bird LLP, by Ryan P. Ethridge, for Guardian ad Litem.*

GRIFFIN, Judge.

Joseph Riddle (“Respondent-father”) appeals from the trial court’s order<sup>1</sup>

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<sup>1</sup> The trial court entered three identical termination orders—one for each of Respondent-father’s children. We therefore address the orders collectively.

terminating his parental rights to his minor children, Taylor, Jack, and Noah.<sup>2</sup> Respondent-father contends the trial court's findings of fact are not supported by clear and convincing evidence and are therefore insufficient to support the conclusions of law. After careful review, we affirm.

### **I. Factual and Procedural Background**

Respondent-father and his then-wife ("Mother") were married in 2009. The couple's first child, Taylor, was born in April 2013. Yancey County Department of Social Services ("DSS") became involved with the family on 30 August 2013 after receiving a report concerning Taylor. DSS filed a petition on 12 September 2013 alleging Taylor was neglected. DSS took custody of Taylor, but he was returned to his parents on 18 December 2014. The couple's second child, Jack, was born in 2014 and their third child, Noah, was born in 2017.

On or about March 2019, Respondent-father was convicted of an unrelated crime and was incarcerated. On 29 August 2019, DSS received another report alleging Mother was allowing known drug dealers and gang members to live in the home and that the three children were left unsupervised. On 9 October 2019, DSS received a report that Noah was walking down the road without supervision. Law enforcement was able to identify the child, but was unable to make contact with a

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<sup>2</sup> We use pseudonyms for ease of reading and to protect the identity of the juveniles. See N.C. R. App. P. 42(b).

caregiver, and found no supervisor at the home. That same day, DSS filed petitions alleging Taylor, Jack, and Noah were neglected and took custody of all three children who remained in DSS custody until the time of termination. On 15 November 2019, the children were adjudicated as dependent.

Respondent-father met with a social worker, Amber Wise, and at a dispositional hearing on 6 December 2019, signed a DSS case plan. This initial case plan required Respondent-father to engage in Alcoholics Anonymous and Narcotics Anonymous (“AA-NA”) while incarcerated, refrain from getting into trouble while incarcerated, take available parenting classes, and support Mother’s progress in sobriety and providing safe housing for the children.

A review hearing was held on the matter on 12 March 2020. At that time, Mother was making progress on her case plan and was the focus of reunification as Respondent-father was still incarcerated. Respondent-father, despite incarceration, was attending AA-NA but was unable to attend online parenting classes due to a lack of available internet.

The matters were again reviewed on 26 June 2020. During this review, the court expressed concern that the parents would resume their relationship after Respondent-father’s release. Respondent-father was released from custody on 26 September 2020 and on 6 October 2020, he signed an updated DSS case plan. The case plan required he complete parenting classes, obtain a comprehensive clinical

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assessment, submit to random drug screens, provide stable housing for the children, and maintain stable employment.

On 2 November 2020, the matters again came up for review. The court found Respondent-father had made some progress on his case plan—he obtained the comprehensive clinical assessment, had stable housing and employment, and had passed two drug screens. The permanent plan for the children had been and remained reunification with Mother and the concurrent plan was reunification with Respondent-father. Respondent-father was awarded two hours of weekly visitation. The court ordered the parents have no contact with each other.

On 28 January 2021, DSS filed a motion seeking to address prohibited contact between Mother and Respondent-father after finding the two were riding together in a car on 1 January 2021 when Mother was arrested with drugs in the vehicle. As a result of this prohibited contact, DSS filed a motion to show cause and suspend all visitation for both parents.

On 24 February 2021, the matters came on for a permanency planning hearing. Respondent-father had missed a random drug screen as well as a therapist appointment with Taylor, and was living with his girlfriend who also had a history with DSS concerning her children. Although the children remained in DSS custody, visits were to be resumed with Respondent-father.

The case was reviewed again on 30 April 2021. Respondent-father had tested positive for THC on one occasion and had missed another drug screen on 31 March 2021. He also missed several phone calls with his children, had not completed parenting classes, and had been charged with larceny of a firearm, possession of a firearm by a felon, and attaining habitual felon status. The Guardian ad Litem requested Respondent-father resolve his pending criminal charges if he was going to be reunified with the children.

