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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-826

Filed 15 August 2023

Forsyth County, No. 14JT211

IN THE MATTER OF:

R.D., III

Appeal by respondent-father from order entered 24 June 2022 by Judge Thomas W. Davis V in Forsyth County District Court. Heard in the Court of Appeals 24 May 2023.

Anné C. Wright for respondent-appellant-father.

Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

The Law Office of Matthew C. Phillips, PLLC, by Matthew C. Phillips, for the guardian ad litem.

GORE, Judge.

The underlying court order terminated the parental rights of respondent-father and respondent-mother to the child Ryan.¹ Respondent-father appeals as a matter of right to this Court pursuant to N.C. Gen. Stat. sections 7A-27 and 7B-1001.

¹ We use a pseudonym to protect the juvenile's identity and for ease of reading.

Respondent-mother did not appeal.

Upon review, we determine that the trial court properly concluded that respondent-father's parental rights were subject to termination under N.C. Gen. Stat. section 7B-1111(a)(2) for willfully failing to correct the conditions that led to Ryan's removal. Having affirmed the trial court's adjudication on this basis, our discussion does not reach the merits of whether respondent-father's parental rights were subject to termination under N.C. Gen. Stat. section 7B-1111(a)(1) based on neglect. Additionally, we discern no abuse of discretion in the trial court's best interest determination.

I.

Prior to the removal of Ryan and his siblings, the children were brought to the attention of the Forsyth Department of Social Services ("FCDSS") through multiple child protective services complaints. The complaints alleged substance abuse, injurious environment, and improper care involving Ryan's mother and her three children, then ages seven, four (Ryan) and two. In early 2014, FCDSS determined that respondent-mother was not providing appropriate care, supervision, and basic needs for the children. Respondent-mother's home was filthy, disorganized, in need of repairs, did not have heat or electricity, and there was regularly no food. It was determined that respondent-mother used her money to gamble, smoke weed, buy alcohol, and that she failed to provide food, shelter, and basic needs for the children. In April 2014, respondent-mother voluntarily placed her children in the care of a

relative who served as a temporary safety provider.

In July 2014, respondent-father had established a home for the children, and they went to live with him. The FCDSS remained involved to monitor their progress. On or about 7 August 2014, FCDSS received a report alleging the children were exposed to sexual activity involving their father. The children reported inappropriate sexual contact with their father, and all the children reported witnessing sexual contact between their father and other adults. Additionally, respondent-father admitted he had given the children beer on two occasions. The children were examined at the hospital and the resulting determination was that there was a “very low suspicion of sexual abuse and no physical evidence of abuse.” Respondent-father was not charged criminally as a result of that investigation. Nevertheless, the children were removed from respondent-father’s home by the FCDSS on 26 September 2014 after the filing of juvenile petitions and orders for nonsecure custody.

On 6 March 2015, Ryan was adjudicated to be a neglected child within the meaning of N.C. Gen. Stat. section 7B-101. Respondent-mother and Respondent-father stood mute to the allegations and did not contest the adjudication of neglect. The disposition order presented a plan for the parents to follow if they desired reunification with the children. Respondent-father was required to: (i) complete a psychological evaluation/parenting capacity assessment and follow all recommendations from said assessment; (ii) participate in a substance abuse assessment and follow all recommendations from said assessment; (iii) submit to

random drug and alcohol screens requested by FCDSS; (iv) maintain a safe, stable living environment; (v) demonstrate the ability to budget and meet the financial needs of the children; (vi) participate in the Strong Father program and demonstrate parenting skills learned; (vii) alert FCDSS to any changes in his contact information; and (viii) sign all necessary release forms for monitoring his progress.

During the period from September 2014 through February 2015, respondent-parents regularly visited with the children. Legal guardianship of the children became the permanent plan for Ryan and his sisters in 2016, and both parents agreed that legal guardianship was in the best interest of the three children. Respondent-parents were allowed supervised visitation with the children as ordered by the juvenile court.

