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NO. COA12-539
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

IN THE MATTER OF:

K.L.T.G.

Gaston County
No. 10 JT 129

Appeal by respondent-mother from order entered 12 March 2012 by Judge Thomas G. Taylor in Gaston County District Court.

Heard in the Court of Appeals 19 November 2012.

Elizabeth Myrick Boone, for petitioner-appellee Gaston County Department of Social Services.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellant mother.

Robinson, Bradshaw & Hinson, P.A., by Ty E. Shaffer, for the guardian ad litem.

ELMORE, Judge.

J.L.G. (respondent) appeals from an order which terminated her parental rights to her minor child, K.L.T.G. (the juvenile).
We affirm.

I. Background

Respondent first became involved with the Gaston County Department of Social Services (petitioner) in 2006. By 2007, her eldest child was adjudicated neglected and dependent due in part to respondent's abuse of cocaine and Valium. Then in early 2009, respondent became pregnant with the juvenile. During the pregnancy, she tested positive for cocaine. Respondent gave birth to the juvenile in October 2009. Several months later, on 5 January 2010, respondent gave her older child up for adoption. A few months after that, petitioner assumed non-secure custody of the juvenile by order entered 15 April 2010, and filed a petition alleging the juvenile was neglected and dependent that same day.

By order entered 14 December 2010, the trial court found that the juvenile was neglected. The court adopted petitioner's case plan for respondent, and found that substance abuse treatment was her first priority in the plan. However, by order entered 30 March 2011, the trial court found respondent continued to abuse drugs and had failed to follow through with her substance abuse treatment, and it set the permanent plan as reunification concurrent with guardianship and adoption. On 9 August 2011, petitioner filed a petition for termination of respondent's parental rights on the grounds that respondent

neglected the juvenile and failed to make reasonable progress to correct the conditions which led to the removal of the juvenile from her custody. N.C. Gen. Stat. § 7B-1111(a)(1), (2) (2011).

After a hearing on 13 February 2012, the trial court entered an order terminating respondent's parental rights. The court concluded that both grounds alleged in the petition existed and it was in the best interest of the juvenile to terminate parental rights. Respondent filed timely notice of appeal.

II. Arguments

Respondent presents nine arguments on appeal. She argues that: 1) The trial court erred in permitting amendment of the petitions to terminate parental rights; 2) The trial court erred in taking judicial notice of the validity of hair follicle drug tests and in relying on a diluted test sample; 3) The trial court erred in relying on respondent's criminal history in adjudicating grounds to terminate her parental rights; 4) The trial court erred in finding that respondent had only complied with one area of her case plan; 5) The trial court erred in finding that "placing the child in mother's home would be placing the child in danger;" 6) The trial court erred in considering best interest factors in the adjudication portion of

the hearing; 7) The trial court erred in adjudicating neglect as a ground to terminate respondent's parental rights; 8) The trial court erred in concluding grounds existed to terminate respondent's parental rights based on willfully leaving the juvenile in foster care for 12 months; 9) The trial court erred in terminating respondent's parental rights. We will address each of respondent's arguments in turn; however, we decline to address arguments 3 or 5. We conclude that these arguments challenge findings of fact which do not affect the validity of the order as a whole and which are not necessary to affirm the trial court's conclusion based on other grounds.

III. Analysis

A. Amendment of petition

Respondent first argues the trial court erred in allowing petitioner's oral motion to amend the petition to terminate her parental rights at the beginning of the hearing. We disagree.

At the start of the hearing, petitioner's counsel asked the court to amend the third-to-last paragraph of the petition in which petitioner asked:

2. That the Court find the existence of one or more grounds for termination of parental rights under N.C.G.S. 7B-1111 based on clear, cogent and convincing evidence and that the parental rights of the Respondent/mother, [M.N.T.], to the

juvenile, [R.X.M.], be terminated

Clearly, respondent is not M.N.T., and the juvenile is not R.X.M. Counsel for petitioner argued that the body of the petition used the proper names for respondent and the juvenile, and that the error was merely a typographical error. Respondent's counsel objected for the record, but the trial court found the error did not prejudice respondent's notice of the allegations against her and allowed the amendment. Respondent has not argued on appeal that she lacked notice that petitioner sought to terminate her parental rights to the juvenile because of the error in the petition. We agree with the trial court that the amendment did not prejudice respondent and overrule this argument. See *In re G.B.R.*, ___ N.C. App. ___, ___, 725 S.E.2d 387, 389-91 (2012) (holding that while it was error to amend a petition to terminate parental rights to conform to the evidence presented at the hearing, the respondent-father was not prejudiced by the amendment because he was sufficiently on notice that the petitioner sought to terminate his parental rights based on the amended ground).