On 3 June 2021, Respondent-father was arrested for threatening phone calls, trespassing, and communicating threats but released the same day. Then, on 9 June 2021, Respondent-father fled the courthouse, where he was meeting with his probation officer, after being informed of an outstanding felony warrant for his arrest. After Respondent-father fled the courthouse, DSS remained unaware of his whereabouts, noting he was not making any progress on his case plan.

At a permanency planning hearing on 20 July 2021, the court changed the permanent plan to adoption and concurrent plan to guardianship due to Respondent-father's lack of progress on his case plan.<sup>3</sup> DSS was also relieved of providing further reasonable efforts to reunify Respondent-father with the children. At some point between this hearing and the termination hearing, Britney Stines replaced Wise as the social worker responsible for the DSS case concerning Respondent-father.

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<sup>3</sup> Plans of reunification with Mother were previously terminated.

Respondent-father was arrested on 9 August 2021 and given a projected release date of 4 March 2022. On 27 October 2021, DSS filed petitions to terminate parental rights as to both parents, alleging neither had made sufficient progress under the circumstances to remediate the conditions which led to the removal of the children.

On 27 January 2022, in Yancey County District Court, the termination petition came on for hearing before the Honorable Rebecca Eggers-Gryder. On 31 January 2022, the trial court entered its order terminating Respondent-father and Mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Respondent-father timely appealed.

## **II. Standard of Review**

This Court will review a district court's adjudication to determine "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 Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

## **III. Analysis**

Respondent-father contends the trial court's findings of fact are not sufficient to support its adjudicatory determination that there existed sufficient grounds to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). Specifically, Respondent-father argues (A) the trial court failed to properly consider the conditions

present from the date of removal through the time of the termination hearing and the obstacles to remediating the removal conditions; (B) the trial court's findings of fact were not based on clear and convincing evidence; (C) the record evidence demonstrates reasonable progress in light of Respondent-father's incarceration; and (D) no grounds for removal were alleged or proved by DSS in the termination proceeding.

**A. Conditions and Obstacles to Remediating Removal Conditions**

Respondent-father contends the trial court failed to properly consider the conditions present from the date of removal through the time of the termination hearing and the obstacles to remediating the removal conditions. We disagree.

Under N.C. Gen. Stat. § 7B-1111(a)(2), a trial court may terminate a parent's parental rights where:

[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) (2021). Our Court, in applying § 7B-1111(a)(2), holds a respondent's conduct is willful when "the respondent [has] the ability to show reasonable progress but [is] unwilling to make the effort." *In re Shermer*, 156 N.C. App. 281, 289, 576 S.E.2d 403, 409 (2003). Further, the nature and extent of a parent's reasonable progress "is evaluated for the duration leading up to the hearing

on the motion or petition to terminate parental rights.” *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006).

When considering a parent’s reasonable progress, “parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist[.]” *In re B.O.A.*, 372 N.C. 372, 384, 831 S.E.2d 305, 313 (2019). However, we recognize that while relevant, compliance is not dispositive, as we have previously stated: “[a] trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the children’s removal simply because of his or her failure to fully satisfy all elements of the case plan goals.” *In re E.C.*, 375 N.C. 581, 585, 849 S.E.2d 806, 809 (2020) (internal quotation marks and citations omitted). Likewise, while “[a] parent’s incarceration is a circumstance that the trial court must consider in determining whether the parent has made reasonable progress toward correcting those conditions which led to removal of the juvenile,” incarceration alone does not preclude or require a finding that the parent willfully left the child in placement outside the home. *In re G.B.*, 377 N.C. 106, 123, 865 S.E.2d 510, 515 (2021) (internal quotation marks and citations omitted).

Here, Respondent-father fails to make an argument beyond simply stating: “The trial court should look at conditions from the removal through the time of the termination hearing and consider obstacles to remediating the removal conditions.”



Nevertheless, we address Respondent-father's contention stated above.

In Finding of Fact 10, the trial court found:

10. . . . That testimony was received from Britney Stines (Yancey DSS); . . . the Petitioner introduced the following exhibit: petitioner 1- [R]espondent[-]father's DSS Case Plan. The [c]ourt has reviewed the prior orders and findings entered from the prior hearings in Yancey County File 13 JA 36 pertaining to the underlying juvenile matter[.]

