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NO. COA14-733

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

IN THE MATTER OF:

J.M. and B.B.

Yadkin County
Nos. 12 JT 46-47

Appeal by respondent-mother and respondent-father from orders entered 13 March 2014 and 21 April 2014 by Judge William F. Brooks in Yadkin County District Court. Heard in the Court of Appeals 10 November 2014.

James N. Freeman, Jr., for Yadkin County Human Services Agency, petitioner-appellee.

Keith Karlsson for guardian ad litem.

Edward Eldred for mother, respondent-appellant.

Assistant Appellate Defender J. Lee Gilliam for father, respondent-appellant.

McCULLOUGH, Judge.

C.B. ("respondent-mother") is the biological mother of B.B. ("Brian") and J.M. ("John").¹ She appeals from the trial court's adjudication order and disposition order terminating her parental rights to the minor children. J.W. ("respondent-father") is Brian's biological father and also appeals from the trial court's adjudication order and disposition order terminating his parental rights to Brian. W.M., John's biological father, has not appealed.

On 14 July 2012, Yadkin County Department of Social Services ("DSS")² received a report that EMS had responded twice to respondent-mother's and W.M.'s home on 13 July 2012. The first call to EMS involved respondent-mother. She had attempted suicide by taking an overdose of Tylenol and cutting herself with scissors. EMS was called back to the home because W.M. had passed out. W.M. was taken to the hospital where he tested positive for benzodiazepines and high levels of alcohol. This was the fourth report on the family since Brian was born in 2010. The first three reports were in Wilkes County where the

¹Pseudonyms are used to protect the privacy of the juveniles and for ease of reading.

²It appears Yadkin County DSS' name changed to Yadkin County Human Services Agency ("YCHSA") at some point during the pendency of this case.

concerns found were domestic violence, substance abuse, and the mental stability of the caregiver.

On 19 July 2012, DSS filed a juvenile petition alleging Brian and John were neglected. On that same date, DSS obtained nonsecure custody of the children. The matter came on for hearing on 6 September 2012, and by order entered 18 September 2012, the trial court adjudicated Brian and John neglected juveniles.

On 10 January 2013, the trial court conducted the first review hearing in this matter. The court accepted into evidence paternity test results showing that respondent-father is the biological father of Brian. A combined review and permanency planning hearing was held on 27 June 2013. The trial court ceased efforts aimed at reunification of Brian with respondent-father and John with W.M. The permanent plan for Brian and John was reunification with respondent-mother and/or adoption. However, following the 26 September 2013 permanency planning hearing, the trial court ceased reunification efforts with respondent-mother as well. The trial court ordered DSS to file a motion or petition to terminate parental rights within sixty days.

On 18 October 2013, DSS filed a motion to terminate parental rights alleging grounds existed to terminate respondent-mother's and respondent-father's parental rights based upon neglect and failure to make reasonable progress. See N.C. Gen. Stat. § 7B-1111(a)(1), and (2) (2013). DSS also alleged dependency as a ground for terminating respondent-father's parental rights. See N.C. Gen. Stat. § 7B-1111(a)(6) (2013).

The adjudicatory phase of the termination of parental rights hearing was held on 23 January 2014 and 17 February 2014. On 13 March 2014, the trial court entered the adjudication order finding the existence of all grounds alleged by DSS. The dispositional phase of the hearing was held on 17 March 2014 and 3 April 2014. The trial court determined that termination of parental rights was in the children's best interests, and on 21 April 2014 entered an order terminating respondent-mother's and respondent-father's parental rights. Respondent-mother and respondent-father appeal.

Respondent-mother's appeal

Respondent-mother argues the trial court's findings do not reflect a proper consideration of changed circumstances and must be reversed. We disagree.

"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).

Although the trial court concluded that more than one ground existed to terminate respondent's parental rights, we find it dispositive that the evidence supports termination of her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), based on failure to make reasonable progress. See *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (a finding of one statutory ground is sufficient to support the termination of parental rights).

A trial court may terminate parental rights on the ground that "[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." N.C. Gen. Stat. § 7B-1111(a)(2). "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) (citations omitted). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995) (citation omitted).

In this case, the trial court made the following pertinent findings of fact regarding respondent-mother:

13. In an attempt to assist the mother and [W.M.] in their efforts to be reunified with their respective children, the Social Worker sent multiple letters and/or notes to the parents informing them of important meetings involving their children, of the status of their children in foster care, of services that could be of advantage to the parents, and offers of encouragement to participate in the completion of their OHFSA's []. Neither parent responded to any of the letters or notes. . . . The mother did not attend any of the four scheduled CFTs.

