

No. COA05-71

FOURTEENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF :
S.B.M.

From Durham County
No. 03 J 23, 03 TPR 23

PETITIONER - APPELLEE'S BRIEF
GUARDIAN AD LITEM - APPELLEE'S BRIEF

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STATEMENT OF THE FACTS

In an action, 99 J 356, in Cumberland County District Court, S.B.M. was adjudicated to be a neglected child on or about February 21, 2000, and placed in the custody of the Cumberland County Department of Social Services. (R. pp. 16-18) The Appellant was represented by counsel. (R. p. 16) A dispositional hearing was held on March 20, 2000, at which time paternity testing was ordered, paternity being an issue, and Cumberland DSS was authorized to place the child with the paternal grandmother. (R. p. 21) A review hearing was held in Cumberland County on June 26/ 2000, and the matter was transferred to Durham County, as the mother was living in Durham County.

The Appellant was present at the review hearing. (R. pp. 24-25) At the time of the June 2000 review hearing, the child was residing with the paternal grandmother in Durham and the father was incarcerated in the North Carolina Department of Corrections. (R. p. 22) On January 17, 2001, the matter was reviewed and a permanency planning hearing was held in Durham County pursuant to a motion for review, filed by the Durham County Department of Social Services (Durham DSS) in the action, now numbered 00 J 242. (R. pp. 26-34) At that time, the father was not incarcerated and did not appear. The Order, as it related to the Appellant,

provided that he was not to live in the paternal grandmother's home and not have unsupervised contact with the child. (R. p. 33) At the April 11, 2001 review of the permanent plan, the Appellant was not incarcerated and did not appear. In addition to previous orders, the Appellant was ordered to receive sex offender treatment. (R.pp. 42-43) On September 5, 2001, a further permanency planning review was held. The Appellant's parole had been revoked and he had been returned to prison. The Court found that the paternal grandmother was not able to protect herself or the child from the Appellant because she allowed unsupervised contact by the Appellant with the child and that the Appellant was violent towards the paternal grandmother. (R. pp. 56-57) In addition to previous orders, the Court ordered that the child's placement change prior to the Appellant's release further prison, and that his visitation be as recommended by the child's therapist (R. p. 58)

On December 5, 2001, another permanency review hearing was held. The Appellant was not incarcerated. (T. p. 33, lines, 6-10) and did not appear at the hearing. (R. p. 66) The Order remained unchanged as to the Appellant. (R. pp. 67-68) The child was removed from the paternal grandmother's home on December 19, 2001 and placed in foster care. (R. p. 71) At the May 29, 2002 permanency review, it is unclear whether or not the

Appellant attended. At said hearing, the permanent plan was changed to adoption with a concurrent plan of guardianship to a court approved caretaker. In addition to previous orders, the Appellant was further ordered to obtain stable employment and housing. The Court found that the matter should be referred to Permanency Planning Mediation. (R. pp. 80-82) A mediation was held on July 15, 2002, which the Appellant was invited to, but did not attend. (T. pp. 90 lines 24-25, 91, lines 1-5, and 12-13)

Another permanency review hearing was held on October 28, 2002. The Order remained the same as the previous order with the addition that DSS not file a termination petition until the cousins who had placement of the child decided that they wished to adopt. (R. p. 92) At the January 21, 2003 permanency review hearing, the Order remained the same. (R. p. 100) The Appellant was arrested on May 8, 2003. (R. p. 136) and released June 24, 2003. (T. p. 30, lines 18-22) The Appellant was arrested again on November 7, 2003. (R. p. 140) The termination of parental rights petition was filed on July 3, 2003. (R. p. 117) The matter was reviewed on July 22, 2003, and the order remained unchanged. (R. p. 108) Counsel was appointed for the Appellant on August 5, 2003, the time to answer the petition was extended until October 27, 2003, and the hearing on the termination petition was continued until November 5, 2003. (R. p. 134) The answer was timely

filed on September 30, 2003. (R. p. 135) The mother relinquished her parental rights on November 19, 2003, and has not revoked said relinquishment. (T. p. 67, lines 1-5) The November 5, 2003 court date was changed to November 19, 2003 due to a scheduling error. (R. p. 139) The Appellant again requested a continuance of the November 19, 2003, court date due to his recent arrest and need for advice of counsel regarding the criminal matter. (R. p.p. 140-141) The December 17, 2003 hearing date was continued due to the Appellant being evaluated in a treatment facility. (R. p. 143) The matter was reviewed for permanency planning the last time on January 20, 2004. The appellant was represented by counsel appointed for him in the termination proceeding. (R. p. 115) From the time that the Appellant was first released from prison, the Appellant met with the different DSS social workers and was informed about what steps he needed to take regarding the child. (T. p.35, lines 18, 19, p. 36, lines 1-3) The Appellant was aware of the requirement to attend sex offender treatment before he could be considered for placement of the child (T. p. 38 Lines 9-13) and before he could have visitation with the child. (T. p.47, lines 6-9) The Appellant did not have sex offender treatment from the time he was released from prison after the parole violation in November 24, 2001 until November 7, 2003, when he was 'arrested on new charges. (T. p. 47)