This finding specifically indicates the trial court's consideration of prior orders and their findings, Respondent-father's case plan, and Stines' testimony at trial—all of which contain evidence concerning both the conditions at the time of removal through the time of the termination proceeding and the obstacles to remediating the removal conditions like Respondent-father's incarceration. Further, in Finding of Fact 22, the trial court found:

the [c]ourt has considered his level of progress for the requisite time prior to the petition and up to the time of the termination hearing[.]

This finding clearly states the trial court reviewed and considered the relevant time period.

Because the trial court properly considered the relevant time period—the time of removal through the time of the termination hearing—and the obstacles Respondent-father faced in remediating the removal conditions, the trial court did not err.

**B. Findings of Fact Based on Clear and Convincing Evidence**

Defendant contends the trial court's findings of fact were not based on clear and convincing evidence because Findings of Fact 10 and 12-20 were entered in prior hearings which required a less stringent standard. We disagree.

North Carolina Juvenile Code requires "a trial court's adjudicatory findings of fact in a termination of parental rights order [to] be based on clear, cogent, and convincing evidence." *In re J.C.*, 380 N.C. 738, 741, 869 S.E.2d 682, 685 (quoting N.C. Gen. Stat. § 7B-1109(f) (2021)). The trial court may, however, "take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard[.]" as long as it does not rely solely on those prior orders but instead receives "some oral testimony at the hearing and make[s] an independent determination regarding the evidence presented." *In re T.N.H.*, 372 N.C. 403, 410, 831 S.E.2d 54, 61 (2019) (citations omitted).

Here, in Findings of Fact 10 and 12-20, the trial court took judicial notice of findings of fact made in previous orders stating:

The [c]ourt has reviewed the prior orders and findings entered from the prior hearings in Yancey County File 13 JA 36 pertaining to the underlying juvenile matter. (Those Orders are set forth hereinbelow in paragraphs 12-20; the findings in these Orders were made by clear, cogent and convincing evidence).

Similarly, the trial court incorporated a statement into Findings of Fact 12-20 maintaining its position stating: "The [c]ourt's findings were made by clear, cogent

and convincing evidence.” The trial court’s findings in the termination of parental rights order must be made by clear, cogent, and convincing evidence. We recognize this standard of proof is higher than that required of the trial court in the prior proceedings and orders of which the trial court takes judicial notice here.

We have repeatedly held that N.C. Gen. Stat. § 7B-1109(f) “implicitly requires a trial court to announce the standard of proof which they are applying on the record in a termination-of-parental-rights hearing[.]” *In re B.L.H.*, 376 N.C. 118, 126, 852 S.E.2d 91, 97 (2020) (“[T]he trial court satisfies the announcement requirement of N.C.G.S. § 7B-1109(f) so long as it announces the ‘clear, cogent, and convincing’ standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court.”). Still, in *In re Church*, the petitioner argued:

[E]ven if the trial court erred by not stating the standard of proof, the error should be deemed ‘harmless error where the [r]espondent-[a]ppellant is not prejudiced and the trial court in fact based its decision upon sufficient evidence and testimony which was clear, cogent, and convincing to the trial court.’

136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000). Our Court held that although there was competent evidence to support the trial court’s findings, the trial court was required to state the proper standard of proof but did not do so and therefore the error could not be harmless.

The instant case can be distinguished from that of *In re Church* in that the trial court satisfied the announcement requirement pursuant to § 7B-1109(f) and only

erroneously overstated the standard of proof applied in the prior orders of which it took judicial notice in its findings. Although we held the error in *In re Church* could not be harmless because the petitioner failed to meet the announcement requirement, we hold the error here was harmless. Not only did the trial court meet the announcement requirement, but even despite its misstatement as to the standard of proof applied in prior orders, it heard sufficient evidence to support Findings of Fact 10 and 12-20.

On direct examination, Stines testified as to Respondent-father's signing of the case plan with DSS and the case plan requirements, his incarceration status as of the date of each hearing, and his progress and lack of progress concerning his case plan—including attended and missed drug screens, visitation with the children, parenting classes, and stable housing and employment.

Even without taking judicial notice of prior orders, the trial court heard sufficient evidence to support its findings and conclusions. The trial court's findings of fact were based on clear, cogent, and convincing evidence and its erroneous statements as to the standard of proof required in each of the prior orders of which it takes judicial notice amounts only to harmless error.

