IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-326

Filed: 1 December 2015

Transylvania County, Nos. 11 JT 007-09

IN THE MATTER OF: A.E., J.M., and T.B.

Appeal by respondent-mother and respondent-father from order entered 7 January 2015 by Judge Thomas M. Brittain in District Court, Transylvania County. Heard in the Court of Appeals on 28 October 2015.

R. Kirk Randleman, for petitioner-appellee Transylvania County Department of Social Services, and Doughton Rich Blancato PLLC, by William A. Blancato, for guardian ad litem.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant mother.

Mercedes O. Chut, for respondent-appellant father.

STROUD, Judge.

Respondent-mother and respondent-father (collectively, "respondents") appeal from the trial court's order terminating their parental rights. Respondent-father (1) argues that the Transylvania County Department of Social Services ("DSS") violated N.C. Gen. Stat. § 7B-1104(6) (2013) by failing to state sufficient facts in its termination motion; and (2) challenges the trial court's grounds for termination of his parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), (2) (2013). Respondent-mother

argues that the trial court erred by terminating her parental rights without the presence of her guardian *ad litem* ("GAL"), and, alternatively, that the trial court erred by failing to conduct an inquiry into whether the appointment of a GAL was necessary. We affirm.

I. Background

Respondent-mother is the mother of T.B. ("Tina"), J.M. ("John"), and A.E. ("Amy").[1] Respondent-father is the father of Tina. The fathers of John and Amy are not parties to this appeal. On 24 March 2011, DSS filed a juvenile petition alleging neglect and dependency and obtained nonsecure custody of the children.

In the petition, DSS alleged the following facts: DSS had received an initial report shortly before Amy's birth in August 2010, when respondent-mother went to the hospital after experiencing what she believed to be labor pains. Hospital staff observed her yelling and cursing at Tina and John. The report indicated that respondent-mother also beat Tina while at the hospital and that the children were starving and filthy. Respondent-mother had been diagnosed with bipolar disorder and was not taking her medication. Respondent-mother also had three older children, none of whom were in her custody. Respondent-mother's parental rights to two of her older children had been terminated, and the third child was in the custody of the child's father with no visitation to respondent-mother. DSS assessed the family

[1] We use pseudonyms to protect the identity of the juveniles and for ease of reading.

and began providing in-home services in September 2010. Respondent-mother continued to yell and curse in front of her children, her children and home were filthy, and she risked eviction from the Brevard Housing Authority because she was allowing Amy's father, a registered sex offender, to live in her home.

On or about 25 March 2011, the trial court appointed a GAL for respondent-mother. In a 30 June 2011 order, the trial court adjudicated the children dependent based on the agreement of the parties. In the dispositional portion of the order, the trial court returned the children to respondent-mother's custody. The trial court also directed all of the parents to comply with various DSS directives. On 23 January 2012, DSS moved to take the children back into nonsecure custody, and the trial court gave DSS nonsecure custody of the children. On 30 January 2012, the trial court ordered that the children be returned to respondent-mother. After holding a review hearing on 2 April 2012, the trial court entered an order on 6 July 2012 again awarding DSS custody of the children.

On 17 July 2013, DSS filed three motions to terminate respondent-mother's parental rights to the children based on the following grounds: (1) neglect; (2) failure to make reasonable progress; (3) willful failure to pay a reasonable portion of the cost of care for the juveniles; (4) dependency; and (5) respondent-mother had her parental rights to another child involuntarily terminated. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6), (9). DSS also moved to terminate respondent-father's parental rights to Tina

based on the following grounds: (1) neglect; (2) failure to make reasonable progress; and (3) willful failure to pay a reasonable portion of the cost of care for the juvenile. *See id.* § 7B-1111(a)(1)-(3). On 20 August 2014, the trial court held a hearing to determine whether respondent-mother continued to need a GAL and concluded that respondent-mother was not incompetent and thus released her GAL.[2]