After the guardianship of Ryan and his sisters was established, further concerns arose regarding the children. On 19 December 2016, the juvenile court found that the children demonstrated sexually reactive behaviors in the home of their guardians and engaged in sexually reactive behaviors with one another. These behaviors were a recurring pattern of behavior stemming from the children's earlier exposure to sexual activity and neglect. Therapists for the children recommended that they would benefit from placements outside the home of the guardians. Legal custody was returned to the FCDSS on 19 December 2016.

After the children were returned to the custody of the FCDSS, supervised parental visitation was allowed on a regular basis. In 2018, based upon the

recommendation of the children's therapists, visits were suspended as there was a correlation between the parental visits and the sexualized behavior of the children. Respondent-father's last visit with Ryan was on 23 February 2018. His visits were suspended and never reinstated by the juvenile court.

During the summer of 2019, Ryan suffered the loss of his foster home placement of two and a half years when the foster parents determined that they could not offer the child permanence. Respondent-father suffered a series of serious health issues including multiple strokes. The permanent plan for Ryan changed to Adoption on 7 August 2019.

On 5 February 2020, the FCDSS filed a Petition to Terminate the Parental Rights of respondent-parents. A termination of parental rights hearing was delayed initially due to the COVID-19 pandemic. The first hearing was partially conducted on 8 July 2020, and subsequently declared a mistrial.

During 2020, Ryan continued to receive therapy and had one documented incident of sexualized behavior which resulted in a disruption of his foster placement. Respondent-father was convicted of possession of controlled substance and possession of drug paraphernalia in March 2020 and received a probationary sentence. Respondent-father did not comply with requested hair and urine drug testing requested by the FCDSS in June 2020 and March 2021. Respondent-father continued to have ongoing health issues including self-reported seizures, strokes, and a heart attack. He reported that he was noncompliant with follow up medical care and that

he avoided going to the doctor. Respondent-father also discontinued almost all contact with the FCDSS related to Ryan.

Following a hearing on 27 May 2022, the trial court entered an order terminating the parental rights of both parents to their son Ryan on 24 June 2022. Respondent-father filed notice of appeal on 27 July 2022.²

II.

Under the Juvenile Code, the trial court “may terminate parental rights upon a finding of one or more . . .” enumerated grounds. N.C. Gen. Stat. § 7B-1111(a). In this case, the trial court found two grounds existed to terminate respondent-father’s parental rights: neglect under section 7B-1111(a)(1) and willful failure to correct the conditions that led to the removal of the juvenile pursuant to section 7B-1111(a)(2). Respondent-father argues neither of these grounds are supported by sufficient findings of fact. We disagree.

A.

“At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists.” *In re O.J.R.*, 239 N.C. App. 329, 332, 769 S.E.2d 631, 634 (2015) (citation omitted). “This Court reviews a trial court’s conclusion that grounds exist to terminate parental rights to determine whether

² Respondent-father’s notice of appeal was timely as he did not receive a copy of the termination of parental rights order until 26 July 2022. N.C.R. App. P. 3(c)(2).

clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015) (citation omitted).

"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 (2009) (citation and quotation marks omitted). Unchallenged findings of fact are deemed supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "Moreover, erroneous findings unnecessary to the determination do not constitute reversible error where the adjudication is supported by sufficient additional findings grounded in competent evidence." *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014) (citation and quotation marks omitted).

"The trial court's conclusions of law are reviewed de novo." *In re Z.G.J.*, 378 N.C. 500, 509, 862 S.E.2d 180, 187 (2021) (citation omitted).

In reviewing the trial court's order, this Court need only establish that one ground adjudicated is substantiated by adequate findings of fact. *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) ("[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights."); *see also* § 7B-1111(a). "If either of the two grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the orders appealed from should be affirmed." *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52 (cleaned up).

B.

We elect to first review the trial court's adjudication under section 7B-1111(a)(2), which authorizes the termination of parental rights if "[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." § 7B-1111(a)(2).

To terminate rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home.

In re C.M.S., 184 N.C. App. 488, 494, 646 S.E.2d 592, 596 (2007) (citation omitted).