During the times that he was not incarcerated, the Appellant had numerous jobs (T. pp. 29-30) and did not provide any financial support for the child. (T. p. 46, lines. 14-16) The Appellant has not seen the child since he went back to prison in May 2001. (T. p. 48) The Appellant accompanied the child to her first therapy appointment and was informed by the therapist, that as a convicted child sex offender, he was not allowed to be in their waiting room where children were present. (T. p. 59) The therapist recommended no contact by the Appellant with the child based upon the child's statements in therapy that she was fearful of the Appellant and continued said recommendation at the time the child's treatment terminated. (T. pp. 62-63)

The child has lived with her foster parents who are maternal cousins, since June 28, 2002. (R. p. 112) Residing in the same home are the child's twin half-siblings who the foster parents are in the process of adopting. (T. pp. 150-151, lines 22-25, 1-2) The foster parents intend to adopt S.B.M. (T. p. 151, lines 5-7) The child wishes to be adopted by the foster parents and to have her last name changed to their last name. (T. p. 151, lines 14-19)

During her therapy, the child made repeated statements to her therapist that she was afraid of the Appellant and did not want to live with him. (T. p. 62, lines 3-5) The child no longer needs individual or family therapy. (R. p. 161)

ARGUMENT

I. THE TRIAL COURT'S ORDER TERMINATING THE PARENTAL RIGHTS OF THE RESPONDENT/FATHER DID NOT VIOLATE THE PROVISIONS OF N. C .G. S SECTION 7B-1110 (A) AS THAT SECTION IS DIRECTORY AND NOT MANDATORY AND NO PREJUDICE TO THE APPELLANT IS SHOWN. ASSIGNMENT OF ERROR NO.1. R. p. 157-162

North Carolina General Statute section 7B-1110(a) (2001) provides that: “Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.” The hearing on the motion to terminate the father's parental rights was held on February 18, 2004, the order was announced in open court on that date, signed on July 22, 2004 and filed on July 27, 2004. The Appellee stipulates that the order was not filed within thirty (30) days of the hearing. This Court has recently held in *In re J.L.K.*, --- N.C. App. ---, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004), that there was no reversible error where the termination of parental rights order was not reduced to writing, signed, and filed within thirty (30) days following the completion of the termination of parental rights hearing.

The Court noted that

[w] hile the trial court’s delay clearly violated the 30-day provision of N.C. Gen. Stat. § 7B-1109(e), it could find no authority compelling that the TPR order be vacated as a result. Further, we reject respondent’s assertion that because section 7B-110 (e) provides that a TPR order ‘shall’ be reduced to

writing, signed, and entered within 30 days, this Court's decision in *In re Alexander*, 158 N.C. App. 522, 581 S.E.2d 466 (2003) requires that we vacate the TPR.

Id. at 390. The Court distinguished *Alexander* as the statute at issue had involved two interlocking statutes and notice requirements for the parents which implicate a fundamental right, unlike the 30-day provision at issue in the case at bar. The statute in *Alexander* was further distinguished as directing the petitioner, whereas the instant statute directs the trial court. *Id.* at 391. More importantly, after distinguishing *Alexander* on the basis of the manifest differences in the statutes, the *J.L.K.* Court specifically held that based upon the facts in the case, vacating the termination of parental rights order is not an appropriate remedy for the trial court's failure to enter the order within 30 days of the hearing. *Id.* at 391. (Emphasis added). The Court of Appeals viewed the transcript and found that the trial judge had stated that neglect and abandonment had been proven by clear, cogent and convincing evidence as the grounds upon which respondent's parental rights were being terminated and that written notice of appeal was filed before the termination of parental rights order was reduced to writing, signed, and entered, and that the Respondent had failed to demonstrate that he suffered any prejudice by the trial court's delay. *Id.*

In the case at bar, the Appellant has similarly failed to show that any

prejudice to Appellant exists. Appellant filed two written notices of appeal, both before and after the filing of the written order, (R. pp. 163-165) and Appellant's right to appeal has not been affected by the timing of the writing, signing or filing of the termination of parental rights order. At the termination of parental rights hearing, the Appellant was incarcerated pending trial and remains so. He is thus unable to provide a home for or even visit with the child. Counsel for the appellant assumes, in her argument that he will be convicted. (Appellant's brief p. 12) Speedy resolution of the appeal will not benefit him in any way. He may actually have inadvertently been benefited by any delay in the resolution of this matter until he knows for certain that he has been convicted.