After holding a hearing on 12 November 2014 and 19 November 2014, the trial court entered an order on 7 January 2015 concluding that grounds existed to terminate respondent-mother's parental rights to all three children and respondent-father's rights to Tina. The trial court specifically found that respondent-father had neglected Tina and that he had failed to make reasonable progress. *See id.* § 7B-1111(a)(1), (2). The trial court also concluded that termination of respondents' parental rights was in the best interests of the juveniles. Both respondents gave timely, but fatally defective, notices of appeal. Both respondents have therefore filed alternative petitions for writ of certiorari. We hereby allow both petitions. We address each respondent's arguments in turn.

II. Motion to Terminate Parental Rights

Respondent-father argues that in its motion to terminate his parental rights, DSS failed to state "[f]acts that are sufficient to warrant a determination that one or

[2] The trial court did not enter this order until 4 June 2015; thus, the record does not include this order. But DSS and the children's GAL have moved to amend the record to include this order. We hereby allow their motion to amend.

more of the grounds for terminating parental rights exist[,]" in contravention of N.C. Gen. Stat. § 7B-1104(6). "While there is no requirement that the factual allegations [in a motion for termination of parental rights] be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). A petition that sets forth only a "bare recitation . . . of the alleged statutory grounds for termination" does not meet this standard. *In re Quevedo*, 106 N.C. App. 574, 579, 419 S.E.2d 158, 160 (construing predecessor statute N.C. Gen. Stat. § 7A-289.25(6) (1989)), *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992).

Respondent-father did not move to dismiss DSS's motion but argues that he may raise this issue for the first time on appeal, because DSS's failure to comply with N.C. Gen. Stat. § 7B-1104(6) deprived the trial court of subject matter jurisdiction. A motion to dismiss based on an alleged violation of N.C. Gen. Stat. § 7B-1104(6) is akin to a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See In re H.L.A.D.*, 184 N.C. App. 381, 392, 646 S.E.2d 425, 433-34 (2007), *aff'd per curiam*, 362 N.C. 170, 655 S.E.2d 712 (2008); *Quevedo*, 106 N.C. App. at 578, 419 S.E.2d at 159; N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). "The Rules of Civil Procedure apply to proceedings for termination of parental rights, and a Rule 12(b)(6) motion may not be made for the first time on appeal." *H.L.A.D.*, 184 N.C. App. at 392, 646 S.E.2d at 434 (citation, quotation marks, and brackets omitted); *see also*

N.C.R. App. P. 10(a)(1); *In re T.M.H.*, 186 N.C. App. 451, 454, 652 S.E.2d 1, 2 ("Only a violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se*."), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007). Respondent-father thus may not raise this argument for the first time on appeal.

Relying on *In re Z.T.B.*, respondent-father argues that he may properly raise this argument for the first time on appeal, because DSS's alleged violation failed to confer subject matter jurisdiction on the trial court. *See* 170 N.C. App. 564, 570, 613 S.E.2d 298, 301 (2005). But *Z.T.B.* is distinguishable. There, the petitioner had failed to include in the petition the "name and address of any judicially appointed guardian or the name and address of any person or agency awarded custody of the child by a court[] and [had] not attach[ed] the existing custody order to the petition" as required by N.C. Gen. Stat. § 7B-1104(4), (5) (2003). *Id.* at 568, 613 S.E.2d at 300. This Court held that the petition's defects prevented it from reviewing the trial court's determination that a guardianship order was void, because "there [was] no . . . remedy available on the face of the petition to correct the failure to attach the custody order or provide facts regarding the guardianship[.]" *Id.* at 569-70, 613 S.E.2d at 301. This Court held that the petition thus was "facially defective and failed to confer subject matter jurisdiction upon the trial court." *Id.* at. 570, 613 S.E.2d at 301.

