

NO. COA06-1299

TWENTY SIXTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:
J.J., T-A.J., T-E.J.,
Minor children.

From Mecklenburg County
File Nos. 06 J 67-69

BRIEF FOR THE GUARDIAN AD LITEM

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STATEMENT OF THE FACTS

The Respondents, Charlene I. and Ta-Ha J., are the natural parents of daughter T-A.J., age 8, son T-E.J., age 7 and son J.J., age 6. (Supp. R p. 99). The Respondents never married. (T p. S17, lines 20-23). Charlene I. has two other children; a daughter Dominique, age 15 whose father is unknown and a daughter, Justice, age 5, whose father is Napoleon I. (Supp. R p. 99). Charlene I.'s two other children are placed in guardianships with family members. (R p. 40). The father, Ta-Ha J. has two other children; a son Hateem, age 7 and a daughter, Sakina, age 4, (T p. 517, lines 4-25 to T p. S18, lines 1-8) whose mother is Kimberly King. (T p. 517, lines 9-11).

From 9 March 1992 until 27 March 2001, there were 11 reports received by CPS in New York State concerning the family. From 24 October 1995 until 28 January 2004 there were 9 reports received in North Carolina, with 3 being substantiated and case services initiated. (T p. 105, lines 18-24). During these years, the mother had criminal convictions for embezzlement, carrying a concealed weapon, felony food stamp fraud, and possession of a stolen vehicle. (T pp. 790-792). The father, Ta-Ha J. was in prison in the early 1990s, 1998 and 1999 for various weapon and drug offenses. (T p. 528; Supp. P. 188). In 2001, the father, Ta-Ha J. was convicted of felony robbery with a dangerous weapon and incarcerated

continuously since that date. (R p. 38). During March of 2003, the mother was found guilty of two counts of felony embezzlement and placed on probation. (T p. 638, lines 8-19). She was later convicted of obtaining property by false pretenses, which was consolidated into her sentence. (T p. 771). In December of 2003 and January of 2004, Mecklenburg County YFS (DSS) received reports of abuse and neglect by the mother. (T p. 104, lines 11-21). At that time, the mother was married to Napoleon I. who is the father of her youngest child. (R p. 37). Mr. I. was physically abusive and violent to Charlene I. and her children and was involved in drug use with crack cocaine and other criminal activity. (R pp. 37-38; T p. 753, lines 11-17). The mother began moving from place to place with her children to avoid Mr. I. (R p. 37). Dominique, age 13 at the time, assumed most of the parenting role for her brothers and sisters, including bathing, child care and feeding. (R p. 38). In December of 2003, Mr. I. entered the home and punched 13 year old Dominique in the face with his fist. (R p. 38). The mother did not protect the child, did not call the police for fear she would be arrested (there was a warrant out for the mother's arrest for communicating threats and probation violation) and did not seek medical attention for her daughter. (R p. 38). Dominique called the police and the mother refused to allow the police to enter the home and then went into hiding. (R p. 38).

On 4 February 2004, Mecklenburg County YFS (DSS) filed a petition for all five children alleging neglect and dependency. (R p. 37). All five of the mother's children were adjudicated neglected and dependent on 6 April 2004. (R p. 37, Supp. R p. 134) and placed into foster care. YFS entered a case plan with the mother wherein the mother agreed to complete an assessment for substance abuse and mental health and follow treatment recommendations, complete parenting education, complete mental health counseling, resolve her criminal charges, refrain from further criminal activity and obtain housing and employment. (R p. 38).

The three children of this appeal were evaluated and treated for ADD, depression and physical aggression and sexual acts with each other and their younger sister, Justice while in foster care. (R p. 40). At the time of the termination trial, T-A.J. was taking Prozac for depression, J.J. was taking Adderall and Clonidine for aggression and ADD and T.J. was taking Concerta for ADHD. (T p. 159, lines 17-23; T p. 160, lines 1-17). All three children receive counseling and therapy. (T p. 188, lines 11-25).

