NO. COA11-329
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

IN THE MATTER OF:

D.K.

New Hanover County
No. 08 JT 145

Appeal by respondent-mother from order entered 29 December 2010 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 29 August 2011.

Regina Floyd-Davis for New Hanover County Department of Social Services petitioner-appellee.

Janet K. Ledbetter for respondent-mother appellant.

Anne M. Middleton for guardian ad litem.

McCULLOUGH, Judge.

Respondent-mother appeals from the district court's order terminating her parental rights to her daughter, D.K. We affirm.

I. Background

On 27 May 2008, D.K. was taken into nonsecure custody by the New Hanover County Department of Social Services ("DSS")

pursuant to a nonsecure custody order issued by the trial court. The following day, on 28 May 2008, DSS filed a juvenile petition alleging that D.K. was a neglected and dependent juvenile. Following a hearing on 10 July 2008, the trial court entered an order adjudicating D.K. neglected and dependent based on respondent-mother's stipulation to the allegations of neglect, and the stipulation of D.K.'s father[1] to the allegations of dependency. In the order, the trial court found that respondent-mother had beaten D.K. with a belt and that D.K. had deep, purple bruises on her right shoulder, upper right chest, and portions of her midsection which were visible for four days. The trial court also found that respondent-mother had failed to administer certain prescription medication to D.K.

In an order entered 15 March 2010, the trial court relieved DSS of reasonable reunification efforts and changed the permanent plan for D.K. to adoption. On 14 June 2010, DSS filed a petition to terminate respondent-mother's parental rights to D.K., alleging the following grounds for termination: (1) neglect; and (2) willfully leaving the juvenile in foster care for more than twelve months without showing reasonable progress to correct the conditions that led to the removal of the

[1] D.K.'s father is not a party to this appeal.

juvenile. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2) (2009). Respondent-mother filed an answer to the petition, denying the material allegations. The trial court conducted a termination hearing on 15 November 2010, and in an order entered 29 December 2010, the trial court found the existence of both grounds for termination alleged against respondent-mother. At disposition, the trial court concluded that it was in the juvenile's best interests to terminate respondent-mother's parental rights. The trial court also terminated the parental rights of D.K.'s father. Respondent-mother timely appealed from the order.

II. Neglect

On appeal, respondent-mother challenges the trial court's finding both grounds for termination of her parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of the ten enumerated grounds. *Id.* If this Court determines that the findings of fact support at least one ground for termination, we need not review the other challenged grounds. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) ("A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination.").

We conclude that the trial court's findings of fact are sufficient to support termination of respondent-mother's parental rights based on neglect. N.C. Gen. Stat. § 7B-1111(a)(1) authorizes neglect as a ground for termination, and our General Statutes define a neglected juvenile, in pertinent part, as one who "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare; . . . ." N.C. Gen. Stat. § 7B-101(15) (2009). "Where, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). Because the determinative factor is the parent's ability to care for the child at the time of the termination proceeding, we have previously explained that "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* "Thus, the trial court must also consider evidence of changed conditions[.]" *Id.* Accordingly, "[i]n those circumstances, a

trial court may find that grounds for termination exist upon a showing of a 'history of neglect by the parent and the probability of a repetition of neglect.'" *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407).

The following findings of fact are pertinent to this ground for termination:

> 4. [Respondent-mother] had administered inappropriate discipline upon [D.K.], leaving visible bruises about her body. Additionally, [D.K.] was prescribed medication for a mental health diagnosis; however [respondent-mother] failed to administer the medication. [Respondent-mother] admitted her actions, and the Juvenile was adjudicated neglected and dependent . . . .
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> 5. That the Department developed and updated Family Service Case Plans with [respondent-mother] in an effort to eliminate the need for out of home placement and work towards the permanent plan of reunification. The case plans of 23 June 2008, 18 September 2008, 03 December 2008, 28 April 2009 and 16 July 2009 recommended that [respondent-mother] engage in individual counseling. The April case plan also recommended that she participate with Methodist In-Home counseling services.
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> 6. That the Court Orders from hearings held from 03 December 2008 through 05 November 2009 included provisions that [respondent-mother] complete a parenting class, enroll in the Domestic Violence Empowerment Group, and participate in

individual counseling and joint family counseling.