A finding of willfulness in the context of section 7B-1111(a)(2) does not require a showing of fault by the parent; willfulness means "something less than willful abandonment[.]" which "connotes purpose and deliberation." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citation omitted). "Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness." *In re C.M.S.*, 184 N.C. App. 488, 494, 646 S.E.2d 592, 596 (2007) (citation omitted). "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. at 699, 453 S.E.2d at 224 (citation omitted).

“Similarly, a parent’s prolonged inability to improve his or her situation, despite some efforts and good intentions, will support a conclusion of lack of reasonable progress.” *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596 (citation omitted).

1.

In this case, the trial court found that “[respondent-father] has willfully left the child in foster care or placement outside the home for more than 8 years 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 child.” The trial court’s finding of willfulness is supported by competent evidence where the record reflects respondent-father left Ryan in foster care for approximately eight times the relevant statutory period. See *In re Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224.

2.

Regarding the trial court’s finding of failure to make reasonable progress, respondent-father challenges several findings of fact as unsupported by competent evidence in the record. However, in most instances respondent-father essentially (and impermissibly) asks this Court to reweigh the evidence in his favor. Whether conflicting evidence could support an alternative finding is beyond the scope of our standard of review:

it is the trial court’s responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn

therefrom. Because the trial court is uniquely situated to make this credibility determination, appellate courts may not reweigh the underlying evidence presented at trial.

In re G.G.M., 377 N.C. 29, 35, 855 S.E.2d 478, 483 (2021) (cleaned up).

We do, however, note respondent-father's challenge to the last portion of the trial court's finding of fact 40 as an impermissible inference drawn from the evidence presented. Finding of fact 40 reads, in its entirety:

40. Social Worker Jules called [respondent-father] on [24 May 2022]. She requested that he take a drug test on that date and offered to provide him transportation to complete the test. [Respondent-father] was first resistant and would not agree to take the test on [24 May 2022]. On [25 May 2022], [respondent-father] called Ms. Jules and said he needed a bus pass to take the drug test. A bus pass was provided to him by 10:00 am that day. At 1:00 pm, [respondent-father] called Ms. Jules and reported that he needed an appointment to take the test. Ms. Jules determined that he had asked to take a DNA test which required an appointment and that no appointment was needed for the drug test. [Respondent-father] called Ms. Jules for the final time on [25 May 2022] at 4:20 pm and indicated that he had been at the testing site for hours and could not produce a urine sample for the drug test. [Respondent-father] did not ask Ms. Jules during these multiple encounters how his son was doing. The Court finds that [respondent-father's] statement that he could not produce a urine specimen on [25 May 2022] to not be credible. The court surmises that [respondent-father] feared that the drug test would be positive for marijuana and that's why he failed to take the drug test.

Respondent-father asserts the last sentence, "[t]he court *surmises* that [respondent-father] feared that the drug test would be positive for marijuana and that's why he failed to take the drug test[.]" is improper. Here, the trial court elected

to use the term “surmise,” which Merriam-Webster’s online dictionary defines as “to form a notion of from scanty evidence.” *Surmise*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/surmise> (last visited Jun. 13, 2023). The precise word chosen by the trial court indicates a mere guess or possibility arising from consideration of the evidence presented. As such, we may freely disregard this portion of finding of fact 40 on appeal. *Shuford v. Scruggs*, 201 N.C. 685, 687, 161 S.E. 315, 316 (1931) (Adjudicatory findings “must rest upon facts proved, or at least upon facts of which there is substantial evidence, and cannot rest upon mere surmise, speculation, conjecture, or suspicion.”). In any event, this portion is ultimately unnecessary to the adjudication where there are many additional findings grounded in competent evidence. *See In re B.S.O.*, 234 N.C. App. at 708, 760 S.E.2d at 62. Moreover, the trial court’s finding on respondent-father’s credibility in this instance is permissibly “grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence” *Shuford*, 201 N.C. at 687, 161 S.E. at 316.