In May of 2004, the mother was convicted of communicating threats against Kimberly King, who has two children by Mr. J. and one child by Mr. I. (T p. 738, lines 24-25 to T p. 739, lines 1-12). The mother was also convicted of injury to personal property. (T p. 789, lines 24-25 to T p. 790,

lines 1-3). In June of 2004, the mother began serving an active sentence for her probation violation which would run until February of 2005. She was placed on work release in October of 2004. During work release, she was employed at Shoney's and Honey Baked Ham. (T p. 178, lines 15-17; T p. 179, lines 1-6). During work release, the mother was allowed supervised visits with the children. (R p. 40). However, the mother violated rules of that program by possessing a cell phone, charger and someone else's checkbook and was terminated from the work release program. (R p. 39). Her sentence was extended until 11 June 2005. (R p. 39). During her incarceration, the mother wrote letters to YFS indicating her displeasure with the agency's decisions in her case and stating that placing Justice with her paternal grandparents would "start a war" (T p. 145, lines 5-25 to T p. 146, lines 1-3).

On 8 June 2005, the three children, T-E. J., T-A. J. and J.J. were placed with their maternal grandmother and step-grandfather to determine if guardianship were possible and to allow more contact with the mother after her release from jail. (R p. 40). Mrs. I's eldest daughter was placed into guardianship with a maternal aunt and the youngest son was placed into a guardianship with his paternal grandparents. (Rp.40). After this placement and increased involvement between the three J. children and their mother, the children began to exhibit increased misbehavior and mental health

issues. (R p. 40).

In November of 2005, YFS received information that the children had been returned to the primary care of the mother without the knowledge or agreement by YFS or the court. (R p. 40). On 18 November 2005, the children were placed back into foster care due to the violation of the court order. Visitation with the mother was ceased. (T p. 153, lines 14-19). After the children returned to foster care, regular mental health therapy and limited contact with their mother, their behaviors improved. (R p. 40). At trial, the eldest daughter had returned to live with the mother without YFS' knowledge or agreement and in violation of the court order. (R p. 40). The mother had enrolled her daughter in high school and the mother's address was on the school enrollment form. (R p. 40).

At trial, T-E.J. testified that he and his siblings had spent nights with their mother at the mother's house and that she took them to school. (T p. 209, lines 25 to T p. 206, lines 1-2). At trial the mother testified that she was living in a two bedroom apartment. (T p. 708, lines 5-17). The mother testified that she had been employed as a private duty home health aide for two months after previously working continuously at a temp agency, Bob Evans and a thrift store. (T p. 709, lines 21-25; T p. 710, lines 10-25). She had not paid any amount as child support to YFS or D.S.S. and had never

offered to pay any amount to YFS. (T p. 242, lines 7-11). She refused to provide any information to D.S.S. about her employment or income. (R p. 40). This refusal directly violated a December 2005 order requiring her to give financial information to DSS within 10 days. (T p. 882, lines 8-17, Supp. p. 377). During the course of the case, YFS spent \$64,000.00 for the children. (T p. 237, lines 12-24). At trial, the social worker testified that during the six months preceding the filing of the termination proceeding, YFS had spent \$15,092.91 for the three children. (T p. 237, lines 12-24; R p. 40). The mother testified that she had worked at a thrift store when released from jail in June of 2005 and that she had provided some money to her mother when the children were living there, although the mother could not say how much money she gave her mother and offered no other proof of any amounts given. (T p. 654, lines 1-23; T p. 655, lines 2-4).

At trial, the mother testified that Napoleon I. had punched Dominique in the face on at least two occasions although she had never told the case workers this before. (T p. 747, lines 5-20). At trial, the mother admitted that she had knowingly falsified a divorce complaint in New York in order to obtain a divorce from Napoleon I. (T p. 750, lines 1-15). The mother completed her mental health assessment and began attending mental health therapy with Dr. Hancock prior to her incarceration. He diagnosed her as

having adjustment disorder with mixed disturbance of emotion and contact, traits consistent with paranoid schizoid, borderline and antisocial traits. (T p. 30, lines 6-14). The mother attended mental health inconsistently, attending 27 of 41 appointments (R p. 39). She did not discuss with Dr. Hancock the issues related to her involvement with D.S.S. and only discussed with him self esteem and anger management issues. (R p. 39). She did not seek any mental health therapy for the issues that led to the placement of the children in DSS custody. (R p. 39). While in jail, the mother completed a few other self-improvement courses. (R p. 39). After her release from jail in June of 2005, the mother completed a domestic violence program on 18 October 2005. (T p. 111, lines 6-17). She was allowed supervised visits with the children but after Dominique resumed her parenting role, the mother requested that visits with Dominique end. (T p. 127, lines 1-13). The mother never completed the parenting program. (T p. 111, lines 15-17). She did not keep in contact with her social worker and never provided YFS with proof of employment or income even though she had obtained both after her release from prison. (R p. 39).