### **C. Record Evidence**

Respondent-father contends the trial court erred in terminating his parental rights because the record evidence demonstrated reasonable progress in light of his

incarceration. Specifically, Respondent-father argues (1) he substantially completed the elements of his case plan, (2) he took action beyond his case plan demonstrating he did not want his children in foster care, and (3) that his current and possible, future incarceration did not demonstrate he willfully left his children in foster care. We disagree.

***1. Respondent-father's Case Plan***

Respondent-father argues the trial court erred in terminating his parental rights because he substantially completed the elements of his case plan.

As mentioned in Section III.A, above, while a respondent's compliance in part with their case plan is relevant, it is not dispositive and therefore does not require a finding of reasonable progress. *In re B.O.A.*, 372 N.C. at 384, 831 S.E.2d at 313; see also *In re E.C.*, 375 N.C. at 585, 849 S.E.2d at 809. Moreover, "[a] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress sufficient to warrant termination of parental rights." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (internal quotation marks and citation omitted).

Here, Stines testified to Respondent-father's initial progress on his case plan stating:

Q. Okay. While he was in custody he was not able to do his parenting classes because he had no Internet

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access; right?

A. Right.

Q. Okay. So what he had done to that point was the AA and NA meetings to your knowledge; right?

A. Right.

The trial court heard evidence both of Respondent-father's work toward completing his case plan, but also the obstacle he faced in having no internet access to take his parenting classes while incarcerated. Further, Stines testified that after Respondent-father's release, he passed several drug screens, maintained stable housing and employment, visited with the children, and was making some progress:

Q. He was really just getting several months into his case plan at that point; right?

A. Yes.

Q. At that point was making some progress; right?

A. Yes.

However, Respondent-father never attended his required parenting classes. Additionally, he missed a drug screen on 27 January 2021; tested positive for THC on 2 March 2021; and failed to appear at his court date on 9 June 2021 with his whereabouts remaining unknown until at least 20 July 2021. DSS noted that during that period, Respondent-father failed to maintain stable housing or employment, had ceased visitation with his children, and failed to attend required drug screenings. Respondent-father was eventually arrested on 9 August 2021 and was again

incarcerated with a projected release date of 4 March 2022.

Although the evidence at trial reflected Respondent-father's initial progress on his case plan, there is sufficient evidence to support the trial court's finding that Respondent-father failed to make reasonable progress under the circumstances.

Limited compliance with a case plan is not dispositive of reasonable progress. Here, because Stines' testimony clearly demonstrated Respondent-father's inability to improve his situation, there was sufficient evidence to support a finding of lack of progress and to support the termination of Respondent-father's parental rights.

## ***2. Actions Beyond the Case Plan's Requirements***

Respondent-father argues the trial court erred in terminating his parental rights because he acted beyond what his case plan required thereby demonstrating he did not want his children in foster care.

As stated above, compliance with a case plan does not require a finding of reasonable progress. See *In re B.O.A.*, 372 N.C. at 384, 831 S.E.2d at 313.

In support of his argument, Respondent-father's brief cites certain instances where he attended court hearings concerning his children, met with Taylor's therapist, and attended Child and Family Team meetings ("CFTs"). Further, Respondent-father notes that he recognized DSS's concerns about his relationship with Mother and filed for divorce. Not only does he argue he filed for divorce, but also that he was only in the presence of Mother on one occasion after doing so—when she

was arrested, with him in the car, on 1 January 2021.

Despite Respondent-father's argument and the instances he offers in support of his argument, we laid out significant evidence from the record in Section III.C.1 which supports the trial court's finding of a lack of reasonable progress. Further, despite some efforts toward progress—attending court hearings and CFTs and filing for divorce—Respondent-father's inability to improve his situation supports both a finding of willfulness and a lack of progress sufficient to warrant termination of his parental rights.

### ***3. Respondent-father's Incarceration Status***

Respondent-father argues the trial court erred in terminating his parental rights because his current and possible, future incarceration did not demonstrate he willfully left his children in foster care.

Respondent-father relies on an unpublished case, *In re T.D.W.*, 259 N.C. App. 423, 812 S.E.2d 913, 2018 WL 2016408 (unpublished), to argue specifically the trial court's Finding of Fact 22 suggested his pending criminal charges showed a lack of reasonable progress but that criminal charges, being inherently transitory, do not constitute evidence of a parenting capacity or future prospects.

