IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-325

Filed: 4 October 2016

Wake County, No. 12 JT 577

IN THE MATTER OF: M.D.

Appeal by Respondent-Mother from order entered 18 December 2015 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 12 September 2016.

Office of the Wake County Attorney, by Roger A. Askew, for the Petitioner-Appellee Wake County Human Services.

Mark Hayes for the Respondent-Appellant Mother.

Penry | Riemann pllc, by Neil A. Riemann, for the Guardian ad Litem.

DILLON, Judge.

Respondent-Mother appeals from an order terminating her parental rights to her son, M.D. ("Matthew").[1] The Respondent-Father ("Father") is not a party to this appeal. After careful review, we affirm the trial court's order.

I. Background

In April 2014, Wake County Human Services ("WCHS") responded to a report of abuse and neglect after a burn mark was discovered on Mother's child, Z.H., who

[1] A pseudonym.

is not the subject of this appeal. Mother was criminally charged with child abuse, and a safety plan was developed whereby Mother was ordered to have no unsupervised contact with either Z.H. or Matthew.

On 12 June 2014, WCHS discovered that Mother had brought Matthew to the emergency room after finding him alone in the bathroom of their home with an empty bottle of mouthwash. The next day, WCHS filed a petition alleging that Matthew was neglected. WCHS obtained non-secure custody of Matthew that same day. After a hearing, the trial court entered an order adjudicating Matthew neglected and directing Mother to comply with the Out of Home Family Services Agreement. Following a permanency planning hearing, the trial court entered an order changing the permanent plan from reunification to adoption.

In August 2015, WCHS filed a motion to terminate parental rights. After a hearing on the motion, the trial court entered an order on 18 December 2015 terminating Mother's parental rights to Matthew as Mother had neglected the juvenile and willfully left him in foster care or placement outside of the home for more than twelve months without showing reasonable progress in correcting the conditions that led to his removal. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2015). Mother filed notice of appeal on 19 January 2016.[2]

[2] Mother has noted that her notice of appeal may have been defective given that her counsel failed to sign the certificate of service and initially served the wrong attorney for the Father. Mother has filed a petition for writ of certiorari seeking review in the event this Court concludes that her

II. Analysis

On appeal, Mother first contends that the trial court erred in finding neglect as a termination ground. Specifically, Mother contends that findings of fact 18-20 are unsupported by clear and convincing evidence. We are not persuaded.

An adjudication order is reviewed to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (internal marks and citations omitted). Findings supported by clear and convincing evidence "are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* at 343, 648 S.E.2d at 523. Unchallenged findings are binding on appeal. *In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013). Conclusions of law are reviewable *de novo*. *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010).

N.C. Gen. Stat. § 7B-1111(a)(1) permits a trial court to terminate parental rights upon finding that the parent has neglected the juvenile. A juvenile is neglected if he or she "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . [or] lives in an environment injurious

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notice of appeal is defective. Given that none of the other parties to this case have raised the issue, Mother's appeal is properly before this Court, and we therefore dismiss the petition for writ of certiorari as moot. *See Hale v. Afro-Am. Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (holding that "a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal").

to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2015). "If there is no evidence of neglect at the time of the termination proceeding . . . [,] parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

A. Finding of Fact 18

Finding of fact 18 provides, in relevant part:

> [Mother] visited regularly with the child and his sibling and enjoyed reading to both children. She asked appropriate questions and was receptive to parenting advice given during the visits. She was not able to demonstrate the skills learned in the parenting class that she did complete and often failed to remember lessons learned during the visits from week to week due to her cognitive delays. The child . . . has global delays and is, therefore, more difficult to parent. [M]other has not progressed in her ability to provide safe and appropriate supervision for the child or his sibling to enable the social worker to be able to recommend monitored or unsupervised visitation. [Mother] did not visit in either August or September 2015, citing her own health issues, lack of transportation, and incarceration. Her last visit was on October 6, 2015, prior to her most recent incarceration.

Mother challenges several statements in finding of fact 18 as unsupported by the evidence. We agree with Mother that the trial court's statement that she "was not able to demonstrate the skills learned in the parenting class" was not supported by clear and convincing evidence. Social worker Leeann Watson was the only individual

who testified to Mother's ability to apply the skills she learned in parenting class, and her testimony was mixed on this issue. When asked whether she had seen Mother demonstrate the lessons she learned in parenting class during her visits with Matthew, Ms. Watson responded "I think in some ways she did gain some information. She definitely enjoyed reading particularly to [Matthew]. She was bringing more nutritious meals to the visits." This testimony indicates that Mother had been applying some lessons from her parenting class in her visits with Matthew and undermines the finding that she was "not able" to do so. We will disregard this statement in finding of fact 18 as unsupported by the evidence.