The natural father has been in prison the entire time the children have been in DSS custody. (T p. 127, lines 18-22). He is not scheduled for release from prison until 2013. (T p. 130, lines 1). He has prior convictions for

armed robbery and kidnapping, marijuana possession, and carrying a concealed weapon. (T p. 530, lines 1-7; Supp. pp. 77-82). The father never entered a case plan with YFS. (T p. 127, lines 23-25). The father did contact the social worker on one occasion to ask permission to write to his children. (T p. 128, lines 3-9). He never responded to any other letters sent by the social worker. (T p. 128, lines 5-6). He wrote to T-A.J. twice and J.J. once and on some occasion wrote directly to the maternal grandmother when the children were with her. (T p. 128, lines 10-25). He has not written to the children since at least November of 2005. (T p. 128, lines 24-25). He testified that his only contact with the children was by asking questions about them from third parties. (T p. 521, lines 5-19). He admitted that his telephone contact with the children was "not that often" since 2004. (T p. 521, lines 2-4). The social worker last had contact with the father prior to July of 2004 (T p. 129, lines 1-3). The father testified that he had not had any physical contact with his children since the initial petition was filed in 2004. (T p. 521, lines 6-19).

His mother (the paternal grandmother) testified that the last time he saw his three children was in 2003 at the prison and that he had seen the children no more than three times between his incarceration in 2000 and the time of trial in 2006. (T p. 489, lines 1-18). The father did not send any gifts

to the children or pay any amount as child support. (R p. 129, lines 21-23).

After a lengthy hearing, the court terminated the parental rights of both the mother and the father pursuant to North Carolina General Statutes Section 7B-1111(a)(2) and 7B-1111 (a)(3). Both parents gave timely notice of appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN MAKING FINDINGS OF FACT 13, 14, 16, 19, 20 AND PART OF 21 MOTHER'S ASSIGNMENTS OF ERROR NO. 10, 11, 13, 16, 18, 19, 20, 21 (R pp. 56-58).

Standard of Review: The appellate court must determine whether the findings of fact are supported by clear, convincing evidence and whether the legal conclusions are supported by the findings of fact. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002).

The trial court made 21 lengthy findings of fact in its termination order. Respondent mother contends that findings 13, 14, 16, 19, 20, and 21 are not supported by competent evidence. In making these findings, the court considered direct testimony from the Respondent mother, the psychologist, the child, T-E.J., social worker Lisa Looby and others.

Findings 13 and 14: At trial, the psychologist, Dr. Hancock, testified that out of 42 appointments, the mother attended 27 or sixty-six percent. (T p. 20, lines 14-23). The mother had "nine no shows, twenty two percent and

five either cancelled or rescheduled appointments constituting twelve percent." (T p. 20, lines 20-23). Dr. Hancock testified:

Q. Okay. My client coming for twenty seven out of forty one scheduled visits, would that show consistency on her part?

A. That would show some and I say that some with an asterisk. (T p. 50, lines 15-19).

A. I sure can. When I say that she is consistent with an asterisk, what I mean by that is she has been to over half of her appointments but in my opinion when she hasn't called, which means she didn't you know, she didn't call to cancel, basically a no show, in my opinion, she's come up with some less, they're basically have been excuses as to why she's not coming. So as a whole, she does come to therapy, but she's not always consistent. And I have; you know a breakdown of her attendance and how it's broken down and there are times when she's you know, weeks on end she makes it, but then there are times when she doesn't come consistently. And in my opinion, when she doesn't come consistently, she provides excuses as to why she doesn't come. And that is a thing with the asterisks.

(T p. 67, lines 24-25 to T p. 68, lines 1-16). In addition, Dr. Hancock testified that he diagnosed her with "adjustment disorder with mixed disturbance of emotion and conduct. Axis II, I diagnosed her as having traits consistent with paranoid schizoid, borderline and antisocial traits." (T p. 30, lines 10-14). Dr. Hancock testified that he was aware the mother had been ordered to attend therapy (T p. 56, lines 4-8) and that the mother would benefit from continuing therapy. (T p. 55, lines 5-8). Findings of fact 13 and 14 directly track and are supported by this direct testimony from Dr. Hancock.

