NO. COA11-745
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

IN THE MATTER OF:

S.H., S.M.

Wake County
Nos. 08 JT 639
09 JT 195

Appeal by respondent from order entered 23 March 2011 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 24 October 2011.

Office of the Wake County Attorney, by Assistant County Attorneys Suzanne Padgett and Lucy Chavis, and Deputy County Attorney Roger A. Askew, for petitioner-appellee Wake County Human Services.

Robert W. Ewing for respondent-appellant mother.

Pamela Newell for guardian ad litem.

ERVIN, Judge.

Respondent-Mother Renee M. appeals from an order terminating her parental rights in S.H. and S.M.[1] On appeal, Respondent-Mother argues that the trial court failed to properly

[1] S.H. and S.M. will be referred to throughout the remainder of this opinion as "Sarah" and "Susan," respectively, which are pseudonyms used to protect the juveniles' privacy and for ease of reading.

consider the extent to which any failure on her part to make reasonable progress toward correcting the conditions that led to the removal of the juveniles from her home was willful given her cognitive limitations. After careful consideration of Respondent-Mother's challenge to the trial court's order in light of the record and the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 21 October 2008, Wake County Human Services received a report alleging that Respondent-Mother had neglected Sarah. The report alleged that Respondent-Mother was using marijuana while caring for Sarah and that Respondent-Mother had left the child for extended periods of time without telling Sarah's caretaker when she would return. In addition, WCHS learned that Respondent-Mother was homeless and could not provide Sarah with stable housing. Respondent-Mother had a history of mental health and substance abuse problems.

On 4 November 2008, WCHS filed a petition alleging that Sarah was a neglected and dependent juvenile. At the same time, WCHS obtained non-secure custody of Sarah. On 29 May 2009, the trial court entered an adjudication and disposition order in which it found that Sarah was a neglected juvenile and ordered Respondent-Mother to: (1) obtain sufficient housing and income;

(2) follow the recommendations made in a psychological evaluation, including participation in individual counseling; (3) comply with the recommendations made in a substance abuse assessment; (4) comply with efforts to establish Sarah's paternity; (5) meet with WCHS to discuss appropriate residential programs; (6) maintain regular contact with WCHS; and (7) visit with Sarah.

On 12 August 2009, WCHS received a referral concerning Susan. At that time, Respondent-Mother was still homeless. Hospital personnel were reluctant to release Susan, a newborn, to Respondent-Mother because she had not made arrangements for Susan's care outside of the hospital. On 14 August 2009, WCHS filed a petition alleging that Susan was a dependent juvenile and took her into its custody. On 23 October 2009, the trial court entered an adjudication and disposition order in which it found Susan to be a dependent juvenile and ordered Respondent-Mother to comply with requirements substantially similar to those imposed in the adjudication and disposition order entered with respect to Sarah.

The trial court held a placement review and permanency planning hearing concerning both juveniles on 4 January 2011. On 7 February 2011, the trial court entered an order changing the permanent plan for both Sarah and Susan to adoption and

ordered WCHS to take the steps necessary to effectuate this permanent plan.

On 2 June 2010, WCHS filed a petition to terminate Respondent-Mother's parental rights in Sarah on the grounds that Sarah was neglected; that Respondent-Mother had willfully left Sarah in foster care for more than 12 months without making reasonable progress toward correcting the conditions that led to Sarah's removal from the home; and that, despite the fact that Sarah had been in WCHS custody for a period of six months, Respondent-Mother had failed to pay a reasonable portion of the cost of Sarah's care during that time. On 30 September 2010, WCHS filed a petition to terminate Respondent-Mother's parental rights in Susan, with this request predicated upon the same grounds for termination that had been asserted with respect to Sarah. The issues raised by the WCHS petitions came on for adjudication on 4 February 2011 and for disposition on 17 February 2011.

On 23 March 2011, the trial court entered an order terminating Respondent-Mother's parental rights in both Sarah and Susan. In reaching this conclusion, the trial court determined that Respondent-Mother had willfully failed to make reasonable progress toward correcting the conditions that had led to the removal of both juveniles from her home, N.C. Gen.

Stat. § 7B-1111(a)(2), and that Sarah was neglected. N.C. Gen. Stat. § 7B-1111(a)(1). At disposition, the trial court concluded that it was in the best interests of both children that Respondent-Mother's parental rights be terminated. Respondent-Mother noted an appeal to this Court from the trial court's order.

II. Legal Analysis

In her sole challenge to the trial court's order, Respondent-Mother contends that the trial court erred by concluding that her parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) because the cognitive limitations to which she was subject precluded the necessary finding of "willfulness." We disagree.[2]

At the adjudicatory stage of a termination of parental rights hearing, the petitioner has the burden of proving the existence of at least one ground for termination by clear, cogent, and convincing evidence. N.C. Gen. Stat. § 7B-1109(f); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Appellate review of an order terminating a parent's

[2] We note that Respondent-Mother has not challenged the trial court's determination that her parental rights in Sarah were subject to termination for neglect. As a result, Respondent-Mother acknowledges in her brief that she has effectively abandoned her challenge to the termination of her parental rights in Sarah.

parental rights is limited to determining whether clear and convincing evidence exists to support the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

In considering a request for the termination of a parent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must conduct a two-part analysis:

> The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of "reasonable progress" may parallel or differ from that which supports the determination of "willfulness" in leaving the child in placement outside the home.

