NO. COA13-789
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

IN THE MATTER OF:

D.M.R. Dare County
No. 11 JT 51

Appeal by respondent-mother from order entered 18 April 2013 by Judge Amber Davis in Dare County District Court. Heard in the Court of Appeals 30 October 2013.

Sharp, Michael, Graham & Baker, L.L.P., by Steven D. Michael, for petitioner-appellee Dare County Department of Social Services.

Parker Poe Adams & Bernstein, LLP, by Matthew H. Mall, for Guardian ad litem.

Anna S. Lucas, for respondent-appellant mother.

MARTIN, Chief Judge.

Respondent-mother appeals from an order terminating her parental rights as to the minor child D.M.R. ("Darcy").[1] For the following reasons, we affirm.

[1]We employ pseudonyms to protect the juvenile's privacy and for ease of reading.

Darcy was born in February 2009. The Dare County Department of Social Services ("DSS") first became involved with the family in June 2010, after Darcy's half-sister ("Katy") was born and both mother and Katy tested positive for marijuana.

On 1 August 2011, the Dare County Sheriff's Office responded to a 911 call at mother's residence. Upon entering the room mother shared with Darcy and Katy, officers observed marijuana, cocaine, and drug paraphernalia located in plain view and in areas accessible to the children. Search of the room revealed cocaine in a dresser where the children's clothes were kept. Mother was then arrested and incarcerated, and DSS obtained nonsecure custody of the children. On 3 August 2011, DSS filed a juvenile petition alleging that Darcy was a neglected juvenile.

Upon mother's stipulation to the allegations in the juvenile petition, the district court entered an adjudication of neglect and temporary disposition on 27 September 2011. The district court found that mother had a "history of instability" including frequent changes of address, unemployment and inability to financially provide for the needs of her children, substance abuse issues, and a pending prior charge for possession of drug paraphernalia. The court also found that

mother had yet to provide DSS with a physical address and failed to attend three scheduled appointments to discuss her case. Mother arrived forty-one minutes late to her initial visitation with Darcy on 5 August 2011 and submitted a positive drug screen following the visit. After refusing to submit to testing on 8 August 2011, she provided a negative drug screen on 22 August 2011. Based on the foregoing findings, the court continued custody of Darcy with DSS and granted mother supervised visitation contingent upon her submission of negative drug screens.

Mother did not attend the disposition hearing on 27 September 2011. In its order entered 26 October 2011, the district court found that mother continued to be unemployed, homeless, and without means of transportation and that she refused to provide DSS with a valid address and contact phone number. The court further found that mother still had not formalized her case plan, having missed two scheduled Child and Family Team meetings at a location chosen to accommodate her transportation needs. The court ordered mother, inter alia, to meet with her case worker, keep DSS apprised of her address and contact information, submit to random drug screens, and comply with her case plan.

After a series of review hearings, the district court held a permanency planning hearing on 17 April 2012. By order entered 12 July 2012, the court found that mother had failed to maintain contact with DSS, obtain stable housing, phone, or means of transportation, participate in parenting classes, submit to drug screens as requested by DSS, and complete the individual and group therapy for substance abuse prescribed by her treatment plan. The court concluded that after eight months of DSS intervention, mother's conduct indicated that she was still no closer to providing a safe and stable home for her children and ordered that further reunification efforts cease.

Mother did not attend the subsequent permanency planning and review hearing on 24 July 2012. In an order entered 15 August 2012, the district court found that mother "continued to lead a lifestyle of instability" and established a bifurcated permanent plan of guardianship or adoption for Darcy. In its following order entered 14 September 2012, the court noted that DSS had been unable to locate mother and that she had posted a comment on Facebook indicating that she had moved to Virginia. The court changed Darcy's permanent plan to adoption and directed DSS to file a petition for termination of mother's parental rights.

DSS filed a petition to terminate mother's parental rights as to Darcy on 23 October 2012, alleging as grounds for termination that mother had (1) neglected Darcy and would likely repeat that neglect if the child was returned to her care, and (2) willfully failed to pay a reasonable portion of Darcy's cost of care in the six months that preceded the filing of the petition. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3) (2011). Although she was provided notice, mother did not attend the termination hearing on 20 March 2013. Her counsel notified the court that she met with mother earlier in the year to discuss her case. Despite repeated attempts to contact mother since then, however, counsel had been unable to do so. Counsel averred that the phone number mother provided did not work and that she apparently no longer resided in the State. Mother's DSS case worker testified that she had last spoken to mother at a permanency planning team meeting on 11 December 2012 and that mother had not called her since then to discuss Darcy as requested to do so.

After hearing the evidence, the district court found that both grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) and (3). The court further concluded that termination of mother's parental rights was in Darcy's best

interests.

Mother filed timely notice of appeal from the termination order. Because the record on appeal lacks proof of service of the notice upon DSS or the guardian ad litem, as required by N.C.R. App. P. 3.1(a), mother later filed a petition for writ of certiorari supported by an affidavit of her trial counsel, who attests to serving the notice of appeal upon DSS and the guardian ad litem. DSS and the guardian ad litem have since moved to dismiss mother's appeal for noncompliance with Rule 3.1(a).

Inasmuch as mother's notice of appeal lacks a certificate of service, we agree that her appeal must be dismissed. *See In re C.T. & B.T.*, 182 N.C. App. 166, 167, 641 S.E.2d 414, 415 (dismissing the respondent-father's appeal because "failure to attach a certificate of service to the notice of appeal is fatal"), *aff'd per curiam*, 361 N.C. 581, 650 S.E.2d 593 (2007). In our discretion, however, we allow mother's petition for writ of certiorari to review the termination order. *See* N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take

timely action . . . .").