Finding: 16: It is undisputed that the mother attended some short programs while in jail and that Melissa Mummert testified that the mother was an "active participant" in 10 one and one half hour domestic violence sessions, some of which were repeated classes. (T p. 342, lines 15-17; T p. 331, lines 16-18). However, Diane Moore testified that "I don't recall a lot except that I liked her. She worked . . . I don't remember her being disruptive" (T p. 383, lines 18-23). She further testified that "I just have too many students to be able to recall individually their work." (T p. 384, lines 14-16). Sandra Willoughby testified that she did not remember anything specific about the mother, stating "I can't - I really don't have any real specific memories that I can speak to. That's not saying negative or positive." (T p. 424, lines 22-25).

This testimony supports the finding that supervisors did not recollect the mother as an active participant. At trial, the court heard testimony from the mother who testified that her husband had punched Dominique twice but that she had never told DSS about that despite the children being in custody for twenty six months. (T p. 747, lines 5-25 to T p. 748, lines 1-3). She testified that she falsified a divorce complaint in New York even though she knew that was wrong to do. (T p. 749, lines 3-25 to T p. 750, lines 1-16). When asked what she would do to provide for her children, the mother

testified, "Well, I have a job. I have a place to live. I would do nothing different - well -than what I was doing before I was with Mr. ----." (T p. 723, lines 3-8). Further, the mother had contact with the children, even allowing them to spend the night with her without the knowledge or permission of DSS. (T p. 832, lines 3-14). The social worker testified that the mother did not contact her and advise her she was taking classes in jail. (T p. 824, lines 21-25 to T p. 825, line 1). This testimony supports the finding that the mother has not changed her dysfunctional attitude toward parenting or the legal system.

Finding of fact 19 and 20: Social worker Lisa Looby testified that the children were living with the maternal grandparents with the intention of a guardianship placement. (T p. 830, lines 1-10). She testified, however, that that placement was disrupted because "We found out the children were living with their mother." (T p. 830, lines 11-15). The social worker testified that T.-E. J. told her "that he and his siblings had been living with their mother, that they spent the night with their mother, that T-A.J. and J.J. spend more nights with her, that he'll stay with his grandparents sometimes when they're there, that Morn would take him to Grandma's and then Grandma would take them on to school or daycare and then the reverse on the way home. (T p. 832, lines 3-14). T-E.J. testified that he and the other children

had spent the night with their mother. (T p. 210, lines 3 -11; T p. 211, lines 1-2). He also testified that he was removed from his grandmother's house "because we couldn't live with our mom." (T p. 209, lines 3-10). In addition, the mother's attorney stipulated to the entry of testimony that the Guardian ad litem had a conversation with the children on 13 December 2005 that they had told her the same as TE.J.'s testimony that he had contact with his mother while living with his grandmother. (T p. 850, lines 14-25). This testimony support finding of fact 19-20.

Finding of fact 21: Social worker Lisa Looby testified that during the six months prior to the filing of the termination petition, that YFS spent \$15,092.91 on the children and provided ongoing mental health services for all three children, case management services through mental health, Medicaid, daycare, and clothing vouchers. (T p. 129, lines 4-20). Ms. Looby testified that both parents had paid absolutely nothing to the Department to support these children. (T p. 129, lines 21-23). Respondent mother argues that her testimony that she gave money, clothes and toys to her mother when the children were living with their grandmother is evidence that she "paid child support." However, the mother testified that she "can't say" how much money she gave her mother but did testify that she did not provide any holiday gifts because she doesn't celebrate holidays. (T p. 635, lines 2-4)

In this case, child support was owed to YFS because that agency was supporting the children. Payments for things other than child support do not constitute child support. *See In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990) (in a termination case, father's payments to son's psychologist are not child support since his child support order required him to pay support to the petitioner). The testimony of the mother and social worker support finding of fact 21. The Guardian ad litem further incorporates her argument in Section III herein in support of this finding of fact.