In re O.C. and O.B., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). "'Willfulness' for purposes of N.C. Gen. Stat. § 7B-1111(a)(2), is something less than 'willful' abandonment when terminating on the ground of N.C. Gen. Stat. § 7B-1111(a)(7)." *In re Shepard*,

162 N.C. App. 215, 224, 591 S.E.2d 1, 7 (internal citation omitted), *disc. review denied*, *sub. nom.*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "Evidence showing a parent's ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach." *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) (citation omitted).

After thoroughly reviewing the record, we conclude that the evidence and the trial court's findings of fact adequately support the trial court's determination that Respondent-Mother had willfully failed to make reasonable progress toward correcting the conditions that led to the removal of the children from her home. Finding of Fact No. 25 describes the steps that Respondent-Mother was required to take before Sarah and Susan could be returned to her care, including obtaining stable housing and employment and participating in therapy and counseling. Findings of Fact Nos. 40 through 49 illustrate Respondent-Mother's subsequent history of unstable housing, including the fact that she may have violated the terms of her current lease by engaging in criminal activity. Findings of Fact Nos. 50 through 57 describe Respondent-Mother's inconsistent employment history, including the fact that her

current job involved inconsistent work hours and failed to provide her with sufficient income to permit her to care for herself and the children. Findings of Fact Nos. 77 through 80 recount Respondent-Mother's "sporadic" participation in therapy and counseling. As a result of the fact that Respondent-Mother has not challenged any of these findings on appeal, we hold that each of them is binding for purpose of appellate review. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Instead of challenging the sufficiency of the evidence to support the trial court's findings of fact, Respondent-Mother contends that the trial court failed to adequately consider her cognitive limitations in determining that she willfully failed to make reasonable progress toward correcting the conditions that led to the children's removal from her home. In essence, Respondent-Mother argues that her failure to make reasonable progress stemmed from her cognitive limitations and that this fact precluded the trial court from concluding that her failure to make reasonable progress was willful. We do not find this argument to be persuasive.

Respondent-Mother's argument is largely based on the testimony of Tina Lanier, who taught Respondent-Mother parenting skills in the "Families on the Grow" program, which attempts to assist parents who are subject to cognitive limitations. Ms.

Lanier did testify that, although Respondent-Mother successfully completed the "Families on the Grow" program, she was easily distracted and sometimes asked irrelevant questions. Erin Lanier, the original social worker assigned to this case, testified, that Respondent-Mother refused to take responsibility for the conditions that led to the removal of the juveniles from her care and never indicated that Respondent-Mother was incapable of understanding those conditions or the steps that she needed to take in order to remedy them. In addition, we note that social worker Kimaree Sanders, who was assigned to this matter at the time of the hearing, provided no basis in her testimony for believing that Respondent-Mother's failure to make reasonable progress should be excused as a result of any cognitive limitations to which she was subject. Despite the fact that she testified at the adjudication hearing and had an adequate opportunity to present evidence on her own behalf, Respondent-Mother has not identified any evidence tending to show she suffers from cognitive limitations of sufficient severity to preclude or undermine a finding of willfulness. Thus, the record simply does not suggest that Respondent-Mother's failure to make reasonable progress toward correcting the conditions that led to the children's removal from her home

stemmed from any cognitive limitations to which she might have been subject.

Moreover, we note that several of the trial court's findings demonstrate that it considered Respondent-Mother's cognitive abilities in reaching its conclusion that her parental rights in Sarah and Susan were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Findings of Fact Nos. 61 through 65 address Respondent-Mother's participation in the "Families on the Grow" program. A careful reading of those factual findings demonstrates that the trial court considered the testimony of Ms. Lanier, along with the other record evidence relating to Respondent-Mother's capabilities, in determining the extent to which Respondent-Mother had willfully failed to make reasonable progress. For that reason, we conclude that the trial court's factual findings demonstrate an awareness of any cognitive limitations to which Respondent-Mother was subject and that the trial court took that evidence into account in making its willfulness determination. As a result, given the absence of any evidence tending to show that Respondent-Mother's failure to make reasonable progress toward eliminating the conditions that led to the removal of the children from her home resulted from cognitive limitations and the fact that the trial court's findings of fact demonstrate

that it adequately considered any cognitive limitations to which Respondent-Mother was subject in making its willfulness determination, we conclude that Respondent-Mother's challenge to the trial court's conclusion that her parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) lacks merit and that the trial court's order should be affirmed.

AFFIRMED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).