7. During [D.K.]'s initial placement in foster care, the Juvenile disclosed that [respondent-mother]'s boyfriend had inappropriately touched her, sexually; the Department was unable to substantiate the allegations. [Respondent-mother] was made aware of the allegations and eventually indicated her belief that the incident did occur. [Respondent-mother] agreed to protect [D.K.] from future risk of sexual harm by not allowing [D.K.] to be in the presence of her boyfriend and/or other unrelated males.

8. At the permanency planning hearing on 30 April 2009, [respondent-mother] had completed her parenting and empowerment class, was participating in individual therapy with Lee Lloyd, was participating in family therapy and exercising unsupervised day visits and one overnight visit per week. This Court authorized continued overnight visitation, which could expand to a trial placement.

9. That within the next six months, [respondent-mother's] progress regressed. Following one of the overnight visits at her mother's home, [D.K.] disclosed that her mother's boyfriend, [Kyle],[2] spent the night during her visit. [Respondent-mother]'s therapist, Lee Lloyd dismissed her due to numerous missed sessions and dishonesty about her continued relationship with her boyfriend, [Kyle]. [Respondent-mother] contends that her therapeutic relationship with Mr. Lloyd ended because she could not afford the three dollar ($3.00) co-payment. She receives SSI for a "learning disability"

[2] A pseudonym.

in the amount of six hundred seventy-four dollars ($674.00) and lives in subsidized housing with a small rent requirement. She did not inform the Department of any financial difficulty nor request any assistance. She did not re-initiate counseling for approximately three months. [Respondent-mother] acknowledged via testimony that she would have been able to pay for counseling if she had properly used her SSI funds.

10. [Respondent-mother] was aware that [Kyle] was not to be in the presence of [D.K.], but concealed their continued relationship. Hence, unsupervised visitation was suspended and the trial placement did not occur.

11. That [respondent-mother] has not been forthcoming regarding the circumstances under which [Kyle] was at her home. In the past, [respondent-mother] has acknowledged that [Kyle] spent the night; however, on this date and at the permanency planning review hearing of 18 February 2010, she maintains that he rang the doorbell and she unknowingly answered the door, resulting in [D.K.] seeing [Kyle]. She does not acknowledge his actual presence within the home.

12. That [respondent-mother] was directed that [D.K.] was to have no contact with her father, . . . due to his non-compliance with Court Orders and because of the witnessed domestic violence which occurred between [respondent-mother] and [D.K.'s father]. Despite said directive, [respondent-mother] contacted [D.K.'s father] and invited him to the birthday party that she was planning for [D.K.]. . . . [Respondent-mother] contacted her DSS Social Worker to see if it was okay

for [D.K.'s father] to attend and was told that he could not as he had not had contact with the Department. [D.K.] did not have any contact with her father. [Respondent-mother] does not appear to comprehend how her actions negatively impact [D.K.]'s emotional growth.

13. That [respondent-mother] cancelled the planned birthday party when the Social Worker restricted the number of persons that could be present for the party. She then chose not to see [D.K.] at all on her birthday, as she was upset and did not want [D.K.] to see her upset. [Respondent-mother] acknowledged that [D.K.] was probably upset that she didn't see her mother on her birthday.

14. That during one of [respondent-mother]'s visitations, she attempted to allow [D.K.] to speak with a man whom [respondent-mother] contends was [D.K.]'s uncle. As the Social Worker was unable to verify the man's identity, [D.K.] was not allowed to converse. [Respondent-mother] became visibly upset, and instead of focusing on the visit with her daughter, she spent the time on the phone informing others of the incident.