The appellate court is bound by the trial court's findings where there is some evidence to support those findings even though the evidence might sustain findings to the contrary. *In re Montgomery*, 311 N.C. 101, 110-111, 316 S.E.2d 246, 252-253 (1984). In this case, direct testimony, much of it from the Respondent mother herself, supported the findings of fact made by the trial court. This direct testimony as set out above supports the findings of fact in the order. The father did not object to any findings of fact. Other than the findings listed above, the mother did not object to any other findings. All of these findings that were not assigned as error are deemed to be supported by competent evidence and conclusive on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

II. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT GROUNDS EXIST TO TERMINATE RESPONDENTS' PARENTAL

RIGHTS FOR WILLFULLY LEAVING THE CHILDREN IN FOSTER CARE FOR MORE THAN TWELVE MONTHS WITHOUT SHOWING TO THE SATISFACTION OF THE COURT THAT REASONABLE PROGRESS UNDER THE CIRCUMSTANCES HAD BEEN MADE WITHIN TWELVE MONTHS IN CORRECTING THOSE CONDITIONS WHICH LED TO THE REMOVAL OF THE CHILDREN. MOTHER'S ASSIGNMENTS OF ERROR NO.1, 4 (R p. 55). FATHER'S ASSIGNMENTS OF ERROR NO.6 (R p. 63).

Standard of Review: The appellate court must determine whether the findings of fact are supported by clear, convincing evidence and whether the legal conclusions are supported by the findings of fact. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002). N.C. Gen. Stat. Sec. 7B-1111(a) (2) provides for termination of parental rights if “the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. Sec. 7B-1111(a) (2).

This requires a two-part analysis. *See In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003). The trial court must determine that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months and that as of the time of the hearing the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. *In re O.C.*, 171 N.C. App.

457, 464, 615 S.E.2d 391, 396, *disc. rev. denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). It is undisputed that Respondents' children, J.J., T A.J. and T-E.J. have been in foster care more than six months next preceding the filing of the termination petition in that they have been in foster care or D.S.S. custody since 4 February 2004 (T p. 105, lines 11-21), nearly 26 months at the time of the hearing. The determinative time for consideration begins 1 January 2005, twelve months prior to the filing of the petition, through 1 January 2006. (R pp. 10, 16, 22); *See In re A.C.F.*, --- N.C. App. ---, 626 S.E.2d 729, 734 (2006).

A. Willfulness: Willfulness is established when the respondent had the ability to show reasonable progress but was unwilling to make the effort. *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). It is something less than willful abandonment and does not require a finding of fault by the parent. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393 (1996).

FATHER'S CASE: In his brief, the father argues only that his lack of progress is not willful. However, in this case, the father contacted the social worker on only one occasion to ask permission to write to his children. (T p. 128, lines 3-9). He never responded to any letters from the social worker. (T p. 128, lines 5-6). The social worker last had contact with the father prior to

July of 2004 (T p. 129, lines 1-3). He wrote to T-A.J. twice and J.J. once and on some occasion wrote directly to the maternal grandmother when the children were with her. (T p. 128, lines 10-25). He has not written to the children since at least November of 2005. (T p. 128, lines 24-25). He testified that his only contact with the children was by asking questions about them from third parties. (T p. 521, lines 5-19). He admitted that his telephone contact with the children was "not that often" since 2004. (T p. 521, lines 2-4). The father did not send any gifts to the children. The father did not pay any amount as child support for the children. (R p. 129, lines 21-23). The father testified that he had not had any physical contact with his children since the initial petition was filed in 2004. (T p. 521, lines 6-19). His mother testified that the last time he saw his three children was in 2003 at the prison and that he had seen the children no more than three times between his incarceration in 2000 and the time of trial in 2006. (T p. 489, lines 1-18).

Willfulness is established when the respondent had the ability to show reasonable progress but was unwilling to make the effort. *In re Fletcher*, 148 N.C. App. 228, 235, 558 S.E.2d 498, 502 (2002). In this case, the father had the opportunity to call and write his children and social worker regularly, however, he willfully failed to do so. He had the opportunity to pay some

even small amount as child support and he willfully failed to do so. He was uninvolved in the life of his children by his own choice. *See In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992) (general lack of involvement over 2 year period supports finding that respondent willfully left child in foster care.) This evidence supports the court's findings of fact and conclusion of law that the father willfully left the children in foster care and failed to make reasonable progress in correcting the reasons for removal.

B. Reasonableness: A parent must demonstrate not merely effort but also positive results to be deemed to have made reasonable progress. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995). This Court has held that extremely limited progress is not reasonable progress. *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004).