In contrast, here, respondent-father contends that DSS violated N.C. Gen. Stat. § 7B-1104(6), which is akin to a Rule 12(b)(6) motion to dismiss. *See H.L.A.D.*,

184 N.C. App. at 392, 646 S.E.2d at 433-34; *Quevedo*, 106 N.C. App. at 578, 419 S.E.2d at 159. A party may not raise such a challenge for the first time on appeal. *H.L.A.D.*, 184 N.C. App. at 392, 646 S.E.2d at 434; *see also* N.C.R. App. P. 10(a)(1). We also note that this Court has declined to follow *Z.T.B.*, instead relying on "precedential authority of our prior decisions regarding the statute." *In re B.D.*, 174 N.C. App. 234, 241, 620 S.E.2d 913, 918 (2005), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 245 (2006). Accordingly, we distinguish *Z.T.B.* and hold that respondent-father has failed to preserve this issue for appellate review.

III. Failure to Make Reasonable Progress

Respondent-father next challenges the trial court's grounds for termination of his parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. Here, the trial court concluded that grounds existed to terminate respondent-father's parental rights to Tina based on: (1) neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); and (2) failure to make reasonable progress pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). If this Court determines that the findings of fact support one ground for termination, we need not review the other challenged grounds. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003). We conclude that the trial court's findings of fact support its conclusion that respondent-father failed to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2) and thus do not address

respondent-father's challenge to the trial court's conclusion of neglect under N.C. Gen. Stat. § 7B-1111(a)(1).

A. Standard of Review

We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996).

B. Findings of Fact

Respondent-father challenges Findings of Fact 23, 25, and 28. We therefore presume that the remaining findings of fact are supported by clear, cogent, and convincing evidence, and consequently, they are binding on appeal. *See In re M.D., N.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

We first address Finding of Fact 23: "That [respondent-father] was to maintain safe and appropriate housing for the relevant period preceding the filing of the Petition to Terminate Parental Rights[.] He did not do so." Respondent-father claims that this finding is inadequate because the trial court did not define the "relevant period[.]" But the trial court used this phrase several times in its findings of fact and defined it as the twelve months immediately preceding the filing of DSS's motions to terminate parental rights, which is the period from 17 July 2012 to 17 July 2013. Respondent-father responds that defining this period as the "relevant period" is

"problematic[.]" But N.C. Gen. Stat. § 7B-1111(a)(2) does not preclude a trial court from considering this twelve-month period as the "relevant period[,]" provided the other statutory conditions apply. Respondent-father further argues that clear, cogent, and convincing evidence does not support this finding, because the "record does not show when he moved into the trailer [where he was living at the time of the termination hearing] or when he repaired the trailer." But a social worker testified that he had visited this trailer about a month before the 12 November 2014 hearing and that it was not safe and appropriate housing for Tina:

> [T]here were several hazards in the home. There were holes in the floor covered with carpet. There were metal pieces sticking up out of the bathroom. There was a lot of broken glass and a lot of trash piled around the home that was reported to be from the previous tenant.

Accordingly, we hold that clear, cogent, and convincing evidence supports Finding of Fact 23.

Respondent-father next challenges Finding of Fact 25, which states: "That [respondent-father] was to complete parenting classes, the Court finds that he started such classes but did not complete those parenting classes." Respondent-father argues that this finding is "misleading and inaccurate" but concedes that he did not complete the parenting classes. He argues that "evidence shows that he worked with a parenting coach whenever he attended visits, which was ninety-five percent of all scheduled visits." But even assuming this is true, the trial court's finding merely

states that he "did not complete those parenting classes[,]" a fact which he admits. Accordingly, we hold that clear, cogent, and convincing evidence supports Finding of Fact 25.

