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NO. COA10-775

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

IN THE MATTER OF:

W.S.P., Jr.

Rowan County
No. 08 JT 103

Appeal by respondent-mother and respondent-father from judgment entered 25 March 2010 by Judge Beth Dixon in Rowan County District Court. Heard in the Court of Appeals 22 November 2010.

Cynthia Dry for petitioner-appellee, Rowan County Department of Social Services.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Carrie A. Hanger, for Guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant, mother.

Rebekah W. Davis for respondent-appellant, father.

BRYANT, Judge.

Because respondent-mother conceded that she willfully left juvenile in foster care for more than twelve months and the trial court's findings of fact support the conclusion that respondent-mother failed to make reasonable progress in correcting the conditions that led to the juvenile's removal from the home, we affirm the trial court's conclusion that sufficient grounds existed to terminate respondent-mother's parental rights.

Where the trial court held a hearing on respondent-father's competency and thereafter concluded respondent-father did not require the appointment of a guardian *ad litem*, there was no abuse of discretion.

Respondent-mother and respondent-father (collectively "respondents") are the parents of W.S.P., Jr., (juvenile) who was born six weeks premature on 21 May 2008. After his birth, juvenile was placed in the neonatal unit until he gained weight and was no longer jaundiced. During this monitoring period, hospital staff became concerned about respondent-mother's ability to care for juvenile and respondent-father's behavior. Respondent-mother frequently left the hospital for extended periods of time, without leaving her contact information, and acknowledged to hospital staff that she had fed her son and changed his diaper no more than six times since his birth six days earlier. Respondent-father was escorted out of the hospital after threatening staff and demanding to take juvenile home despite the newborn's medical condition. Hospital staff reported their concerns to Rowan County Department of Social Services (DSS).

A DSS investigation revealed that respondent-father had been incarcerated on an assault conviction from 23 January 2008 until 6 May 2008; that he had a significant criminal history; and, according to respondent-mother's family, respondent-father had been violent toward respondent-mother. DSS's investigation also raised concerns about respondent-mother's living situation. The Cemetery Street residence listed by respondent-mother on hospital admission

forms was raided by police on 23 May 2008. Police found stolen firearms, drugs and drug paraphernalia in the residence, and arrested several of respondent-mother's relatives. Respondent-mother informed DSS that she was living with respondent-father on East Lafayette Street.

DSS told respondents that they would need to take drug tests before juvenile would be released to them. Until the drug screen results came back, respondent-mother entered into a voluntary placement agreement with DSS pursuant to which juvenile was released from the hospital and placed in a licensed foster home on 30 May 2008. Respondent-mother's drug screen came back negative and, on 20 June 2008, she terminated the voluntary placement agreement. Respondent-mother named Deborah D. as a safety resource with whom she and juvenile could reside. Respondent-mother signed a safety assessment stating that she would remain in the home of Deborah D., and Deborah agreed to be her safety resource. Because, respondent-father tested positive for cocaine, respondent-mother agreed not to allow respondent-father contact with juvenile. DSS placed juvenile with respondent-mother at Deborah's home on 20 June 2008. The next day, Deborah informed DSS that respondent-mother and juvenile left her home, and she did not know their whereabouts.

On 25 June 2008, DSS social workers located respondent-mother and juvenile at the E. Lafayette Street home of respondent-father. Respondent-mother fled with the newborn. Law-enforcement soon found respondent-mother hiding in a nearby house. Juvenile was taken into nonsecure custody and returned to foster care. Law

enforcement also discovered a large bundle of cash in respondent-mother's purse. Respondent-mother stated that respondent-father's primary source of income came from dealing drugs. On 26 June 2008, DSS filed a juvenile petition alleging that juvenile was neglected.

After holding a hearing on 7 August 2008, the trial court adjudicated juvenile a neglected juvenile. The trial court ordered DSS to retain legal custody of juvenile but allow a trial placement with respondent-mother. The trial court ordered respondent-mother to: obtain and maintain suitable housing and employment; complete the Parents as Teachers in home services program; cooperate with DSS as it pertained to child care services; and cooperate with DSS and other involved agencies. The trial court ordered respondent-father to have no contact with juvenile until he completed a safety assessment and a case plan service agreement. Respondent-mother was ordered to contact DSS and law enforcement if respondent-father attempted to visit the minor child.