MOTHER'S CASE: In her brief, the mother argues that she made reasonable progress by complying with her case plan. However, the evidence before the court does not support the mother's contention that she completed her case plan. The mother completed her mental health assessment and began attending mental health therapy with Dr. Hancock prior to her incarceration. He diagnosed her as having adjustment disorder with mixed disturbance of emotion and contact, traits consistent with paranoid schizoid, borderline and antisocial traits. (T p. 30, lines 6-14). The

mother attended mental health inconsistently, attending 27 of 41 appointments (R p. 39). She did not discuss with Dr. Hancock the issues related to her involvement with D.S.S. and only discussed with him self esteem and anger management issues. (R p. 39). She did not seek any mental health therapy for the issues that led to the placement of the children in DSS custody. (R p. 39). This is similar to *In re Baker*, 158 N.C. App. 491, 581 S.E.2d 144 (2003), in which a therapist testified that the respondent attended anger management classes but had a limited understanding of the concepts. The mother never completed the parenting program through the Women's Commission as requested by the social worker. (T p. 111, lines 15-17). She did not keep in contact with her social worker and never provided YFS with proof of employment or income even though she had obtained both after her release from prison. (R p. 39).

In this case, the Respondent mother made some efforts by attending some self-improvement classes while in prison. (R p. 39). After her release from jail in June of 2005, the mother completed a domestic violence program on 18 October 2005. (T p. 111, lines 6-17). However, *In re B.S.D.S.*, held that a delayed effort in attending SAIS classes (over a year later) and psychological visits three weeks prior to trial constituted insufficient progress. *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89,

93 (2004). Despite the classes she completed, the mother continued to exhibit deceptive, angry and dysfunctional behavior in regard to parenting and the legal system. She violated the terms of work release by having contraband items in her possession. (R p. 39). She wrote angry letters to YFS criticizing their actions in her case and threatening that their actions would “start a war.” (T p. 145, lines 5-25 to T p. 146, lines 1-3). When YFS attempted a family placement with the maternal grandfather after the mother's release from prison, the mother kept the children overnight for extended periods of time without the knowledge or permission of YFS or the court and despite the court order requiring her to have supervised visitation. (R p. 40).

At trial, she had enrolled Dominique at the local high school and listed Dominique's address as her own. (R p. 40). She refused to provide any information to the social worker about her employment or income despite a December 2005 court order requiring her to give financial information to DSS within 10 days. (T p. 882, lines 8-17). At trial, the mother admitted that Napoleon I. had punched Dominique in the face on another occasion prior to the incident in 2004, yet the mother had never divulged this to anyone prior to the termination hearing. (T p. 747, lines 5-20). The mother testified that she had falsified a divorce complaint filed in New York in 2004 knowing it

was improper in order to obtain a fast divorce from Napoleon I. (T p. 750, lines 1-15).

In *In re Fletcher*, the court found that termination pursuant to N.C. Gen. Stat. Sec. 7B- 1111(a) (2) was appropriate where the respondent made some efforts but no sufficient progress. *In re Fletcher*, 148 N.C. App. 228, 235-236, 558 S.E.2d 498, 502 (2002). In *In re Nolan*, the court found that the mother's alcoholism and abusive living arrangements continued and that she had not obtained positive results from her sporadic efforts, stating that "extremely limited progress is not reasonable progress." *In re Nolan*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-225 (1995). *See also In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989) (Termination upheld where Respondent made some progress in parenting skills and a job, but the progress was extremely limited.)

In this case, the evidence shows that the mother failed to demonstrate any progress in correcting the conditions-that led to the removal of the juvenile. She continued to engage in angry, deceptive and dysfunctional behavior. She blatantly disregarded court orders requiring her to provide documentation and information to YFS and to have supervised visitation. This evidence supports the findings and conclusion that termination of the mother's parental rights was proper pursuant to N.C. Gen. Stat. Sec. 7B-

1111(a) (2).

III. THE TRIAL COURT HAD SUFFICIENT EVIDENCE AND FINDINGS TO CONCLUDE THAT GROUNDS EXISTED TO TERMINATE RESPONDENTS' PARENTAL RIGHTS BASED UPON WILLFULLY LEAVING IN FOSTER CARE FOR MORE THAN SIX CONTINUOUS MONTHS WITHOUT PAYING A REASONABLE PORTION OF THE CHILD'S COST OF CARE. MOTHER'S ASSIGNMENT OF ERROR NO.1, 5 (R p. 56). FATHER'S ASSIGNMENT OF ERROR NO.7 (R p. 64).