15. That [respondent-mother] has not maintained consistency in the recommended individual counseling, during the period that [D.K.] has been in care, i.e. from 27 May 2008 through the present. She saw D.H. for approximately 6-7 sessions, but D.H. moved out of the area. Her next therapist, Lee Lloyd discharged her for failing to disclose her continued relationship with [Kyle]. In mid November of 2009, [respondent-mother] utilized the services of Wendy Cox at MQA for community support and counseling. However, [respondent-mother]

voluntarily suspended their services in February of 2010, upon advice of counsel of record. On 20 July 2010, approximately one month after the Petition to terminate her parental rights was filed, [respondent-mother] initiated counseling services with Marlissa Van Hout. [Respondent-mother] believes that she is benefitting from counseling by learning how to take responsibility for her actions, expressing herself as opposed to bottling her feelings, and learning not to take out her frustration and anger on [D.K.].

16. That despite intermittent individual counseling, and family counseling with Trish Brown, [respondent-mother] has not demonstrated the ability to put [D.K.]'s needs, safety and well-being first and foremost in her life. Methodist In-Home Services worked with [respondent-mother] for nineteen (19) weeks; they noted that "on a surface level, [respondent-mother] appears to have completed the goals of in-home services. When considering the psychological evaluations on both [respondent-mother] and [D.K.], and some of the dynamics observed; it[] seems that this parenting intervention is a good place to start, but it is the deeper psychological components that pose a more serious safety concern." [D.K.] has been placed out of home twelve days shy of two (2) years, six months.

. . . .

19. [Respondent-mother] and [D.K.] lived with [D.K.'s father] and his mother, . . . for approximately six (6) months. During said time, [D.K.'s father] was violent with [respondent-mother]. He prevented her from contacting law enforcement by pulling the phone cord from the wall. [D.K.'s father's mother] returned

> [respondent-mother] and [D.K.] to North Carolina due to the domestic violence perpetrated upon [respondent-mother] by [D.K.'s father].

Of these findings of fact, respondent-mother challenges numbers 7 and 9 through 16. Respondent-mother purports to challenge findings of fact numbers 8 and 19, but provides no specific argument that these two findings lack evidentiary support. Additionally, respondent-mother does not challenge findings of fact numbers 4 through 6. We therefore presume that findings of fact numbers 4 through 6, 8, and 19 are supported by competent evidence, and consequently, they are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996). We address each challenged finding of fact in turn.

Finding of fact number 7 pertains to allegations that respondent-mother's boyfriend, Kyle, touched D.K. inappropriately in the past. Respondent-mother argues this finding is not supported by the evidence because there was no

evidence that respondent-mother continued her relationship with Kyle or that D.K. sustained any impairment due to her contact with Kyle. Respondent-mother, however, does not appear to dispute the fact that D.K. reported sexual abuse by Kyle. Nor does she dispute the fact that DSS put a safety plan into place under the terms of which D.K. was not to have any contact with Kyle. Indeed, respondent-mother's own testimony at the hearing supports finding of fact number 7. At the hearing, respondent-mother admitted that she believed Kyle had sexually abused D.K. She also admitted allowing Kyle to be in the presence of D.K., despite knowing that he was not to have any contact with D.K. This evidence is sufficient to support finding of fact number 7. Therefore, we conclude that finding of fact number 7 is supported by clear and convincing evidence.

In the first part of finding of fact number 9, the trial court found that D.K. reported that Kyle had spent the night with respondent-mother during one of D.K.'s overnight visits. Findings of fact numbers 10 and 11 further expound on this incident and respondent-mother's reaction. In finding of fact number 10, the trial court found that respondent-mother concealed the relationship, which led to the suspension of overnight visits and the cancellation of a trial placement. In

finding of fact number 11, the trial court found that respondent-mother refused to acknowledge the incident and provided an alternative explanation at the hearing. Respondent-mother challenges these findings, arguing that DSS failed to present any evidence that respondent-mother continued a relationship with Kyle at the time of the hearing. Respondent-mother's argument is irrelevant. The findings do not indicate that respondent-mother was still in a relationship with Kyle at the time of the hearing, and regardless of when respondent-mother ended the relationship, the evidence is sufficient to show that she carried on the relationship while the case was pending. Both a social worker and the guardian *ad litem* ("GAL") testified that D.K. disclosed Kyle's overnight stay with respondent-mother. They also testified that overnight visitation was suspended and the trial placement was cancelled due to the incident. Although respondent-mother testified that Kyle had only come to her front door, the trial court was free to discredit respondent-mother's testimony and instead believe the accounts of the social worker, the GAL, and respondent-mother's acknowledgment at a previous hearing. It is the duty of the trial judge to determine the weight and credibility to be given to evidence. *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d

213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). Therefore, we conclude that the trial court's findings in numbers 9, 10, and 11 were properly supported by the evidence.