II. THE TRIAL COURT CORRECTLY FOUND FACT NUMBER 25 BY FINDING THAT THE RESPONDENT/FATHER "DID NOTHING DURING THE PERIODS OF TIME THAT HE WAS NOT INCARCERATED TO PURSUE SEX OFFENDER TREATMENT."

III. THE TRIAL COURT CORRECTLY FOUND FACT NUMBER 27 BY FINDING THAT THE RESPONDENT/FATHER "DID NOT TAKE ACTIONS NECESSARY TO CORRECT THE CONDITIONS THAT LED TO THE REMOVAL OF THE CHILD" AND THAT "HE DID NOT DO ANYTHING TO IMPROVE HIS SITUATION SO THAT HE COULD VISIT." Assignment of Error Nos. 2 and 3 R. P. 161

Arguments II and III are argued together.

There is a presumption in favor of the correctness of the trial court proceedings in termination of parental rights orders. *In re Moore*, 306 N.C.

394, 403, 293 S.E.2d 127, 133 (1982). The burden is on the appellant to show error. *Id.* A factual determination is conclusive upon appeal if it is supported by any competent evidence. *Prescott v. Prescott*, 83 N.C. App. 254, 258, 350 S.E.2d 116, 119 (1986).

Here, the trial court's facts numbered 25 and 27 were supported by competent evidence and there was no error. In this case, Appellant was ordered by the trial court to receive sex offender treatment beginning April 11, 2001. (R. pp 42 43) He was incarcerated from May, 2001 to November, 2001. From November, 2001 to November 7, 2003, he was not incarcerated except for a brief period from May 8, 2003 (R. p. 136) to June 24, 2003. (T. p. 30, lines 18-22) After he was arrested on November 7, 2003, he remained incarcerated up to and during the hearing on the motion to terminate parental rights. (T. p. 25, lines 1-8) For the two years he was not incarcerated, Appellant failed to attend any sex offender therapy. He testified that he did not attend because he was unable to afford therapy. (T. p. 47, lines 15-18) Yet, in April, 2003, when the social worker referred the Appellant to Carolyn Kardasco for sex offender therapy, Appellant told the social worker he could afford the expense. (T. p. 80, lines 7-12). He was working as a nurse's assistant, a job he had for almost a year prior to April, 2003. (T. p. 69, lines 13-15 and T. p. 30). Clearly, he could have afforded the treatment

prior to April, 2003. Yet, he did not have a screening until August, 2003 and failed to attend the follow-up appointment scheduled for October, 2003. (T. p. 37, lines 15-18.) This inaction prevented any consideration by the court of reinstating visits between Appellant and S.B.M.. Appellant was informed and knew what he needed to do to reinstate visitation. (T. p. 78 and T. p. 47) The child's therapist further testified that she could have recommended visits if the father had received therapy. (T. pp. 63-64) Therefore, facts numbered 25 and 27 were supported by competent evidence.

Further, these findings and others support conclusion number 8, that the father has willfully left the child in foster care for more that twelve (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 child." (R. p. 162) This Court has held that "willfulness" under this statute constitutes less than willful abandonment and does not require finding of fault by parent. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). The court can find willfulness where a parent tries to recover custody of the child but does not exhibit "reasonable progress or a positive response." *Id.* at 440. This court has held that if parents were not required to demonstrate both positive efforts and positive results, a parent could forestall termination

proceedings indefinitely by making sporadic efforts for that purpose." *In the Matter of B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004). It is not disputed that S.B.M. has been left in foster care for over 12 months. The trial court has found by clear, and convincing evidence, as required by N.C. Gen. Stat. § 7B-1111(b), that Appellant has not made sufficient progress to correct the conditions that led to S.B.M.'s removal. At the time of the child's removal, Appellant was incarcerated. He was again incarcerated at the hearing to terminate his parental rights. He had received no sex offender treatment. Although he had employment for several months at a time, his efforts were not reasonable progress. This Court has held that a parent's mere efforts are insufficient to overturn an order for termination of parental rights absent progress. This Court has held that extremely limited progress is not sufficient progress to overturn a trial court's order for termination of parental rights. *In the Matter of Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989). This Court upheld a termination of parental rights order, even though the respondent mother made some efforts, because the evidence supported the trial court's determination that she did not make sufficient progress in correcting conditions that led to the child's removal." *In re Fletcher*, 148 N.C. App. 228, 235-36, 558 S.E.2d 498, 592 (2002).