Mother first challenges the sufficiency of the district court's findings of fact in support of its termination of her parental rights based upon neglect. Specifically, mother contends that the court erred by taking judicial notice of the underlying case file and adopting the findings of fact verbatim from its prior orders, because the earlier findings were subject to a lower evidentiary standard. Mother further argues that the few "independent" findings made by the court fail to show that she neglected Darcy or that she was likely to do so in the future, as required to establish grounds for termination under N.C.G.S. § 7B-1111(a)(1).

"The standard for 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 Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). If the findings of fact are supported by competent evidence, they are binding on appeal, even though there may be evidence to the contrary. *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50, *appeal after remand*, 200 N.C. App. 594, 684 S.E.2d 902 (2009). Moreover,

where sufficient additional findings support an adjudication of neglect authorizing termination of parental rights, "erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

A trial court may terminate parental rights upon a finding, based on clear, cogent, and convincing evidence, that the parent has neglected the juvenile. *See* N.C. Gen. Stat. §§ 7B-1111(a)(1), -1109(f) (2011). A neglected juvenile is defined as one who, inter alia, "does not receive proper care, supervision, or discipline . . . ; or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2011). Although "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect," *In re Ballard*, 311 N.C. 708, 713–14, 319 S.E.2d 227, 231 (1984), a termination of parental rights requires evidence of neglect "at the time of the termination hearing." *In re C.W. & J.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). Where "the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent

is likely to neglect the child in the future." *Id.*

The juvenile code places a duty on the trial court as the adjudicator of the evidence. It mandates that "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e). A trial court, thus, must make an independent determination of whether grounds authorizing termination of parental rights exist at the time of the termination hearing. *See In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) ("'The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing.'" (quoting *In re McDonald*, 72 N.C. App. 234, 241, 324 S.E.2d 847, 851 (1984), *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985))), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

While a trial court must make an independent determination of whether grounds authorizing termination of parental rights exist at the time of the hearing and "may not delegate its fact

finding duty," *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), "a trial court may take judicial notice of earlier proceedings in the same case." *In re W.L.M. & B.J.M.*, 181 N.C. App. 518, 523, 640 S.E.2d 439, 442 (2007). A trial court may take judicial notice of findings of fact made in prior orders even where those findings are based on a lower evidentiary standard because the court "is presumed to have disregarded any incompetent evidence." *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (internal quotation marks omitted). The court, however, may not rely solely on prior court orders and reports but must receive some oral testimony at the termination hearing. *In re A.M., J.M.*, 192 N.C. App. 538, 542, 665 S.E.2d 534, 536 (2008), *appeal after remand*, 201 N.C. App. 159, 688 S.E.2d 118 (2009).

Mother argues that the district court erred by taking judicial notice of the prior orders in the underlying case file and reciting the findings of fact of those prior orders verbatim in the termination order. As mother notes, the ninety-one pages of adjudicatory findings included in the termination order consist almost entirely of findings reiterated wholesale from the district court's prior orders in the case. The court was entitled to take judicial notice of its prior adjudication of

Darcy as neglected and the adjudicatory facts it found in support thereof. *See In re Ballard*, 311 N.C. at 713–14, 319 S.E.2d at 231–32; *In re J.B.*, 172 N.C. App. at 16, 616 S.E.2d at 273. More importantly, the prior orders do not form the sole basis for the court's finding that grounds authorizing termination of mother's parental rights existed at the time of the termination hearing.

In addition to taking notice of its prior orders and other documents of record, the district court heard live testimony from mother's DSS case worker at the termination hearing. The testimony indicated that mother: (1) had not made progress in obtaining stable housing and employment; (2) failed to maintain contact with DSS or provide DSS with the means to contact her;(3) submitted at least two positive drug screens, refused to provide samples on eight occasions, and failed to pursue her prescribed substance abuse treatment;(4) attended only nineteen of her thirty-three scheduled visits with Darcy and was late for twelve of those nineteen visits; and (5) failed to participate in parenting classes. Moreover, based on mother's conduct since DSS obtained custody of Darcy, mother's case worker advised the court that "if the child were returned to [her care,] there would likely be a repeat of . . . neglect."

Insofar as the district court's findings of fact are supported by the testimony at the termination hearing, we hold that it is immaterial that the court copied language from its prior orders. A careful review of the termination order reveals a sufficient number of properly supported findings to demonstrate mother's prior neglect of Darcy and a probability of future neglect if the child was returned to her care. The district court, therefore, did not improperly rely solely on findings from its prior orders in determining that grounds existed to terminate mother's parental rights at the time of the termination hearing. Furthermore, although many additional findings are not supported by the testimony or by other evidence presented at the termination hearing, we conclude that the erroneous findings are mere surplusage unnecessary to the court's adjudication. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

This Court has "previously upheld findings that there is a probability of repetition of neglect where the respondent failed to obtain counseling, maintain a stable home and employment, and attend parenting classes." *In re J.E.M.*, __ N.C. App. __, __, 727 S.E.2d 398, 401 (2012) (citing *In re Davis*, 116 N.C. App. 409, 413–14, 448 S.E.2d 303, 306, *disc. review denied*, 338 N.C.

516, 452 S.E.2d 808 (1994)). Therefore, in light of mother's failure to engage with DSS or address the issues which led to the child's removal from her custody, there is clear, cogent, and convincing evidence of neglect authorizing termination of mother's parental rights under N.C.G.S. § 7B-1111(a)(1). We overrule mother's argument.

Because a single ground for termination under N.C.G.S. § 7B-1111(a) is sufficient to support an order terminating parental rights, we need not address mother's remaining argument challenging the adjudication under N.C.G.S. § 7B-1111(a)(3). *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246. Accordingly, we affirm the termination order.

Affirmed.

Judges GEER and STROUD concur.

Report per Rule 30(e).