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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-583

Filed: 15 November 2016

Guilford County, Nos. 15 JA 212, 213

IN THE MATTER OF: K.R. & K.R.

Appeal by respondent from order entered 8 April 2016 by Judge Avery L. Crump in Guilford County District Court. Heard in the Court of Appeals 17 October 2016.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

TYSON, Judge.

Respondent-mother (“Respondent”) appeals from the trial court’s adjudication of her children, K.R. (I) and K.R. (II), to be dependent juveniles and the court’s order that the permanent plan for the juveniles be adoption, with a concurrent secondary plan of reunification. We affirm.

I. Background

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On 19 May 2015, Guilford County Department of Health and Human Services (“DHHS”) filed juvenile petitions alleging Respondent’s daughters, K.R. (I) and K.R. (II), were neglected and dependent juveniles. The petitions were filed several months after DHHS had been notified by the juveniles’ caregiver that she could no longer take care of the two children, and she “wanted the children out of her home.”

At the time of the petition, the juveniles were living with the daughter of Respondent’s father’s girlfriend, Ms. Flythe. The fathers of K.R. (I) and K.R. (II) are unknown. Genetic testing excluded nine men listed as possible fathers by Respondent. The children had not lived with Respondent for three years. Respondent had provided little or no financial or emotional support for the children during this time. Respondent is the mother of another child, who is not a subject of this petition, and who lives with Respondent’s father and Respondent’s father’s girlfriend.

At the 27 January 2016 adjudication hearing, social worker Amber Telfair testified Flythe was not related to the juveniles and the children had been left in her care without support from Respondent. Testimony showed Flythe repeatedly called DHHS and sought to have the children removed, and she could not handle caring for them any further. Telfair testified Flythe was unemployed, relied on her own boyfriend for support, and Flythe was unable to “keep up” with the counseling and therapy needs of K.R. (I) and K.R. (II). Flythe had made repeated allegations of the juveniles reporting and demonstrating inappropriate sexual behavior. Telfair

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testified these reports were not substantiated by DHHS. When Telfair confronted Respondent with the information that the children could not remain with Flythe, Respondent stated she was not able to care for the children, and “she didn’t have any other options” for her children. Telfair testified that during the three years the children were living with Flythe, Respondent provided one exchange of shoes, but she was unaware of any other child support or other gifts provided by Respondent.

At the adjudication hearing, Respondent offered testimony of her boyfriend’s probation officer, who stated the requirements of the boyfriend’s supervised probation as a convicted sex offender. On 25 February 2016, the trial court concluded K.R. (I) and K.R. (II) were neglected and dependent juveniles as defined by N.C. Gen. Stat. § 7B-101 (9) and (15).

The combination disposition and permanency planning hearing was held on 26 February 2016. The trial court heard testimony from the DHHS social worker and the guardian ad litem volunteer. The entire Child Protective Services case file was offered into evidence. The court concluded the permanent plan should be adoption with a concurrent secondary plan of reunification. The court ordered DHHS to “continue to make reasonable efforts towards reunification with [Respondent]” and ordered Respondent to “comply with her case plan, cooperate with the [DHHS], if she wishes to work towards reunification.” Respondent filed timely notice of appeal.

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Respondent asserts the trial court (1) lacked clear and convincing evidence to adjudicate the juveniles as dependent and (2) abused its discretion when it entered an order setting out a primary permanent plan of adoption.

II. Adjudication of Dependency

A. Standard of Review

On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings. Unchallenged findings are binding on appeal. The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*.

In re J.D.R., 239 N.C. App. 63, 66, 768 S.E.2d 172, 174-75 (2015) (citations omitted).

B. Analysis

1. Finding of fact 21

Respondent challenges the trial court's finding of fact 21 as being more properly classified as a conclusion of law. The trial court found:

21. Based on the allegations in the Petition and the evidence presented today, the Court finds that the juveniles are neglected in that they do not receive proper care, supervision or discipline from the juveniles' parents, guardian, custodian; and the juveniles are dependent in that the parent, guardian, or custodian is unable to provide for the juveniles' care or supervision and lacks an appropriate alternative child care arrangement.

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Respondent argues without finding of fact 21, no other findings of fact stated in the adjudication order support a conclusion the children were dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101(9). We disagree.

Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation. Facts, in turn, provide the bases for conclusions. We note that, [i]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.

In re M.R.D.C., 166 N.C. App. 693, 697, 603 S.E.2d 890, 892-93 (internal quotation marks and citations omitted), *disc. review denied* 359 N.C. 321, 611 S.E.2d 413 (2004).

A juvenile is dependent if the child is “in need of assistance or placement because . . . the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9) (2015).