Not only is *In re T.D.W.* not binding precedent, but, in that case, this Court was considering whether “the bare finding of [the] respondents’ pending criminal charges [was] insufficient to support the trial court’s elimination of reunification



efforts under N.C. Gen. Stat. §§ 7B-906.2(b), (d).” 259 N.C. App. 423, 2018 WL 2016408, \*6. The issue in *In re T.D.W.* involved the trial court’s decision under a different statute. Even so, the trial court here in Finding of Fact 22 states:

That although the [R]espondent[-]father initially made progress on his case plan, he did not make reasonable progress; he did not maintain stable housing; he is incarcerated for probation violation; has pending felony charges which he has not resolved; has not maintained employment; never provided documentation as to completion of the parenting classes; his visitations are suspended; the [c]ourt has considered his level of progress for the requisite time prior to the petition and up to the time of the termination hearing; that [ ] [R]espondent[-]father had adequate time to comply with his case plan to reunify with the juvenile.

This finding of fact, while including Respondent-father’s incarceration status and pending criminal charges as evidence of his lack of reasonable progress, included a substantial amount of other evidence also suggesting a lack of reasonable progress. Further, the trial court did not make the finding based on “the bare finding of [Respondent-father’s] pending criminal charges” as in *In re T.D.W.* See *Id.*

As noted above, Respondent-father’s present and future, possible incarceration status alone did not lead the trial court to terminate his parental rights. Instead, the trial court properly considered other evidence showing a prolonged inability to improve his situation, supporting both a finding of willfulness and a lack of progress sufficient to warrant the termination of his parental rights.

#### **D. Grounds for Removal Alleged or Proved by DSS**

Finally, Respondent-father contends the trial court erred in terminating his parental rights because no grounds for removal were alleged or proved by DSS in the termination proceeding. We disagree.

Under N.C. Gen. Stat. § 7B-1111(a)(2), a trial court may terminate a parent's parental rights where, *inter alia*, the parent has failed to make reasonable progress in correcting those conditions which led to the removal of the juvenile. N.C. Gen. Stat. § 7B-1111(a)(2) (2021). The conditions which led to the child's removal can be read to include: "both those inherent in the events immediately surrounding the child's removal from the home and any additional underlying factors that contributed to the difficulties that resulted in the child's removal." *In re B.O.A.*, 372 N.C. at 381, 384, 831 S.E.2d at 311, 313-14. Further,

compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home.

*Id.*

While Respondent-father argues the removal conditions were not alleged by DSS, Stines specifically testified as to the removal stating:

Q. That the youngest child, [Noah], was walking down

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the road with maybe a blanket and was unsupervised right?

A. Yes.

Q. No parent around?

A. Right.

Q. Okay. And the officer that went to the scene went to the home to try to locate a parent; right?

A. Yes.

Q. Knocked on the door and nobody answered?

A. Right.

Q. Broke into the house and found an individual named Dakota Renfro (phonetic) who is a relative asleep in the bed; right?

A. Right.

Q. Okay. [Mother] wasn't there?

A. Correct.

Q. Okay. And at that time the Department already had an open assessment on this family as the result of a report that was made two months before on August 29th; right?

A. Yes.

Q. And that concern was that [Mother], while [Respondent-father] was incarcerated, was allowing people with drug histories to be in the home and that the kids weren't being supervised; right?

A. Right.

Q. Okay. And we had a prior DSS history with this

family on child one; right?

A. Yes.

Q. Okay. And one of the issues in that case was domestic violence between the parents; right?

A. Right.

Q. Okay. So DSS filed a petition on October 9th, the following day and assumed custody; right?

A. Right.

This testimony from Stines indicated the conditions which contributed to the removal of the juveniles. Further, as we noted in *In re B.O.A.*, even if there is no direct relationship between the conditions addressed in the case plan and the circumstances which led to the removal, the case plan is still relevant in determining whether grounds for termination exist. As demonstrated above, the record contained sufficient evidence to support the trial court's termination of Respondent-father's parental rights as he failed to make sufficient reasonable progress.

#### **IV. Conclusion**

For the aforementioned reasons, we hold the trial court's findings of fact are supported by clear and convincing evidence and are sufficient to support the termination of Respondent-father's parental rights.

AFFIRMED.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).