We must also address respondent-mother's remaining challenge to finding of fact number 9, which details respondent-mother's dismissal from a previous therapist, Lee Lloyd. The trial court found that respondent-mother was dismissed due to dishonesty about her relationship with Kyle. Although the social worker's testimony on this issue was somewhat vague, the trial court's finding is also supported by a previous permanency planning order. "'A trial court may take judicial notice of earlier proceedings in the same cause[,]'" which the trial court did in the present case in its order terminating respondent-mother's parental rights. *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). Although the permanency planning order is subject to a lower standard of evidentiary proof, this Court has acknowledged the "well-established

supposition that the trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.'" *Id.* (quoting *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000)). The remainder of the finding is merely a summary of respondent-mother's testimony regarding the issue and is therefore supported by the evidence presented at the hearing. Again, we note that while respondent-mother denied being dismissed from therapy due to dishonesty about her relationship with Kyle, the trial court was free to discredit respondent-mother's testimony and rely on other competent evidence in the record. *See Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Accordingly, we affirm the remainder of finding of fact number 9.

Next, we turn to findings of fact numbers 12 and 13. In these findings, the trial court found that respondent-mother was prohibited from allowing D.K. to have contact with her father and that despite said directive, respondent-mother invited him to a birthday party for D.K. The trial court further found that respondent-mother cancelled the party and chose not see D.K. at all on D.K.'s birthday after a social worker limited the number of guests and informed respondent-mother that D.K.'s father was not permitted to attend. Respondent-mother does not appear to challenge the evidentiary basis for these findings, and instead

points out that, at the hearing, she acknowledged the foolishness of her actions and has not missed any visits with D.K. since her birthday. This argument is also irrelevant. Even if she later acknowledged the foolishness of her actions, findings of fact numbers 12 and 13 demonstrate respondent-mother's inappropriate handling of the issue. Furthermore, findings of fact numbers 12 and 13 are based on the testimony of a social worker and respondent-mother herself. We therefore conclude that these findings are supported by clear and convincing evidence.

Finding of fact number 14 details an incident where respondent-mother permitted D.K. to speak to an unidentified male on the telephone during a visit. Respondent-mother claimed the man was D.K.'s uncle. Nonetheless, the social worker did not allow D.K. to speak to the man because she was unable to verify the man's identity. Rather than spending time with her daughter, respondent-mother became upset and spent the remaining time on her telephone discussing the incident with others. Again, respondent-mother does not challenge the factual basis for this finding. Instead, she seems to suggest that the finding was not fair because the man on the phone was her brother, not an unidentified male. Regardless of who was on the

phone, this finding again demonstrates respondent-mother's inappropriate handling of the situation. Furthermore, the finding is supported by the testimony of the social worker and respondent-mother, and we therefore conclude that it is supported by clear and convincing evidence.

In finding of fact number 15, the trial court made findings regarding respondent-mother's therapy history. First, respondent-mother takes issue with the findings pertaining to therapist Lee Lloyd. Respondent-mother made identical challenges to finding of fact number 9, and we affirm the findings in number 15 pertaining to Lee Lloyd for the same reasons we affirmed finding of fact number 9. However, respondent-mother further claims that the findings pertaining to her subsequent therapists are not supported by the evidence. We disagree. At the hearing, respondent-mother herself provided the trial court with a detailed account of her therapy history, which supports the trial court's findings.