The trial court’s finding of fact 21 combines ultimate facts that Respondent is “unable to provide for the juveniles’ care or supervision and lacks an appropriate child care arrangement,” with a conclusion of law, that “the juveniles are dependent.” “Ultimate facts are those found in that vaguely defined area lying between evidential facts . . . and conclusions of law In consequence, the line of demarcations between ultimate facts and legal conclusions is not easily drawn.” *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657 (1982) (quoting *Woodard v. Mordecai*, 243 N.C. 463, 470, 67 S.E.2d 639, 645 (1951)).

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A finding of fact that is “essentially a conclusion of law” will be treated as a fully reviewable conclusion of law on appeal. *In re M.R.D.C.*, 166 N.C. App. at 697, 603 S.E.2d at 893. “Mislabeling of a finding of fact as a conclusion of law is inconsequential if the remaining findings of fact support the conclusion of law.” *Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) (citing *In re R.A.H.*, 182 N.C. App. 52, 59, 641 S.E.2d 404, 409 (2007)). Presuming finding of fact 21 is more properly categorized as a conclusion of law, other unchallenged findings are supported by clear, cogent, and convincing evidence, and support the trial court’s conclusion of law that the “juveniles are neglected and dependent as defined by G.S. § 7B-101 (15) and (9).”

2. Ability to provide care or supervision

Respondent asserts she was willing and able to care for her children at the time DHHS filed the petition. In her brief, Respondent acknowledges her live-in boyfriend was a registered sex offender and could not be left alone with any female under the age of 20. K.R. (I) is ten years old and K.R. (II) is eight years old. Respondent argues, without referencing any support from transcript or record evidence, that she had stable housing and sufficient income to meet the needs of her children. The record evidence and testimony at adjudication show Respondent’s assertion is meritless. Respondent’s arguments are overruled.

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Respondent fails to challenge any of the trial court's findings of fact regarding her failure and refusal to provide any financial support for her children. "The allegations in a petition alleging that a juvenile is . . . dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) (internal quotation marks and citation omitted).

Unrefuted testimony and court reports received at trial show Respondent indicated she would not assist K.R. (I) and K.R. (II) financially as she had her own bills to pay. Respondent also asserted she did not feel comfortable giving her father money, after he offered to care for her children, because he would spend it on "marijuana and crack."

Telfair testified Respondent replied to a social worker she would not be present for a Team Decision Meeting ("TDM") because "she needed her sleep." Even when offered the opportunity to participate in the TDM meeting via telephone, Respondent did not respond to her phone when called by Telfair.

The trial court's findings of fact more than amply support its conclusion that Respondent's children were dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101(9). Respondent's arguments are overruled.

III. Disposition

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Respondent argues the trial court abused its discretion in making the children's primary permanent plan as adoption. We disagree.

A. Standard of Review

"We review a dispositional order only for abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (citations and quotation marks omitted).

B. Analysis

1. Undetermined adoptive placement

Respondent argues the court abused its discretion when it made the juveniles' permanent plan adoption, where no prospective adoptive placement had been identified. Respondent's argument is misplaced.

At a permanency planning hearing, the trial court "shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2015).

In the Disposition Hearing Order and Permanency Planning Hearing Order, the court ordered the requisite concurrent plan and included reunification as a

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secondary plan, as required by the statutes. The court ordered DHHS to proceed with filing for termination of Respondent's parental rights as termination is a prerequisite to adoption. The court also ordered DHHS to "continue to make reasonable efforts towards reunification with [Respondent]" and ordered Respondent to "comply with her case plan . . . if she wishes to work towards reunification."

At a permanency planning hearing where a juvenile is not placed with a parent, the court is required to consider additional factors and "make written findings regarding those that are relevant[.]" N.C. Gen. Stat. § 7B-906.1(e) (2015). N.C. Gen. Stat. § 7B-906.1(e)(3) is relevant "[w]here the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption." N.C. Gen. Stat. § 7B-906.1(e)(3).

The trial court received evidence from the DHHS foster care social worker assigned to the case and the guardian ad litem volunteer. After listing fifty-nine detailed findings of fact, setting forth Respondent's accomplishments, as well as the situation and needs of the juveniles, the trial court's order includes conclusion 4: "It is in the best interest of the juveniles that the primary permanent [plan] be adoption, with a concurrent secondary plan of reunification."

Among the findings of fact, the trial court includes

53. The Department and the Guardian *ad Litem* are requesting that the plan be changed to adoption at this hearing. *The barrier to the plan of adoption includes terminating the parental rights of the mother and unknown*

fathers and identifying an adoptive home for the juveniles.
(emphasis supplied).

Respondent argues the trial court's primary plan of adoption was unsupported by reason because her children's extraordinary behaviors made it difficult to find an adoptive placement. This Court has held that proving adoptability "is not required in order to terminate parental rights." *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *disc. review denied*, 310 N.C. 744, 310 S.E.2d 25 (1984). Respondent cites no authority to support her argument that the trial court abused its discretion in not listing her neglected children, who have exhibited behavioral issues, as a barrier to adoption. Respondent has failed to show any abuse of discretion. Her argument is overruled.