Respondent-father finally challenges Finding of Fact 28, which states: "That [respondent-father] was unemployed for approximately one half of the relevant period of 12 months immediately prior to the filing of the Petition to Terminate Parental Rights." Respondent-father claims that this finding is not supported by the evidence because he "worked odd jobs" after losing his regular employment in October 2012 and before obtaining a job at McDonald's a "few months" before the 12 November 2014 hearing. As discussed above, the trial court's "relevant period" was 17 July 2012 to 17 July 2013, so the period from October 2012 to 17 July 2013 constitutes more than half of the "relevant period[.]" A social worker, Steven Luke, did testify that respondent-father had reported that he worked some "odd jobs" after losing his regular employment in October 2012, but Luke also testified that respondent-father would not give any details about these "odd jobs":

> He did tell me at some point after that[,] that he was working doing odd jobs doing yard work, things like that. I asked him who he was working for. I told him I needed confirmation of his schedule as he was having to reschedule a lot of appointments. And at that point he told me that he was being paid under the table and he wasn't comfortable telling me who he worked for and that I would just have to take his word on it when he couldn't attend a meeting or something.

Given respondent-father's evasiveness, it was within the trial court's discretion, as the finder of fact, to discount his claims to Luke. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). Therefore, we hold that clear, cogent, and convincing evidence supports Finding of Fact 28.

C. Conclusion of Law

Respondent-father argues that the trial court's findings of fact do not support its conclusion of law that he failed to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). This subsection provides that the trial court may terminate a person's parental rights if

> [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).

> Under this section, willfulness means something less than willful abandonment. A finding of willfulness does not require a showing of fault by the parent.
>
> Willfulness may be found under this statute where

> the parent, recognizing her inability to care for the child, voluntarily leaves the child in foster care. In addition, willfulness is not precluded just because respondent has made some efforts to regain custody of the child.

Oghenekevebe, 123 N.C. App. at 439-40, 473 S.E.2d at 398 (citations omitted). "A parent's willfulness in leaving a child in foster care may be established by evidence that the parents possessed the ability to make reasonable progress, but were unwilling to make an effort." *In re Baker*, 158 N.C. App. 491, 494, 581 S.E.2d 144, 146 (2003) (quotation marks omitted).

The trial court made the following findings of fact that address this issue:

> 11. That each of the children came into the custody of [DSS] by an Order entered on April 2, 2012.
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> 12. That at that time a plan was created for reunification of the children with a parent.
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> . . . .
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> 20. As to [respondent-father], he was to remain drug free and sober for the period of time that is relevant prior to the filing of the Motion to terminate parental rights. He failed to do so.
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> 21. That [respondent-father] was to submit to random drug screens and pass all those drug screens. In October and November 2012 he had three positive drug screens for the presence of cocaine.
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> 22. That [respondent-father] was to obtain a substance abuse assessment and follow through with all treatment. That [respondent-father] did obtain a substance abuse assessment as part of his inpatient treatment at the Neil Dobbins Center in December 2012.

> 23. That [respondent-father] was to maintain safe and appropriate housing for the relevant period preceding the filing of the Petition to Terminate Parental Rights[.] He did not do so.
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> 24. That [respondent-father] was to visit with his child at every opportunity, the Court finds he has substantially complied with that requirement during the relevant time period for termination of parental rights at least 95% of the time.
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> 25. That [respondent-father] was to complete parenting classes, the Court finds that he started such classes but did not complete those parenting classes.
>
> . . . .
>
> 28. That [respondent-father] was unemployed for approximately one half of the relevant period of 12 months immediately prior to the filing of the Petition to Terminate Parental Rights.
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> 29. That when [respondent-father] was employed, he was employed at Transylvania Vocational Services and that he submitted to wage withholding for purposes [of] satisfying his child support obligation.