14. At the time of the final Court review hearing on September 26, 2013, the mother and [W.M.] had demonstrated the following progress in completing their OHFSA's:

a. The mother: obtained a psychological evaluation, a domestic violence/anger management assessment, a substance abuse assessment and completed a series of parenting classes. She did not follow the recommendations from any of those evaluations or assessments. She did not receive consistent mental health

treatment. She regained her driver's license and, for a short while, had her own residence. She was not employed.

. . . .

c. Both parents had not refrained from engaging in further acts of domestic violence and both had violated domestic violence protective orders by associating with one another on several occasions. In December of 2012, [W.M.] severely beat the mother who obtained a domestic violence protective order. [W.M.] was charged, found guilty of assaulting a female and spent time in jail. Neither parent could be located during the months of May, June and July until sometime in July of 2013 when the mother was again associating with [W.M.] and, when asked by the Social Worker "why" responded, "Better to keep the peace." In August of 2013, [W.M.] was found at the same motel the mother was staying in and law enforcement was called to remove him for her protection.

15. The mother took advantage of 24 out of 38 scheduled visits with [John] and [Brian].

. . . .

16. During the pendency of this case, the mother was incarcerated from August 8 to September 27 of 2013. . . .

17. The mother produced positive drug screens on January 30, 2013 (oxycodone), January 31, 2013 (methadone) and February 21, 2013 (barbiturates). The mother testified that the last time she 'used' was on August 8, 2013 when she used opiates. These positive drug screens caused her to miss some scheduled visits with her

children. She has tested negative on drug screens since August 8, 2013. . . .

18. The mother does not have a stable work history. She testified that she regularly looked for work without much success. She did work 2-3 weeks at a Habitat for Humanity Restore, various days at the Candle Corporation, a short stint with Pizza Hut (she left because of erratic work hours and stolen tips), and could not keep a job at Subway because she could not make bond. Part of the mother's inability to obtain and keep a steady job is the fact that she was incarcerated from time-to-time. . . .

19. Neither parent has paid any child support and neither parent has been under an order to pay child support. Early on in this case, the mother and [W.M.] would bring a toy or an article of clothing to the children when visiting; however, neither has done so recently including sending cards, letters or gifts on birthdays and holidays since 2012. The mother has maintained contact with the YCHSA except for May-August of 2013 when she relapsed and while she was again associating with [W.M.]. . . .

20. The mother now lives in the residence of a female friend and her three children. She has a valid driver's license, but has no vehicle of her own. She testified that she has just begun a new job working four 10-hour shifts per week. She testified that she attends Daymark Recovery Services two times per week for group therapy to help with substance abuse.

. . . .

22. The mother made good progress early on in this case. She completed all of the requested evaluations and assessments. She

got her license reinstated. She made attempts to become employed. However, the mother was not good at following-up the evaluations and assessments with recommended therapy and counseling. Instead, she would seek help and therapy when she relapsed or found herself in trouble. She has been unable to dissociate herself from [W.M.]. She has been unsuccessful in obtaining and maintaining her own residence. She has been unable to obtain and maintain employment. She has not supported her children.

The only finding challenged by respondent-mother as unsupported by the evidence is "the second half of Finding of Fact 22." We conclude that any error in finding of fact 22 is harmless. See *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006) ("When []ample other findings of fact support an adjudication . . ., erroneous findings unnecessary to the determination do not constitute reversible error."). Respondent-mother has not challenged any of the other findings as lacking evidentiary support and they are deemed to be supported by competent evidence and are binding on appeal. *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

We conclude that the trial court's findings of fact are based on clear, cogent, and convincing evidence. Furthermore, the findings indicate that the trial court properly considered any evidence of respondent-mother's changed circumstances. While the evidence and findings show respondent-mother made some

progress, the trial court did not err in concluding respondent-mother failed to make reasonable progress under the circumstances. Thus, it was not error for the trial court to find that grounds existed to terminate respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

Having concluded that the trial court properly found grounds pursuant to N.C. Gen. Stat. § 7B 1111(a)(2), we need not address the arguments concerning the remaining grounds. *In re Clark*, 159 N.C. App. 75, 84, 582 S.E.2d 657, 663 (2003).

Respondent-father's appeal

Respondent-father argues the trial court lacked subject matter jurisdiction because DSS lacked standing to file the motion for termination of parental rights.