Although the Appellant in the case before the court has maintained

employment, he has not corrected the conditions that led to S.B.M.'s removal. Although he testifies he has attempted to obtain sex offender treatment, he has not demonstrated adequate progress to constitute error.

IV. THE TRIAL COURT DID NOT ERR IN CONCLUSION OF LAW NUMBER 9 IN THAT THE CONCLUSION IS SUPPORTED BY THE EVIDENCE. ASSIGNMENT OF ERROR NO.4 R. p. 162.

The failure to pay child support ground requires a consideration of the appellant's actions and abilities for the six (6)month period prior to the filing of the petition.

The juvenile has been placed in the custody of a county department of social services, . . . and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. 7B-1111 (a) (3). (Emphasis added) The petition was filed on July 3, 2003. (R. p. 117) Therefore, the relevant time period is January 2003, to July 2003. During that time, the child was living in a foster home and not with the paternal grandmother. (T. p. 150) A parent is required "to pay that portion of the cost of foster care for the child that is fair, just, and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592; 604, 281 S.E.2d 47, 55 (1981). In *Clark*, the court recognized that the "reasonable portion" standard is often a difficult standard to apply, but the court had no difficulty concluding that zero is not a reasonable portion under

the circumstances. *Id.* The evidence at trial was that the Appellant had paid nothing whatsoever (T. p. 46, lines 14-16) despite having worked, according to his own testimony, as a nurses' aide for approximately one year, (T. p. 29, line 10, p. 30, lines 6-8) earning \$8.00 per hour for 40 hours per week (T. p. 30, lines 1-5) During part of that time, he was living with his grandmother and uncle (T. p. 25, lines 19-21) The Court found that based upon his earnings and living arrangement at the time that the Appellant could afford to make some payment. (R. p. 162) Prior to that time, Appellant had offered to bring clothing and other necessities to the child and was instructed to bring them to DSS. He did not do so. (T. pp. 89-91) His offer is some evidence that he had the ability to pay for items and yet did not do so, or at least, did not follow through with delivery. Under these circumstances, zero is not a reasonable portion to pay. Therefore, there is sufficient evidence of this ground to terminate parental rights.

V. THE TRIAL COURT DID NOT ERR IN CONCLUSION OF LAW NUMBER 10 IN THAT THE CONCLUSION IS SUPPORTED BY THE EVIDENCE. ASSIGNMENT OF ERROR NO.5. R. P. 162.

The ground of abandonment also requires a consideration of the Appellant's actions for at least six consecutive months prior to the filing of the termination petition. "The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the

petition or motion." N.C.G.S. 7B-1111 (a) (7). Appellees agree that "the determination of willful abandonment is a fact-specific inquiry." *In the Matter of M.L.*, COA03-441 (June 15, 2004), 600 S.E.2d 898 (2004). Appellees agree that "[A]bandonment imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child[.]" *In re A.M.*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982). Appellees further agree that: "[t]he word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citing *In re Clark v. Jones*, 67 N.C. App. 516, 313 S.E.2d 284, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 128 (1984)). The converse of *Apa* should also apply in that mere statements of good intentions and blanket expressions of caring made to third parties from time to time should not be considered sufficient to qualify as "conduct that evinces a settled purpose to assume any parental duties" or to provide the love, support and nurturance that a child needs and deserves on a consistent basis. During the relevant statutory time period (January 2003 to July 2003), the Appellant was only in jail for approximately six weeks. (R. p. 136, T. p. 30, lines 18-22, R. p. 140) During the relevant time period, the Appellant was employed. (T. p. 30) During that

time, the Appellant did not engage in sex offender treatment so that he could visit with his child. (T. pp. 32, 77, 80) The only appointments for sex offender treatment that the Appellant scheduled were after the filing of the termination of parental rights petition and those were not kept. (R. p. 161) During that time, the Appellant did not provide gifts or money for the child. (T. p. 46, lines 14-16, pp. 89-91) There is no evidence of any actions taken by the father after October 2002, until April 2003, when he contacted social worker, Ann Marie Burke. (T. p. 92 lines 21-25, p. 93, lines 1-2) The father had not seen the child since December 2002 and the trial court found that he did not do the things he needed to do in order to see the child. (R. p. 161) The trial court did not find that the abandonment occurred at the time of the adjudication of the neglect, nor are the Appellant's actions through September 2002, as argued in Appellant's brief, relevant. (Appellant's brief, pp. 16-17). The trial court correctly noted the specific facts and properly concluded abandonment. Additionally, the cases cited by Appellant refer to imprisoned parents. As previously noted, the Appellant was not imprisoned during the time period that is relevant to establish the ground in the case at bar.