Standard of Review: The appellate court must determine whether the findings of fact are supported by clear, convincing evidence and whether the legal conclusions are supported by the findings of fact. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002). North Carolina General Statutes Section 7B-1111(a) (3) provides that a court may terminate parental rights if the juvenile has been placed in the custody of a county department of social services, . . . for a continuous period of six months next preceding the filing of the petition or motion, and the parent 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. Sect. 7B-1111(a) (3). The "cost of care" refers to the amount it costs the Department of Social Services to care for the child, namely, foster care. In this case, the cost of care for the children was \$15,092.91 for T-A.J., T-E.J. and J.J. for the six month period. ((T p. 237, lines 12-24; R p. 40).

A parent's ability to pay is the controlling characteristic of what is a

reasonable portion of cost of foster care for the child which the parent must pay. *In re Bradley*, 57 N.C. App. 475, 291 S.E.2d 800 (1982). 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). It is undisputed that the mother is not handicapped or unable to work. In fact, at trial the mother testified that she had been employed as a private duty home health aide for two months after previously working continuously since her release from prison in June of 2005 at a temp agency, Bob Evans and a thrift store. (T p. 709, lines 21-25; T p. 710, lines 10-25). Yet, despite continuous employment, the mother did not pay any amount as child support to YFS or DSS and never offered to pay any amount to YFS. (T p. 242, lines 7-11). She refused to provide any information to DSS about her employment or income (R p. 40) even though this refusal directly violated a December 2005 order requiring her to give financial information to DSS within 10 days. (T p. 882, lines 8-17). The mother argues that there was no order requiring her to pay support and that she provided some money to her mother when the children were living there, although Respondent could not say how much money she actually gave her mother. (T p. 654, lines 1-23; T p. 655, lines 2-4).

However, a child support order is not required to obligate a parent to support their children while in foster care. *In re T.O.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd* 359 N.C. 405, 610 S.E.2d 199 (2005). In this case, child support was owed to YFS because that agency was supporting the children. Any payments for things other than child support do not constitute child support. *See In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990) (in a termination case, father's payments to son's psychologist are not child support since his child support order required him to pay support to the petitioner). Given the mother's ability to work and her actual continuous gainful employment since at least June of 2005, her failure to pay any amount as child support constitutes a failure to pay a reasonable amount since she had the ability to pay some amount greater than zero. *In re T.O.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd* 359 N.C. 405, 610 S.E.2d 199 (2005).

FATHER'S CASE: It is undisputed that the father has been incarcerated continuously during the time the children have been in DSS custody. The father did not pay any amount as child support for the children. (R p. 129, lines 21-23). In *In re T.O.P.*, the incarcerated father earned only 40 cents to 1 dollar per day. This Court held that the finding that "Respondent Father is employed at the prison unit as a cook. He earns very

little money. He has used his money to buy personal items but has not sent any money for the minor child, nor has he even sent her a card" was sufficient evidence for the trial court to find that the respondent had the ability to pay child support. *In re T.O.P.*, 164 N.C. App. 282, 595 S.E.2d 735 (2004), *aff'd* 359 N.C. 405, 610 S.E.2d 199 (2005).

In this case, the court found as undisputed findings of fact that the father "never even attempted to qualify for any of the prison programs that would have allowed him to provide some level of financial support for his children" (Finding 5, R p.38) and that the father "had the means and ability to pay something toward the children's cost of care; however neither paid anything." (Finding 21, R p. 40). Given the father's ability to pay some small amount and his failure to even attempt to obtain a job while in prison, payment of nothing by the father constitutes a failure to pay a reasonable amount since he had the ability to pay some amount greater than zero. *In re T.O.P.*, 164 N.C. App. 287, 595 S.E.2d 735 (2004), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005).

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TERMINATING THE RESPONDENTS' PARENTAL RIGHTS. MOTHER'S ASSIGNMENTS OF ERROR NO.6, 22 (R p. 56-59) FATHER'S ASSIGNMENT OF ERROR 8 (R p. 64)

Standard of review: Once a Court has determined that a statutory ground to terminate parental rights exists, then it proceeds to the

dispositional phase to determine whether termination is in the best interest of the child. N.C. Gen. Stat. Sec. 7B- 1110(a) (2005). At the dispositional stage, the court may issue an order to terminate of parental rights unless it determines that the best interests of the child require that the parental rights of such parent not be terminated. N.C.GS. §.7B-1110(b) (2005). The court's decision to terminate parental rights is discretionary and should not be reversed on appeal absent a clear showing of abuse of discretion. *In re Montgomery*, 311 N.C. 101, 116, 316 S.E.2d 246, 301 (1984).