A motion or petition to terminate parental rights may be filed by "[a]ny county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction." N.C. Gen. Stat. § 7B-1103(a)(3) (2013). Although DSS had been given custody of Brian, respondent-father argues DSS did not have standing to file the motion because respondent-father was not served with the neglect petition or summons in the underlying case. Respondent-father purports to make a lack of subject matter jurisdiction claim;

however, it appears he is actually making a claim that the trial court lacked personal jurisdiction over him.

Our Supreme Court has held that "summons-related deficiencies implicate personal jurisdiction rather than subject matter jurisdiction[.]" *In re J.T.*, 363 N.C. 1, 2, 672 S.E.2d 17 (2009). "Objections to a court's exercise of personal (in personam) jurisdiction . . . must be raised by the parties themselves and can be waived in a number of ways." *Id.* at 4, 672 S.E.2d at 18. "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons.'" *Id.* (quoting *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 359 (1956)).

In this case, respondent-father's arguments are wholly without merit. Brian was in DSS's custody and pursuant to section 7B-1103(a)(3), DSS had standing to file the motion to terminate parental rights. Moreover, respondent-father made no objection to the trial court's exercise of personal jurisdiction over him. Respondent-father's full participation in the termination proceedings, without objection, constituted a general appearance and served to waive any objections that might have been made. *Id.* at 4, 672 S.E.2d at 19.

Furthermore, N.C. Gen. Stat. § 7B-1102 (2013) clearly undermines respondent-father's argument as this section provides a procedure for service of the motion for termination of parental rights when a party was not originally served with a summons. Upon the filing of a motion for termination of parental rights, "the movant shall prepare a notice directed to . . . [t]he parents of the juvenile." N.C. Gen. Stat. § 7B-1106.1(a)(1) (2013). The motion and the notice required by N.C.G.S. § 7B-1106.1 must be served in accordance with N.C. Gen. Stat. § 1A-1, Rule 4 when "[t]he person or agency to be served was not served originally with summons." N.C. Gen. Stat. § 7B-1102(b)(1)(a). Here, respondent-father was served with the notice and motion pursuant to Rule 4 since he was not served with the summons in the underlying case. The trial court did not lack subject matter jurisdiction.

Respondent-father also challenges the trial court's determination that grounds existed to terminate his parental rights. Respondent-father contends the trial court terminated his parental rights for the sole reason that he was incarcerated. We disagree.

We find it dispositive that the evidence supports termination of his parental rights pursuant to N.C. Gen. Stat. §

7B-1111(a)(1). A trial court may terminate parental rights based on a finding that the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is defined as follows:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2013). Neglect must exist at the time of the termination hearing. However, 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." *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). This Court has stated that, "[a]n individual's 'lack of parental concern for his child' is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child." *In re Williamson*, 91 N.C. App. 668, 675, 373 S.E.2d 317, 320 (1988). Moreover, "on the question of neglect, the trial judge may consider . . . a parent's complete failure to provide the

personal contact, love, and affection that inheres in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982).

In this case, the trial court's determination that grounds existed to terminate respondent-father's parental rights was not based solely on respondent-father's incarceration. The trial court found that "[t]he Social Worker mailed at least 7 letters to [respondent-father] to let him know about court proceedings, about the status of his child, about how he could participate in CFT meetings without actually attending, and about how to contact the YCHSA[,] " and respondent-father "responded to only one of those communications." The trial court further found that respondent-father "did not contact the YCHSA to inquire about his son[;]" that he "had a trust account from which he could have paid child support[,] " but "testified that no one asked him to pay child support[;]" and that respondent-father "did not offer any information about a relative or other person who was ready, willing and able to care for [Brian] until [respondent-father] was released from prison."

The findings demonstrate that the court considered respondent-father's "complete failure to provide the personal contact, love, and affection[.]" *Id.* This Court has upheld

termination of parental rights where the parent was incarcerated and failed "to provide filial affection, support, maintenance, financial assistance, and proper care and supervision[.]" *In re Williams*, 149 N.C. App. 951, 960, 563 S.E.2d 202, 207 (2002). We therefore conclude the trial court did not err in finding grounds existed to terminate respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Having so found, we need not address the arguments regarding the other grounds. *Clark*, 159 N.C. App. at 84, 582 S.E.2d at 663.

Based on the foregoing, the trial court's orders are affirmed.

Affirmed.

Judges GEER and STEPHENS concur.

Report per Rule 30(e).