2. Progress on case plan

Respondent also argues the court abused its discretion by concluding she had made no reasonable progress on her case plan. She challenges the trial court's finding of fact number 44 that she failed to make "adequate progress on her case plan within a reasonable amount of time."

The trial court found

58. The barriers to the permanent plan of reunification are:
- Ms. Robinson has not been the caregiver for the children in more than three years.
 - Ms. Robinson has failed to make substantial progress on her case plan.
 - a. Although Ms. Robinson completed the PATE program, it took her six months to

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complete the ten-week course. She is to be commended for finally completing it. As long as visitation remains suspended, she cannot progress to Phase II - Therapeutic Visitation. A barrier to assessing whether visitation is therapeutically appropriate is the fact that Ms. Robinson has missed sessions with the juveniles' therapists. (sic) which is required before they can start the process of assessing whether visitation with the mother is in the juveniles' best interests.

b. Ms. Robinson has not demonstrated an increase in parental knowledge based on the following:

- o On November 12, 2015, Ms. Robinson engaged in a physical altercation in the presence of her 2-year-old daughter. That altercation resulted in a substantiated report and referral to InHome Services with the Forsyth County Department of Social Services.

- o Ms. Robinson's relationship with Mr. Crompton, a registered sex offender, ended due to domestic violence.

- o Ms. Robinson recently became pregnant twice despite having two juveniles in the custody of the Guilford County Department of Health and Human Services and two additional juveniles that are placed with relatives and not in her care.

- Ms. Robinson has a history of engaging in relationships that may be detrimental to the well-being and safety of her children

- a. Mr. Jarrett Crompton is a registered sex offender.

- b. Rudolph Harris has been convicted of Child Abuse to Inflict Serious Injury.

- c. Sherrnaine Cortez Moses, the alleged father of Ms. Robinson's unborn child, was

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released from prison on September 27, 2015, after being convicted of Robbery with a Dangerous Weapon, Assault with a Deadly Weapon Inflicting Serious Injury and Felony Breaking and Entering.

- Ms. Robinson has provided three letters for the juveniles, dictated by her and typed by her attorney. She returned a coloring book page sent to her by Keyonna.

- Ms. Robinson has failed to recognize the importance of attending therapeutic appointments with the therapists for the juveniles. Ms. Robinson failed to attend an appointment on December 21, 2015, she was 30 minutes late for an appointment on January 6, 2016, and she failed to attend her appointment on January 11, 2016.

- a. Ms. Robinson recently completed her parenting/psychological assessment.

- b. Ms. Robinson is not presently taking her psychotropic medication based on her second pregnancy since January 2016. Ms. Robinson was diagnosed with schizoaffective disorder, bipolar type, continuous; alcohol use disorder, moderate; generalized anxiety disorder; insomnia disorder, persistent;. and intellectual developmental disability, mild. Ms. Robinson has also reported hearing voices when she is stressed out.

- c. Ms. Robinson's inability to schedule and manage her own appointments does not demonstrate an ability to meet the needs of the juveniles.

- o Attorney Jamie Forbes on January 7, 2016, "She {Ms. Robinson} has many deficits which are documented in the 2012, psychiatric assessment and the top priority records. She does not have a computer. She has no access to email. She has limited reading and writing skills. She has multiple appointments

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to keep track of with Top Priority, this case, other community supports and Forsyth County DSS. Short term memory deficits are well documented.”

....

- Ms. Robinson’s two-year-old child with Mr. Compton is in a kinship placement in Forsyth County after being removed, and her four-year-old child is with the paternal grandmother.

The trial court heard and received evidence from the social worker and her court summary at the disposition hearing. Clear and convincing evidence in the record and presented at the hearing supports each of these findings, as well as the findings reflecting Respondent’s completion of the PATE Program, her weekly contact with the social worker, and her participation in Child and Family Team Meetings.

These findings support the trial court’s conclusion to order a primary plan of adoption with a concurrent secondary plan of reunification. Respondent has shown no abuse of discretion. Her arguments are overruled.

IV. Conclusion

We affirm the trial court’s conclusion that K.R. (I) and K.R. (II) are neglected and dependent juveniles. The trial court’s unchallenged findings of fact support a conclusion that K.R. (I) and K.R. (II) do not receive proper care or supervision and Respondent lacks any appropriate alternative child care arrangement for the juveniles. The trial court’s findings of fact are supported by clear, cogent, and convincing evidence, and these findings support the court’s conclusions of law.

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Respondent has failed to show an abuse of discretion by the trial court in its determination that the best interests of the juveniles are served by a primary plan of adoption, with a concurrent secondary plan of reunification. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).