Appellant has cited *In the Matter of: A.N.B.*, COA03-501 (August 3, 2004), 601 S.E.2d 331 (2004), which is an unpublished case that can only be

cited in the absence of any published opinions on point. Further it can be distinguished in that the parent in *A.N.B.* was under an order to have absolutely no contact with the child. In the case at bar, while the Appellant was not permitted visitation with his child, he was informed of what he needed to do to reinstate visitation with the child. (T. pp.78, 91-92) He failed to take those actions. He claimed that he could not afford to take sex offender treatment, but even after an affordable program was found for him, he did not engage in treatment. He received the referral information in April 2003, went to a screening and then missed two appointments. (T. pp. 77, 80) By his arrest in November, he had not yet begun treatment. (T. p. 32) It is clear from his actions after learning of an affordable program that he was not taking deliberate or purposive actions to regain contact with his child. The conclusion of law as to the ground of abandonment is supported by the evidence.

CONCLUSION

A finding of any one of the enumerated grounds is sufficient to support termination. *In re Pierce*, 67 N. C. App. 257, 312 S.E.2d 900 (1984). “If a conclusion that grounds exist under any subdivision of this section is supported by findings of fact based on clear, cogent and convincing evidence, the order terminating parental rights must be affirmed.” *In re*

Ballard, 63 N.C. App. 580, 586, 306.S.E.2d 150, 156 (1983), *rev'd on other grounds*, 11 N.C. 708, 319 S.E.2d 227 (1984); *In re Swisher*, 74 N.C. App. 239, 328 S.E.2d 33 (1985). Even if the appellate court determines that one or two of the three grounds was not supported by clear, cogent and convincing evidence of that the conclusion, it must still affirm the trial court's order based on the other ground.

VI. THE EVIDENCE WAS SUFFICIENT TO SUPPORT CONCLUSIONS OF LAW 11,12, AND 13 AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT IT WAS IN THE CHILD'S BEST INTERESTS TO TERMINATE APPELLANT'S PARENTAL RIGHTS. ASSIGNMENT OF ERROR NO.6 R. p. 162

Appellant presented no evidence at the termination hearing that termination was not in the best interest of the child. (T. P. 160, lines 17-19)

Conclusion of Law number 11 is thus supported by the evidence.

Once a petitioner meets its burden of proof at the adjudicatory stage, the court's decision to terminate the parental rights is discretionary... At the dispositional stage a court is required to issue an order of termination unless it determine[s] that the best interests of the child require that the parental rights of such parent not be terminated.

In re Parker, 90 N.C. App. 423, 431, 368 S.E.2d 879, 884 (1988). In the instant case, there was clear cogent and convincing evidence of D.S.S.'s plan of adoption by the foster parent relatives who were in the process of adopting the child's two half-siblings and with whom the child had been living since June 28, 2002, and where she was doing well and by whom she

wished to be adopted, (R. p. 150, lines 17-25, p. 151, P 157 lines 18-25) to support Finding of Fact number 28. (R. p. 161) Finding of Fact number 28 is sufficient to support either or both Conclusions of Law numbers 12 and 13. Appellant's argument speaks in terms of what has not been shown regarding the Appellant. (Appellant's brief p. 23) That argument more properly addresses grounds for termination, rather than the best interests of the child. As the trial court heard and considered evidence regarding the best interests of the child, found specific facts regarding the circumstances of the child and the plan for the child and concluded that it was in the best interests of the child that her father's rights be terminated, there is no abuse of the trial court's discretion.

CONCLUSION

For the reasons stated above, the trial court's order terminating respondent's parental rights should be upheld and the respondent's appeal should be dismissed.

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CERTIFICATE OF SERVICE

This is to certify that we have this day served a copy of the foregoing PETITIONER APPELLEE'S and GAL-APPELLEE's BRIEF upon counsel for the respondent by depositing a copy thereof in the United States mail, first class and postage prepaid, addressed as follows:

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This the 6 day of March, 2005.

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