Next, respondent-mother challenges the first sentence of finding of fact number 15, in which the trial court found "[t]hat [respondent-mother] has not maintained consistency in the recommended individual counseling, during the period that [D.K.] has been in care[.]" Respondent-mother argues that this

finding is not supported by the evidence. We disagree. This finding is a reasonable inference that the trial court was permitted to draw based on the evidence before it. As the trier of fact in a juvenile proceeding, it is the trial court's duty to "weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Accordingly, we conclude that finding of fact number 15 was supported by clear and convincing evidence.

Finally, respondent-mother challenges the second sentence of finding of fact number 16, which contains a lengthy quote from Methodist In-Home Services. Respondent-mother argues that this quote has no support in the record or transcript. We agree. Nevertheless, this sentence was not necessary to the trial court's ultimate finding of neglect and any error on the part of the trial court is therefore harmless. Furthermore, the remaining portions of finding of fact number 16 were not challenged and are therefore presumed to be supported by competent evidence. *See In re M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

In her challenge to the trial court's conclusions of law, respondent-mother first argues that DSS failed to present any evidence that neglect was likely to reoccur. Respondent-mother also argues that the evidence is insufficient to demonstrate that D.K. suffered any impairment or risk of impairment due to respondent-mother's behavior. We disagree with both contentions. The trial court's findings of fact demonstrate that respondent-mother continued a relationship with Kyle despite prohibitions by the trial court and DSS; that she was dishonest about the relationship; that she was inconsistent in attending therapy and that at least some of the inconsistency was due to respondent-mother's own actions; that she handled several situations with D.K. inappropriately; and that she maintained a relationship with Kyle and invited D.K.'s father to a birthday party, both of whom were prohibited from being in the presence of D.K. and were harmful to D.K.'s well-being. Furthermore, respondent-mother admitted that she would benefit from anger management classes, that she had not completed everything required in her case plan, and that she needed more time to show she could parent D.K. The foregoing evidence was sufficient to demonstrate that a repetition of neglect was likely if D.K. was returned to respondent-mother's custody. In addition, the evidence was

sufficient to demonstrate that D.K. was at risk of impairment if she was returned to respondent-mother's custody.

After reviewing the findings of fact, we conclude that they are supported by clear, cogent, and convincing evidence. We further conclude that the findings of fact support the trial court's conclusions that respondent-mother neglected D.K., that repetition of neglect was likely if D.K. was returned to respondent-mother's custody, and that termination of respondent-mother's parental rights was justified based on the ground of neglect.

Lastly, respondent-mother challenges finding of fact number 23, in which the trial court made the ultimate finding that there was clear, cogent, and convincing evidence that respondent-mother neglected D.K. and that the neglect was likely to recur if D.K. was returned to respondent-mother. Respondent-mother argues that this finding is actually a conclusion of law. "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties." *Hughes*, 74 N.C. App. at 759-60, 330 S.E.2d at 219. We agree that this finding is determinative of the issue between the parties and therefore is a conclusion of law. However, we consider an improperly classified finding of fact as a

challenged conclusion of law. *See In re T.H.T.*, 185 N.C. App. 337, 345, 648 S.E.2d 519, 524 (2007), *modified and aff'd*, 362 N.C. 446, 665 S.E.2d 54 (2008). We have already concluded that the findings of fact support the conclusion that grounds exist to terminate respondent-mother's parental rights based on neglect. Therefore, we also conclude that finding of fact number 23 is supported by the trial court's findings of fact.

Upon finding the existence of a ground to terminate respondent-mother's parental rights, the trial court was required to determine whether termination was in the best interests of the minor child. *In re S.C.R.*, 198 N.C. App. 525, 536, 679 S.E.2d 905, 911, *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Here, the trial court found that termination of respondent-mother's parental rights was in D.K.'s best interests. Although respondent-mother raised an issue as to whether termination was in D.K.'s best interests, respondent-mother failed to argue the issue in her brief. Therefore, we do not address the trial court's "best interests of the child" determination. *In re D.J.D.*, 171 N.C. App. 230, 236-37, 615 S.E.2d 26, 31 (2005); *see also* N.C.R. App. P. 28(b)(6) (2011) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as

abandoned.”). Accordingly, we affirm the trial court’s order terminating respondent-mother’s parental rights to D.K.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).