Mother next challenges the statement that she "often failed to remember lessons learned during the visits from week to week," arguing that Ms. Watson's testimony was that Mother "sometimes" failed to remember lessons learned. Mother fails to demonstrate how this difference in word choice necessitates a conclusion that this finding of fact is unsupported by the evidence.

Next, Mother challenges the statement that she "has not progressed in her ability to provide safe and appropriate supervision for the child . . . to enable the social worker to be able to recommend monitored or unsupervised visitation." We will disregard the statement regarding "monitored" visitation. This appears to be a typographical error given that Mother already enjoyed monitored visitation, and none of the individuals testifying advised against monitored visitation. However, after

discussing some of the issues she observed in Mother's interactions with her children during visitation, Ms. Watson was asked if she "wouldn't have recommended anything other than supervised visits at this time," to which she responded "[c]orrect." This testimony supports the finding that the social worker could not recommend unsupervised visitation.

B. Finding of Fact 19

Finding of fact 19 states as follows:

> The mother completed the psychological evaluation on January 23, 2015, but subsequently revoked her consent for release of information to Wake County Human Services. This revocation delayed the referral of the mother for services until a new consent was obtained in April 2015. The recommendations of the psychological evaluation were for the mother to participate in individual therapy, complete a psychiatric evaluation and follow the recommendations therefrom, to participate in and complete the Families on the Grow program, and to identify a support person who could provide ongoing guidance for the mother. The mother has provided no documentation that she is participating in individual therapy or that she has complied with the psychiatric evaluation even though she claims to have been prescribed psychotropic medication. The social worker was unable to provide a referral for the Families on the Grow program after receiving the report from the psychological evaluation due to the fact that the Court had already ordered that reunification efforts cease. The program will not provide the service in cases where reunification efforts are not ongoing. If the mother had not revoked her consent to the release of her psychological evaluation report, she could have been enrolled in the Families on the Grow program before reunification efforts were ceased. The mother named her sister as her "support" person even though her

> sister resides in the state of Virginia and is not physically available to provide the day-to-day support needed by the mother.

In challenging finding of fact 19, Mother first contends that the trial court's statement that she "has provided no documentation that she is participating in individual therapy or that she has complied with the psychiatric evaluation" creates the inference that she did not in fact participate in such sessions. However, our task on appeal is to review what the findings of fact provide, not what the parties infer from them, and in this case Mother admits that Ms. Watson testified to her failure to provide any such documentation. Thus, this portion of finding of fact 19 is supported by the evidence.

Next, Mother challenges the statement that "[t]he social worker was unable to provide a referral for the Families on the Grow program after receiving the report from the psychological evaluation due to the fact that the Court had already ordered that reunification efforts cease." We agree that this statement was not supported by the evidence. The Guardian ad Litem report, which was incorporated into the trial court's order ceasing reunification efforts, established the following: (1) Mother consented to having her psychological evaluation released to WCHS in April 2015; (2) the social worker, Ms. Watson, received the psychological evaluation report in May 2015; and (3) the hearing in which the trial court ceased reunification efforts did not occur until June 2015. Thus, the statement that reunification efforts had already

ceased when Ms. Watson received the report from Mother's psychological evaluation is contradicted by the record evidence and will be disregarded in our analysis.

Mother next challenges the statement that "[i]f [M]other had not revoked her consent to the release of her psychological evaluation report, she could have been enrolled in the Families on the Grow program before reunification efforts were ceased." Mother again argues against what she infers from the statement rather than what it actually provides. While Mother is correct that there were other delays in the psychological evaluation report being forwarded to WCHS and Ms. Watson, finding of fact 19 does not state that she was the sole cause for the Families on the Grow program becoming unavailable. Mother admitted in her testimony that she delayed the release of her psychological evaluation report by three months, which supports the trial court's finding that the Families on the Grow program could have been available to her had she not revoked consent.

Mother then contends that even if she were solely to blame for not completing the Families on the Grow program, the trial court could not fault her for failing to complete the program because it was not listed as a task for her to complete in the trial court's permanency planning order. Mother ignores the plain statement in the trial court's order ceasing reunification efforts that, if Mother wished to reunify with Matthew, she must "[c]omplete a psychological evaluation *and follow all recommendations*." Moreover, the trial court had already provided in its August 2014

adjudication and disposition order that Mother must "[c]omplete a mental health assessment and follow all recommendations." One recommendation following Mother's psychological evaluation was that she complete the Families on the Grow program. Accordingly, this argument lacks merit.

