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NO. COA14-685
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

IN THE MATTER OF:

J.C.S. | Nash County
No. 12 JT 102

Appeal by respondent mother from order entered 31 March 2014 by Judge William C. Farris in Nash County District Court. Heard in the Court of Appeals 24 November 2014.

Staff Attorney Jayne B. Norwood for petitioner-appellee Nash County Department of Social Services.

Windy H. Rose for respondent-appellant mother.

Ellis & Winters, LLP, by James M. Weiss, for guardian ad litem.

DIETZ, Judge.

Respondent mother appeals from the trial court's order terminating her parental rights. As explained below, the trial court's detailed findings concerning Respondent's failure to address her serious alcohol abuse problem are supported by clear and convincing evidence. Those findings, in turn, support the

court's conclusion that Respondent willfully failed to make reasonable progress toward reunification, thus supporting termination of Respondent's parental rights. In addition, the trial court did not abuse its discretion by declining to appoint Respondent a guardian ad litem as there was no indication that Respondent lacked capacity or was incompetent. Accordingly, we affirm the trial court's order.

Facts and Procedural Background

On 11 June 2012, the Nash County Department of Social Services (DSS) received a report that Respondent had been hospitalized after she suffered from an alcohol withdrawal seizure. Until that time, Respondent was drinking two to three 40-ounce bottles of malt liquor to the point of intoxication on a daily basis. Respondent lived in a motel room with J.C.S., her then eight-month-old child, who went hungry most days and was significantly underweight. J.C.S. is the fourth child that Respondent failed to parent.

Respondent entered into a voluntary placement agreement with DSS and agreed to enter a long-term inpatient treatment facility. Respondent appeared to improve for a few weeks, but later admitted to drinking. When questioned about why she was drinking, Respondent explained that she was "testing herself."

On 9 August 2012, Respondent declined to visit J.C.S. and admitted she had relapsed.

On 5 September 2012, DSS filed a petition alleging the juvenile was neglected and dependent, and J.C.S. was placed in non-secure custody. A guardian ad litem was appointed for Respondent on 20 September 2012. In an order entered 4 December 2012, the trial court adjudicated the juvenile dependent and ordered Respondent to continue in intensive outpatient treatment, to continue to take psychiatric medication as directed, to obtain and maintain stable housing and employment, and to attend and complete a parenting class and demonstrate what she had learned in the class. In a 21 February 2013 permanency planning order, the trial court set a permanent plan of reunification for the juvenile, but expressed concern that Respondent had an ongoing relationship with the juvenile's father that caused her to be exposed to alcohol.

During this time, Respondent relapsed into alcohol abuse and, as a result, was terminated from her alcohol abuse program on 18 February 2013. She had at least two more relapses after exiting treatment. On 10 July 2013, the trial court entered an order changing the permanent plan to adoption and ordering DSS to cease reunification efforts with Respondent. On 13 September

2013, DSS filed a motion to terminate Respondent's parental rights. DSS alleged four grounds to terminate her parental rights: (1) neglect; (2) willful failure to make reasonable progress; (3) willful failure to pay a reasonable portion of the cost of care; and (4) dependency. N.C. Gen. Stat. §§ 7B-1111(a)(1)-(3), (6) (2013).

After a hearing on 9 and 10 January 2014, the trial court entered an order terminating Respondent's parental rights and those of J.C.S.'s father. The trial court concluded that grounds existed to terminate Respondent's parental rights based on willful failure to make reasonable progress and based on dependency, and that termination of Respondent's parental rights was in the juvenile's best interests. Respondent timely appealed.

Analysis

I. Grounds for Termination of Parental Rights

Respondent first argues that the trial court erred by concluding that grounds existed to terminate her parental rights. For the reasons discussed below, we reject this argument and hold that grounds for termination existed based on Respondent's willful failure to make reasonable progress toward reunification.