Respondent-father argues that he did not fail to make reasonable progress because the trial court made no finding that his actions were willful. *See* N.C. Gen. Stat. § 7B-1111(a)(2). Respondent-father argues that his struggle to obtain stable housing and employment was not willful and emphasizes that the trial court cannot terminate his parental rights based on poverty alone. *See id.*

But respondent-father overlooks the trial court's findings of fact that he failed to "remain drug free and sober" during the "relevant period" and had "three positive drug screens for the presence of cocaine" in October and November 2012. In addition, the trial court found that respondent-father had failed to complete parenting classes. These findings of fact demonstrate respondent-father's willfulness and show that the trial court did not base its conclusion solely on respondent-father's poverty. *See id.*; *Oghenekevebe*, 123 N.C. App. at 439-40, 473 S.E.2d at 398; *Baker*, 158 N.C. App. at 494, 581 S.E.2d at 146. Accordingly, we conclude that the trial court's findings of fact adequately support its conclusion of law that respondent-father failed to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2).

IV. Mother's Guardian *Ad Litem*

Respondent-mother argues that the trial court erred by terminating her parental rights without the presence of her GAL. Alternatively, she argues that the trial court erred by failing to conduct an inquiry into whether the appointment of a GAL was necessary.

A. Standard of Review

> [T]rial court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard. An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.
>
> . . . .

> Affording substantial deference to members of the trial judiciary in instances such as this one is entirely appropriate given that the trial judge, unlike the members of a reviewing court, actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record.
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> . . . As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

In re T.L.H., 368 N.C. 101, 107-09, 772 S.E.2d 451, 455-56 (2015) (citation, quotation marks, and brackets omitted).

B. Analysis

N.C. Gen. Stat. § 7B-1101.1(c) governs the appointment of a guardian *ad litem* for a parent in termination of parental rights cases. This subsection provides that, "[o]n 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); *see also* N.C. Gen. Stat. § 7B-602(c) (2013) (providing for analogous appointment of a GAL in juvenile abuse, neglect, and dependency actions). "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. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005). This Court has also recognized that once the trial court, in its discretion, appoints a GAL for the parent, "it is necessary for the parent to be represented by a GAL throughout the neglect and dependency and termination proceedings, as long as the conditions that necessitated the appointment of a GAL still exist." *In re P.D.R.*, 224 N.C. App. 460, 470, 737 S.E.2d 152, 159 (2012) (brackets omitted).

The record indicates that the trial court appointed a GAL for respondent-mother on or about 25 March 2011—the day after DSS filed the underlying juvenile petition and first obtained nonsecure custody of the children. But on 20 August 2014, approximately three months before the termination hearing, the trial court held a hearing to determine whether respondent-mother continued to need a GAL and concluded that "[b]ased upon the statement of [the GAL] and the answers of [respondent-mother] to the questions from the Court," respondent-mother was not incompetent and thus did not need a GAL. Accordingly, the trial court released respondent-mother's GAL.

After reviewing the record, we discern no abuse of discretion in the trial court's order releasing respondent-mother's GAL. The trial court made its decision after hearing from both the GAL and respondent-mother and was able to observe and assess respondent-mother's demeanor and mental condition. Additionally, on 20 August 2014, the same day of the competency hearing, respondent-mother filed a

motion to review in which she requested that the trial court change the permanent plan for the children from adoption/termination of parental rights to reunification with respondent-mother. In the motion, respondent-mother indicated that she had been regularly attending family improvement classes and counseling, had secured a three-bedroom residence, and had applied for a number of jobs. This evidence constitutes "an appreciable amount of evidence tending to show" that respondent-mother is not incompetent. *See T.L.H.*, 368 N.C. at 108-09, 772 S.E.2d at 456. We note that while the record here discloses that respondent-mother had mental health concerns, such evidence does not necessitate a conclusion that she was incompetent. *See In re J.R.W.*, ___ N.C. App. ___, ___, 765 S.E.2d 116, 120 (2014) ("[E]vidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings."), *disc. review denied*, 367 N.C. 813, 767 S.E.2d 840 (2015).

In sum, we conclude that the trial court did not abuse its discretion in releasing respondent-mother's GAL. Because the trial court did not err in this regard, we also conclude that it did not err in holding the termination hearing without the presence of respondent-mother's GAL.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).