The day after the adjudication hearing, DSS placed juvenile with respondent-mother on a trial basis. Within a month, DSS terminated the trial placement upon learning that respondent-mother and juvenile were living with respondent-father.

The trial court held a permanency planning hearing on 11 December 2008. The trial court found that juvenile's pediatrician referred juvenile to the Child Developmental Services Agency after his foster care provider related concerns about juvenile's gross motor skills. The trial court found that it was "contrary to the best interest of [juvenile] for custody to return to [respondent-

mother] at this time as a trial placement needs to be effectuated and monitored, and [respondent-mother] continues to need the support and assistance of the [DSS]"; however, "[t]he permanent plan should remain reunification with [respondent-mother]." The trial court ordered respondent-mother to: comply with all treatment, evaluations, and appointments made by Child Development Services; maintain suitable housing and employment; provide for all of juvenile's needs; complete the 12-week parenting program through the Adolescent and Family Enrichment Council; cooperate with DSS as it pertains to child care services; take all prescribed medication; cooperate with DSS and other involved agencies; have no contact with respondent-father; contact DSS and law enforcement if respondent-father attempted to visit juvenile; and strictly comply with and adhere to the court's orders and further orders of the court. The trial court ordered respondent-father to have no contact with juvenile "unless and until he presents himself to the court and agrees to complete any orders of the court."

Child Development Services found that juvenile was in need of physical therapy twice per week for decreased age appropriate skills in gross motor development. However, on 18 February 2009, respondent-mother missed an appointment, and in following up, DSS discovered an eviction notice posted on the door of respondent-mother's listed residence. Respondent-mother thereafter missed two home visits scheduled with DSS.

During a permanency planning hearing conducted on 26 February 2009, the trial court reprimanded respondent-mother for her evasive

conduct and ordered respondent-mother to maintain suitable housing and employment, cooperate with DSS, have no contact with respondent-father, not change residences without prior approval of DSS, keep DSS apprised of where juvenile was staying, and comply with and adhere to the court's orders. Respondent-mother informed the court that she moved to an address on Henderson Street on 17 February 2009. The trial court again ordered respondent-father not to have contact with his son "unless and until he presents himself to the court and agrees to complete recommendations."

Following the 26 February 2009 hearing, DSS went to the Henderson Street address and learned respondent-mother had given false information about her living situation. DSS subsequently located respondent-mother and juvenile at an apartment on North Main Street. After DSS learned the apartment was rented in the names of both respondent-mother and respondent-father, DSS returned to the North Main Street home to take custody of juvenile but was met at the door by respondent-father, who was uncooperative. DSS, with the landlord, later returned to the North Main Street home and determined that respondent-mother and juvenile had left.

On 5 March 2009, the trial court held a hearing to review its February 2009 permanency planning order. The trial court found that respondent-mother and juvenile had contact with respondent-father in violation of the court's order and that the current whereabouts of respondent-mother and juvenile were unknown. The trial court concluded that the trial placement of juvenile with respondent-mother was no longer appropriate.

On 4 April 2009, respondent-mother and juvenile were discovered in Chester, South Carolina. Respondent-mother and juvenile had been living with respondent-mother's father. At that residence, a DSS agent observed beer bottle caps and empty cigarette cartons littering the edge of the house, as well as a strong smell of smoke. Juvenile was clean but could not take snacks with his hand or feed himself. Upon return, juvenile was placed in the foster home of Cindy B., who had cared for juvenile prior to his trial placement with respondent-mother beginning 12 December 2008.

Cindy B. observed that juvenile was very quiet and pale, his mouth had a bad odor, and juvenile had seemingly regressed in his gross motor development. Also, there was a large flat spot in the back of juvenile's head. The day after being placed into foster care, juvenile developed a fever and was diagnosed with pneumonia.

After a permanency planning hearing on 30 July 2009, the trial court found that juvenile was progressing well in foster care and that respondent-mother had not made progress in the last thirteen months. The trial court also found that respondent-father had several pending drug charges. The trial court changed the permanent plan from reunification with respondent-mother to adoption. The trial court ordered DSS to file a termination of parental rights petition.