At a termination of parental rights hearing, the burden is on the petitioner to prove by clear and convincing evidence that at least one ground for termination exists. N.C. Gen. Stat. § 7B-1109(f) (2013); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Review in the appellate courts is limited to determining whether clear and convincing evidence exists to support the findings of fact, and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

"When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). "[F]indings of fact made by the trial court . . . are conclusive on appeal if there is evidence to support them." *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (citation and internal quotation marks omitted). "'[W]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal[.]'" *In re S.D.J.*, 192 N.C. App. 478, 486, 665 S.E.2d 818, 824 (2008) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

The trial court terminated Respondent's parental rights on two alternative grounds, the first of which was willful failure to make reasonable progress toward correcting the conditions that led to the juvenile's removal from the home. N.C. Gen. Stat. § 7B-1111(a)(2). In terminating 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.

In re O.C., 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005).

Respondent argues that the trial court erred in the second part of this analysis because the court failed to acknowledge that she "made substantial progress in correcting the conditions that led to her child's removal, such as completing an alcohol rehabilitation program" and "testing negative for alcohol aside from two times." We disagree.

To be sure, as Respondent contends on appeal, the record indicates that she made *some* efforts to address her alcoholism. But that is not enough. "Extremely limited progress is not reasonable progress. This standard operates as a safeguard for children. If parents were not required to show both positive efforts and positive results, a parent could forestall termination proceedings indefinitely by making sporadic efforts for that purpose." *In re J.W.*, 173 N.C. App. 450, 465, 619 S.E.2d 534, 545 (2005), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006) (citations, brackets, and quotation marks omitted).

Here, despite some progress, Respondent continued to suffer from serious alcohol abuse problems. In its order, the trial court made detailed, uncontested findings describing Respondent's history of alcohol abuse, attempts at sobriety, relapses into alcohol abuse, refusal of inpatient substance abuse treatment, inability to maintain stable housing or employment, and inconsistent involvement with the juvenile during available visitations, often as a result of substance abuse. The court expressly found that Respondent declined requests to re-enter an inpatient alcohol abuse program and

refused to stop drinking. Respondent also testified at the termination hearing that she was "an alcoholic."

These findings support the trial court's conclusion that Respondent "has not addressed the substance abuse that led to the removal of her child" and therefore had not made "reasonable progress" to correct the conditions that led to the removal. Accordingly, we reject Respondent's argument and affirm the termination of parental rights. Because we affirm on the basis of willful failure to make reasonable progress, we need not reach the trial court's alternative ground for termination. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

II. Appointment of a Guardian ad Litem

Respondent next argues that the trial court abused its discretion by failing to appoint her a guardian ad litem. We disagree.

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A-1, Rule 17." N.C. Gen. Stat. § 7B-1101.1(c) (2013).[1] "A trial judge has a duty to

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[1] The statute was amended, effective for cases pending as of 1 October 2013, to remove language referencing a parent's "diminished capacity." 2013 N.C. Sess. Laws 129.

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. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010) (citation omitted).

An incompetent adult "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2013). The trial court is not required to appoint a guardian ad litem in every termination of parental rights case where a cognitive limitation is alleged. Rather, the trial court should appoint guardians in cases where parents "would be unable to aid in their defense at the termination of parental rights proceeding." *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48.

Here, the trial court acted within its discretion by not appointing Respondent a guardian ad litem during the termination phase. As Respondent acknowledges, she was initially appointed a guardian ad litem on 20 September 2012 because of her substance abuse. At a hearing held after the guardian ad litem withdrew, Respondent testified that she no longer needed a guardian ad litem. The court then found Respondent no longer suffered from diminished capacity, the prior standard for appointment of a guardian ad litem, and declined to appoint her a new one.

Finally, although the termination motion relied in part on allegations of Respondent's substance abuse, nothing in the record suggests Respondent's substance abuse rendered her incompetent, or incapable of aiding in her own case, at the termination hearing. In fact, Respondent testified in a cogent manner at the termination hearing. Accordingly, we hold the trial court did not abuse its discretion in declining to appoint Respondent a guardian ad litem. We therefore affirm the order terminating Respondent's parental rights.

Affirmed.

Judges STROUD and DILLON concur.

Report per Rule 30(e).