Next, Mother challenges the statement that she "named her sister as her 'support' person even though her sister resides in the state of Virginia and is not physically available to provide the day-to-day support needed by [M]other." However, Mother admits that it was recommended to her that she identify a support person, and acknowledges that the social worker testified that she did not believe that Mother could care for herself and Matthew "on a full-time, long-term basis" without having a support person to assist her. This statement is therefore supported by the evidence.

C. Finding of Fact 20

Mother also challenges several statements in finding of fact 20. This finding provides as follows:

> [Mother] has not obtained or maintained stable, appropriate housing for herself and this child or his sibling. Her housing situation has been unstable for a period in excess of three (3) years. In that period of time, she has resided in a minimum of eleven (11) different locations. [M]other's testimony at the permanency planning hearing indicated that she did not have sufficient funds to meet her own needs. She receives disability income in the amount of $708 per month. [M]other's sister is her payee. During the time the child . . . was residing with her, [M]other's income was regularly supplemented by family members to cover expenses for which she had no funds remaining.

> [M]other has not obtained sufficient income to meet the needs of the children.

First, Mother challenges as unsupported by the evidence the statement that "[M]other has not obtained or maintained stable, appropriate housing for herself and this child." Mother points to her own testimony that, upon her release from incarceration, the plan was for her and her boyfriend to reside at his grandmother's house. Mother argues that this living arrangement would be stable because she "listed it as her post-release residence, and would actually be required to live there the rest of the year." We disagree. Mother has no deed, lease or legal right to reside in the living arrangement she describes as "stable." The evidence showed Mother was previously incarcerated for assaulting her boyfriend, and was incarcerated on another occasion for identity theft and fraud after stealing from her boyfriend's cousin. These crimes show how easily Mother's living arrangement could unravel in the event of conflict between Mother and her boyfriend's family. Furthermore, the fact that Mother would be obligated to remain in the post-release residence she listed does not mean that her boyfriend's grandmother would be obligated to permit Mother to remain there. Finally, the social worker testified that this living situation would not have been appropriate for Matthew. Accordingly, we find that this statement is supported by the evidence.

Mother next challenges the statement that "[s]he receives disability income in the amount of $708 per month," pointing to her own testimony that she would start

receiving $736 in disability income within eight months' time. However, it was Mother herself who testified that she was receiving $708 in disability income at the time of the hearing. This statement is therefore supported by the evidence.

Mother more broadly challenges the statement in finding of fact 20 that she "has not obtained sufficient income to meet the needs of the children." She argues that this finding was not based on evidence introduced at the termination hearing, but rather on a finding in the trial court's order ceasing reunification efforts. Mother contends that the trial court could not rely on evidence introduced at the permanency planning hearing because the evidentiary standard in permanency planning hearings is lower than the evidentiary standard in termination hearings.

Evidence in the form of Mother's own testimony at the termination hearing provides support for this finding. When asked whether Matthew "ever had to do without because of limited money," Mother replied that "there was times where I was $100 short on the light bill, and my mom and my grandma would just buy the diapers and the wipes." Mother's testimony that there had been times when she could not cover childcare costs provides the evidentiary support for the trial court's statement regarding her insufficient funds.

III. Conclusion

Mother relies on her challenges to the findings of fact in support of her argument that the trial court erred in finding neglect as a ground to terminate her

parental rights, and does not argue that the finding of neglect was erroneous even if the challenged findings of fact remain undisturbed. We have disregarded the trial court's findings that Mother "was not able to demonstrate the skills learned" in parenting class, and that "[t]he social worker was unable to provide a referral for the Families on the Grow program." However, the remaining findings show that Mother lacked a stable living arrangement, financial resources, and the parenting skills necessary to adequately care for Matthew. These findings support the conclusion that a repetition of neglect was likely if Matthew was returned to Mother's care. While Mother challenges the trial court's conclusion that the ground for termination listed in N.C. Gen. Stat. § 7B-1111(a)(2) existed in this case, we need not address that challenge given our decision to uphold the trial court's conclusion that Mother's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) ("A finding of any one of the enumerated grounds for termination of parental rights under [N.C. Gen. Stat.] § 7B-1111 is sufficient to support a termination."). We therefore affirm the trial court's order terminating Mother's parental rights to Matthew.

AFFIRMED.

Judges McCULLOUGH and ENOCHS concur.

Report per Rule 30(e).