On 22 September 2009, DSS filed a petition to terminate the parental rights of respondent-mother and respondent-father. On 7 January 2010, the trial court continued the hearing on the

termination petition when counsel for respondent-father informed the trial court of "serious concerns about [respondent-father's] capacity." The trial court ordered that a Rule 17 guardian *ad litem* hearing regarding respondent-father's capacity be conducted on 21 January 2010. By order filed 3 February 2010, the trial court found that the documentary evidence revealed "[respondent-father] is competent to participate in the legal system by the current legal standards. He possesses sufficient capacity to understand the nature of the termination of parental rights proceeding and to assist his attorney in his response to the petition." The trial court concluded that respondent-father was not in need of a guardian *ad litem* and set the termination of parental rights hearing for 4 February 2010.

Following the termination of parental rights hearing, the trial court found grounds to terminate the parental rights of respondent-father as to juvenile for neglect, for willfully leaving juvenile in foster care, for failing to pay a reasonable portion of the cost of care for juvenile, and for willful abandonment of juvenile, pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), (3) and (7). The trial court also found grounds to terminate respondent-mother's parental rights for neglect and for willfully leaving juvenile in foster care, pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2). The trial court concluded it was in the best interests of juvenile to terminate the parental rights of respondents. Respondent-mother and respondent-father separately appeal.

On appeal, respondent-father questions whether the trial court erred by failing to appoint him a guardian *ad litem*. Respondent-mother questions whether the trial court had sufficient evidence to terminate her parental rights on the basis of (I) neglect; and (II) willfully leaving her child in foster care.

Respondent-Father's Appeal

Respondent-father contends the trial court erred in denying his motion for appointment of a guardian *ad litem*. We disagree.

Appointment of a guardian *ad litem* for a parent is governed by Section 7B-1101.1, which, in relevant part, states:

(c) On motion of any party or on the court's own motion, the court *may* appoint a guardian *ad litem* for a parent in accordance with G.S. 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest. The parent's counsel shall not be appointed to serve as the guardian *ad litem*.

N.C. Gen. Stat. § 7B-1101.1(c) (2009) (emphasis added). Pursuant to N.C. Gen. Stat. § 7B-1101.1(c), "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). Whether the circumstances are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge. *In re C.G.A.M.*, 193 N.C. App. 386,

390, 671 S.E.2d 1, 4 (2008). As this Court has stressed, a trial court is not required to appoint a guardian *ad litem* in every case in which cognitive limitations or substance abuse is alleged to exist. *J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 49.

Here, the trial court postponed the hearing on respondent-father's termination of parental rights based on counsel's "serious concerns about [respondent-father's] capacity." Through counsel, respondent-father filed a motion to appoint a Rule 17 Guardian. The trial court held a hearing in accordance with N.C. Gen. Stat. § 7B-1101.1 to inquire about respondent-father's capacity. The trial court considered several assessments conducted in preparation for a trial on respondent-father's criminal charges, including: a Forensic Consultation Summary, dated 15 July 2009, prepared by Forensic Psychiatrist Dr. Nicole Wolfe at Central Regional Hospital in Raleigh, who concluded that "despite his difficulties, [respondent-father] is able to understand the nature and object of the . . . proceedings against him, is able to comprehend his position relative to those proceedings, and is capable of assisting in his defense"; and a forensic consultation summary prepared by Dr. Heather Ross, Senior Psychologist at Central Hospital, who concluded that respondent-father "show[ed] an adequate ability to process information, to reason logically, and to comprehend legal concepts."

The trial court concluded that respondent-father was

competent to participate in the legal system by the current legal standards. He possesses sufficient capacity to understand the nature of the termination of parental rights

proceedings and to assist his attorney in his response to the petition. He has a different perspective on the world than most, but it is a reasoned, intelligent perspective.

And, "[b]ased on the documentary evidence presented, [respondent-father] is not in need of a Rule 17 Guardian ad Litem [sic]." We cannot say that the trial court abused its discretion. Accordingly, respondent-father's argument is overruled. Respondent-father does not otherwise challenge the findings of fact and conclusions of law in the order terminating his parental rights. Therefore, we affirm the trial court's termination of parental rights as to respondent-father.