There is nothing in the record or order to indicate that the trial court applied the incorrect standard of proof in its termination order. In fact, the order states the correct standard of proof. (R p. 37, "Upon evidence presented to the Court. . . there is clear, cogent and convincing evidence. . ." and (R p. 40) "it is in the children's best interests that the parental rights. . .be terminated." Respondent mother argues that the court failed to consider the criteria in N.C.G.S. 7B-1110(a) (2005). However, the court made specific findings concerning the status of the minor children including findings of their age, that they "flourished" in foster care, that their mental health issues and disorders were treated in foster care, and that their behaviors improved during their time in foster care and when they had limited contact with their mother. (Finding 17, R pp. 39-40). The court

found that when the children began having more contact with their mother after her release from prison, their misbehavior and mental health issues returned. (Finding 19, R p. 40). The court heard testimony that the children had been in foster care for twenty six months at the time of the hearing and need stability and permanence. The father is in prison with a release date in May of 2013. He offered no alternative plan of care for the children during the next 7 years of his incarceration and had little relationship with the children prior to DSS involvement. Social worker Lisa Looby who worked with the family for 2 years, testified:

Q. Well, do you believe termination and adoption is in the children's best interests?

A. Yes.

Q. Why is that?

A. These children need to have consistency and stability and they need to have it immediately. They respond very well to it and do very well when it's provided for them. The chaotic lifestyle that they've been exposed to has damaged them considerably and they've worked very hard to overcome what they've been subjected to. In order for them to grow up and to be healthy productive young adults and adults, they need to have stability.

(T p. 136, lines 3-16). It is the children and their best interests at issue, not the Respondent's hopes for the future. *See In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982). A trial court's exercise of discretion in ordering a disposition will not be disturbed

unless the ruling “is so arbitrary that it could not have been the result of a reasoned decision.” *Chicora County Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998).

The detailed findings of fact undisputed by the father and many undisputed by the mother are supported by clear and convincing evidence. These findings show that the Judge's dispositional decision to terminate the Respondent parents' parental rights was not "manifestly unsupported by reason.” *Clark v. Clark*, 301 N.C. 123, 129, 371 S.E.2d 58, 63 (1980) and not an abuse of discretion.

V. THE RESPONDENTS' ASSIGNMENTS OF ERROR NOT ADDRESSED IN THEIR BRIEFS SHOULD BE DEEMED ABANDONED. MOTHER'S ASSIGNMENTS OF ERROR NO.2, 3, 7, 8, 9, 12, 14, 15, 17, 23-39 (R pp. 55-62). FATHER'S ASSIGNMENTS OF ERROR NO.1, 2, 3, 4, 5 (R p. 63).

Appellant mother has failed to address assignments of error numbered -2, 3, 7, 8, 9, 12, 14, 15, 17, 23-39 and Appellant father has failed to address 1, 2, 3, 4, and 5. Any assignments of error not addressed with argument and supported by authority in an appellate brief are deemed abandoned and are not to be considered by the reviewing court. N.C.R.A.P. Rule 28 (b) (6). Guardian ad litem respectfully requests that these assignments of error be deemed abandoned.

CONCLUSION

For the above-stated reasons, the Guardian ad litem, requests that this Court affirm the 19 May 2006 (filed 28 June 2006) Termination of Parental Rights Order entered by the Honorable Regan A. Miller.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief for the Guardian ad litem was filed with the North Carolina Court of Appeals on 7 November 2006 by mailing a copy thereof to the Honorable John H. Connell, Clerk, North Carolina Court of Appeals, Court of Appeals Building, One West Morgan Street, PO Box 2779 Raleigh, NC 27602-2779.

The undersigned further certifies that a copy of the above and foregoing Guardian ad litem's Brief has been served upon counsel of record for the parties on 7 November 2006 by placing a copy of the same in a United States Postal Service depository, first class postage prepaid, to the following persons at the following address:

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