B. Hair follicle drug tests

Respondent next argues the trial court erred in taking judicial notice of the validity of a hair follicle drug test and

basing its finding of fact on the validity of the testing. Respondent's argument is misplaced.

At the hearing, Jennifer Helms, an employee of petitioner, testified that on 11 January 2012, respondent took a hair follicle drug test and tested positive for cocaine. Respondent did not object to Ms. Helms' testimony, but did later state in her own testimony that she does not trust the accuracy of a hair follicle drug test. In rendering its order on adjudication, the trial court took judicial notice that a hair follicle drug test was a reliable test, and the court made the following finding in its order terminating respondent's parental rights:

That the test given on January 11, 2012 was a hair follicle test and the Respondent/Mother testified that she did not believe in hair follicle tests. This Court, however, takes judicial notice of the validity of hair follicle testing and accepts the results as positive for cocaine.

Respondent now argues the trial court erred in taking judicial notice of the validity of hair follicle drug tests because their validity is not a fact, not subject to reasonable dispute, and the trial court failed to identify what source or sources it relied upon in taking judicial notice. Respondent ignores, however, that the results of the hair follicle drug test were admitted into evidence without objection, and thus

came into evidence for the substantive purpose of establishing that she tested positive for cocaine on 11 January 2012. Accordingly, whether the trial court erred in taking judicial notice of the validity of hair follicle drug tests is moot as that validity was never legally challenged by respondent.

Respondent also argues that the trial court erred in considering her drug test taken on 8 February 2012 as a positive drug screen because the sample was deemed too diluted to perform an accurate test. On the day in question, respondent initially refused to take the drug test, saying she had just used the bathroom, and did not take the drug test until after drinking three large bottles of water. Under the terms of respondent's case plan, a failure to submit to requested drug testing within three hours of the request would be considered a positive screen. Additionally, department policy considered diluted drug tests as positive screens. Accordingly, we hold the trial court did not err in finding that the 8 February 2012 drug test constituted a positive drug screen given respondent's initial refusal to take the test and drinking large quantities of water immediately before the test, such that the sample was too diluted to obtain an accurate result.

C. Compliance with case plan

Respondent further argues the trial court erred in finding that she "did what she was suppose[d] to do in **one** area of her case plan" because she attended almost all of her visits with the juvenile. Respondent contends that she also was compliant with the requirements of her case plan regarding obtaining mental health treatment, obtaining dental treatment without using narcotics, avoiding criminal activity, and keeping and attending appointments for the juvenile. While we agree that the trial court's statement that respondent only complied with one area of her case plan is not supported by the evidence, given respondent's failure to make progress in other areas of her case plan, as discussed below, we cannot say respondent was prejudiced by the error.

D. Best interest factors in adjudication hearing

Respondent also argues that several of the trial court's findings of fact made in the adjudication portion of the order terminating her parental rights are directly related to the best interests of the juvenile under N.C. Gen. Stat. § 7B-1110(a), and that the trial court's consideration of these factors in the adjudication portion of the hearing show the trial court blurred the required two-step process and considered the best interests

of the juvenile prior to determining grounds for terminating her parental rights. We disagree.

Termination of parental rights proceedings involve a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "In 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). "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.

Here, the trial court conducted a bifurcated trial, finding by clear, cogent and convincing evidence at the end of the adjudicatory phase that grounds existed to terminate respondent's parental rights under sections 7B-1111(a)(1) (neglect) and 7B-1111(a)(2) (failure to make reasonable progress), and then, after conducting the dispositional phase of the hearing, the trial court concluded that the termination of respondent's parental rights was in the best interest of the juvenile. The trial court's order is similarly bifurcated into

adjudicatory and dispositional sections and it applies the correct evidentiary standard in each section. The mere fact that some of the trial court's adjudicatory findings of fact touch upon dispositional best interest factors does not show the trial court blurred the boundaries of the two-step process. Accordingly, we overrule this argument.

E. Grounds to terminate parental rights

We next address respondent's argument that the trial court erred in concluding grounds existed to terminate her parental rights under section 7B-1111(a)(2). Respondent argues the trial court erred in failing to make a specific finding that she acted willfully in failing to address her substance abuse issues. Respondent additionally argues that the trial court erred in finding that her unemployment and housing situation supported its conclusion. Respondent's arguments are misplaced.

Grounds exist for termination of parental rights when

[t]he 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. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2011). "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (citations and quotation marks omitted), *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). The trial court's findings of fact which an appellant does not specifically dispute on appeal "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

Here, the trial court made the following relevant findings in support of its conclusion that grounds existed to terminate respondent's parental rights under section 7B-1111(a)(2):

4. That the juvenile has remained in the custody of the Gaston County Department of Social Services since April 14, 2010, approximately twenty-two (22) months, and no Court has seen fit to return the juvenile to the custody of the Respondent/Mother.