Further, respondent-father’s asserts FCDSS failed to present any evidence that his use of marijuana rendered him unable to parent Ryan, and the trial court made no findings of fact to that effect. “A finding of fact that a parent abuses alcohol [or drugs], without proof of adverse impact upon the child, is not a sufficient basis for an adjudication of termination of parental rights” *In re Phifer*, 67 N.C. App. 16, 25, 312 S.E.2d 684, 689 (1984). However, there is no indication the trial court

adjudicated grounds for termination based on marijuana use alone. Rather, one of the concerns upon removal of Ryan from respondents' home was the accessibility of substances. Here, the trial court found:

38. Forsyth County Department of Social Services social worker Dara Burleson made an announced home visit to the home of [respondent-father] in 2019 and observed a marijuana blunt and loose marijuana in the home. When the social worker brought this observation to the attention of [respondent-father], he acted like it was no big deal. This demonstrates his ongoing lack of judgement.

It is evident from the trial court's finding of fact that respondent-father's substance use, tendency to avoid required drug tests, and statements that "his use of marijuana had no bearing on his parenting ability," merely demonstrate respondent-father's failure to acknowledge or correct conditions that led to Ryan's removal.

Similarly, the trial court found:

39. Forsyth County Department of Social Services social worker Pierrette Jules made an unannounced visit to the home of [respondent-father] on [19 May 2022]. She observed his apartment to be "rough". She determined that the home was not only not safe and appropriate for [Ryan], it was not safe and appropriate for [respondent-father] either. She noted mold on the ceilings, multiple spider webs on the cooking pots and utensils, cracks on the wall and the foundation appeared to be unsafe. It appeared that things in the kitchen hadn't been moved in a long time. [Respondent-father] told social worker Jules that he planned to move soon and had received a Section 8 voucher. [Respondent-father] provided Ms. Jules with his new phone number at that meeting. [Respondent-father] did not ask Ms. Jules at this home visit how his son was doing.

Ryan was removed for the second time from respondent-father's home in late

2017, and in that time, respondent-father had nearly five years to obtain a suitable living environment for Ryan. The presence of spider webs on pots and utensils, mold on the ceiling, and cracks in the foundation, are not to be viewed in isolation. Rather, these facts demonstrate respondent-father's failure to understand the conditions that led to the removal of his children, and failure to obtain a safe, stable living environment. This combination of facts, along with the respondent-father's insufficient compliance with his case plan, demonstrates a prolonged inability to make reasonable progress in correcting the situation that led to Ryan's removal. *See In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596.

We determine that the trial court's finding of grounds to terminate respondent-father's parental rights under N.C. Gen. Stat. section 7B-1111(a)(2) is supported by clear, cogent, and convincing evidence in the record. Accordingly, our determination obviates a discussion of neglect under section 7B-1111(a)(1).

III.

Respondent-father argues the trial court's best interest determination should be reversed because of Ryan's low likelihood of adoption. We disagree.

"After an adjudication that one or more grounds for terminating a parent's rights exist, the [trial] court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a). The trial court must consider the juvenile's age; the likelihood that the juvenile will be adopted; whether termination will help to achieve the permanent plan; the bond between the parent

and the juvenile; the quality of the relationship between the juvenile and any potential adoptive parent; and any other factor that the trial court determines is relevant. *Id.* “The trial court’s assessment of a juvenile’s best interest at the dispositional stage is reviewed only for abuse of discretion.” *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (citation omitted).

Here, the trial court found:

74. The likelihood of Adoption for [Ryan] is at least possible. The [FCDSS] social worker believes that it is possible and the Guardian ad Litem for the child reported that adoption is not impossible for [Ryan]. While there is not a currently identified prospective adoptive family for [Ryan], he has lived with this current foster family for almost 2 years. [Ryan] is extremely bonded to his foster family as they are to him.

While Ryan is not currently in a prospective adoptive home, our Supreme Court has stated “that the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.” *In re A.J.T.*, 374 N.C. 504, 512, 843 S.E.2d 192, 197 (2020). Our review of the record reveals that the trial court weighed the appropriate factors as required by section 7B-1110(a), and that each of the trial court’s dispositional findings are supported by competent evidence presented at the dispositional portion of the termination hearing. We are satisfied that trial court’s best interest determination was neither arbitrary nor manifestly unsupported by reason.

IV.

IN RE: R.D., III

Opinion of the Court

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).