Respondent-Mother's Appeal

Respondent-mother contends the trial court erred by finding and concluding that sufficient grounds exist to terminate her parental rights on the basis of (I) neglect and (II) willfully leaving her child in foster care. We initially address respondent-mother's second (II) issue, that she did not willfully leave her child in foster care for more than 12 months in violation of N.C. Gen. Stat. § 7B-1111(a)(2). As to this issue, respondent-mother contends that her progress in correcting those conditions which led to the removal of the juvenile was reasonable. We disagree.

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602

(2002) (citation omitted). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602 (citation omitted). On appeal, the trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Id.* The trial court's findings of fact, if supported by clear and convincing evidence, are binding. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Unchallenged findings of fact are also binding. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003).

North Carolina General Statutes, section 7B-1111(a)(2), provides that a court may terminate parental rights where:

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. § 7B-1111(a)(2) (2009). "[T]o find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must perform a two part analysis." *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The trial court must determine by clear, cogent, and convincing evidence that: (1) the respondent "willfully" left the juvenile in foster care or placement outside the home for more than twelve months, and (2) that s of the time of the hearing the respondent failed to make "reasonable progress" in

correcting the conditions that led to the juvenile's removal from the home. *Id.* at 464-65, 615 S.E.2d at 396. Respondent-mother does not contest that she willfully left juvenile in foster care for more than 12 months.

The trial court made numerous unchallenged findings of fact regarding respondent-mother's failure to make reasonable progress. On 7 August 2008, juvenile was initially adjudicated neglected based on findings that

[respondent-mother] was not spending appropriate time with the juvenile following his premature birth, [and] hospital staff did not know how to contact [respondent-mother] while she was away for long periods of time from the hospital [P]olice raided the address listed by [respondent-mother] as her address on hospital paperwork and charged [respondent-mother's] mother, sister, and brother with various crimes including drug and firearms charges, [respondent-mother] failed to attend properly to own health condition, . . . [respondent-mother] violated a safety assessment with [DSS] by failing to remain in the home where she agreed to stay with the juvenile after terminate the placement agreement, [respondent-mother] and the juvenile were located in the home of [respondent-father] after [respondent-mother] had agreed not to have any contact with [respondent-father], [respondent-mother] had no formula for the juvenile when located . . .

The trial court ordered respondent-mother to obtain and maintain suitable housing and employment, complete the Parents as Teachers in home services program, cooperate with DSS as it pertained to child care services, cooperate with DSS and other involved agencies, and contact DSS and law enforcement if respondent-father attempted to visit the minor child.

The trial court found that since the initial adjudication of neglect

[respondent-mother] has not completed the Court's orders, allowed contact between the juvenile and his father in direct violation of the Court's orders, failed to maintain necessary developmental physical therapy appointments for the juvenile, was dishonest with the Court and the [DSS] during the reunification process to the detriment of the juvenile, failed to maintain medical appointments for the juvenile, and left the state with the juvenile in violation of court order.

Further, the trial court found that, while respondent-mother "maintained suitable housing for a time, she left that housing without the knowledge or permission of the [DSS], was dishonest about the reasons she left and pretended to live at a different residence where she and the juvenile did not live"; respondent-mother has "lived in at least six different residences during the period of less than a year[,] and "did not complete the Parents as teachers in-home services program as ordered. [And,] has [had] no parenting training from August 2008 until October 2009, a delay of fourteen months."

The trial court's findings of fact support its conclusion that respondent-mother willfully left juvenile in foster care without showing reasonable progress had been made in correcting those conditions which led to the removal of the juvenile. See N.C.G.S. § 7B-1111(a) (2) (2009). Therefore, we hold the trial court did not err in concluding that sufficient grounds existed to terminate respondent-mother's parental rights as to juvenile pursuant to N.C.

Gen. Stat. § 7B-1111(a)(2). Accordingly, respondent-mother's argument is overruled.

Because sufficient grounds existed to terminate respondent-mother's parental rights as to juvenile on the basis of N.C. Gen. Stat. § 7B-1111(a)(2), we do not address respondent-mother's remaining arguments challenging the termination of her parental rights on the basis of neglect. *See In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984) (a finding of one statutory ground is sufficient to support the termination of parental rights).

Affirmed

Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).