. . . .

7. Said juvenile was adjudicated a "Neglected" juvenile on July 27, 2010 in Gaston County file numbers 10-JA-129, based in part on the fact that at [sic] the Respondent/Mother tested positive for cocaine in May 2009, during her pregnancy with this minor juvenile.

8. Respondent/Mother tested positive for cocaine, oxycodone, and hydroquinone on January 5, 2010, the same day that she released her other child, [S.], for adoption.

9. On April 13, 2010, Respondent/mother was suspended from Cascades, an inpatient substance abuse treatment facility for testing positive for cocaine. Respondent/mother has a history of positive drug screens for cocaine dating back to October 2006.

10. Respondent/Mother refused drug screens on the following dates: August 25, 2011; September 9, 2011; September 20, 2011; September 23, 2011; December 7, 2011.

11. Respondent/Mother had the following positive drug screens: August [1]6, 201[0]

for benzodiazepines; October 18, 2010 for benzodiazepines and cocaine; October 25, 2010 for benzodiazepines and cocaine; November 3, 2010 for opiates; March 14, 2011 could not give a sample; March 17, 2011 for cocaine; October 7, 2011 for cocaine; October 24, 2011 for cocaine; January 11, 2012 for cocaine; and February 8, 2012 gave a diluted sample. That the test given on January 11, 2012 was a hair follicle test and the Respondent/Mother testified that she did not believe in hair follicle tests. This Court however takes judicial notice of the validity of hair follicle testing and accepts the results as positive for cocaine. This Court also notes that the evidence regarding a diluted drug screen taken just five (5) days prior to this hearing is uncontested.

. . . .

16. That the Respondent/Mother entered into a mediated case plan which enumerated and described the steps she was required to take to reunify with her child.

17. Substance abuse treatment was to be first priority. Respondent/Mother will successfully resolve any substance abuse or alcohol issues and maintain sobriety on an ongoing basis. Respondent/Mother has continued to test positive for cocaine and other controlled substances throughout this case.

18. That in the area of substance abuse, the Mother's failure to cooperate with drug screens, and continued positive screens for cocaine after she had completed treatment, shows that she has not corrected this condition that caused the minor child to come into custody. That this Court has sympathy for the Respondent/Mother's battle

with addiction, however the Court finds that the Respondent/Mother has not been forthright in her treatment.

19. That at the time of this hearing the Respondent/Mother testified that she does not currently have a sponsor nor has she found an NA group to attend in Rowan County.

Respondent has not challenged any of these findings of fact as being unsupported by the evidence,¹ and they are thus binding on appeal.

We hold these findings fully support the trial court's conclusion that respondent willfully left the juvenile in foster care for more than twelve months without making reasonable progress toward correcting the conditions that led to the removal of the juvenile from her custody. Respondent concedes that the juvenile was removed from her custody due to her use of illicit drugs, and respondent has not demonstrated any meaningful progress toward the amelioration of her substance abuse problems. The trial court did not make a finding that respondent acted willfully in leaving the juvenile in foster care. However, the trial court's findings of respondent's

¹ Respondent has challenged that the trial court erred in taking judicial notice of the validity of hair follicle tests. However, as discussed *supra*, that challenge does not impact the trial court's finding that she tested positive for cocaine on 11 January 2012.

repeated positive drug screens, even after entering substance abuse treatment, and repeated refusals to take requested drug tests demonstrate a prolonged failure to address her substance abuse problems, and are sufficient to support the trial court's conclusion that she willfully failed to make reasonable progress to correct the conditions which led to the removal of the juvenile from her custody. See *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (holding "a respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness"). Accordingly, we hold the trial court did not err in concluding grounds exist to terminate respondent's parental rights pursuant to section 7B-1111(a)(2).

"[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.'" *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (quoting *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). We, therefore, do not address respondent's arguments regarding the conclusion that

grounds existed under section 7B-1111(a)(1). Additionally, while respondent does challenge additional findings of fact made by the trial court, we need not address those arguments because the challenged findings are not necessary to affirm the trial court's conclusion that grounds exist to terminate her parental rights pursuant to section 7B-1111(a)(2) and thus any error in the findings would not constitute reversible error. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). Since respondent has not challenged the dispositional ruling that termination of her parental rights was in the best interests of the juvenile, we affirm the trial court's order terminating respondent's parental rights to K.L.T.G.

IV. Conclusion

In sum, for the reasons set forth above, we affirm the trial court's order terminating respondent's parental rights to the juvenile.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).