IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-733

Filed: 21 February 2017

Wake County, No. 14 JA 183

IN THE MATTER OF: V.G.

Appeal by respondent-mother from order entered 9 May 2016 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 30 January 2017.

*Office of the Wake County Attorney, by Roger A. Askew and Jennifer M. Jones, for petitioner-appellee Wake County Human Services.*

*Robert W. Ewing, for respondent-appellant mother.*

*Michael N. Tousey, for guardian ad litem.*

CALABRIA, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to V.G. ("Virginia").[1] After careful review, we affirm.

## I. Factual and Procedural Background

On 25 July 2014, Wake County Human Services ("WCHS") obtained nonsecure custody of Virginia and her younger half-sister, T.R. ("Tammy"), and filed a juvenile

[1] Pseudonyms are used for ease of reading and to protect the identity of the juvenile and other children involved.

petition alleging that they were neglected juveniles. The petition alleged that respondent-mother was a migrant worker with no permanent residence who moved from state to state with her two children, who were twelve and seven at the time. Most recently, the family had lived in a migrant housing camp. WCHS alleged that Virginia reported being raped by a man in the migrant camp and that Tammy reported being touched inappropriately by respondent-mother's ex-boyfriend. According to the petition, Virginia sometimes worked in the fields with her mother and told supervisors that she was sixteen. Virginia also told WCHS that her mother recruited migrant workers and often left the two girls alone. The whereabouts of the juveniles' fathers were unknown at the time of the petition.

In an order entered on 9 January 2015, the trial court adjudicated Virginia and Tammy neglected. The trial court made findings of fact regarding the pertinent allegations in the juvenile petition, including the sexual assaults perpetrated on both girls. The trial court also made findings about the family's history. The family previously lived in Illinois, where the children were born, and later moved to Florida. They moved from Florida to a migrant work camp in New Hanover County in June 2014. While in Florida, the children had been enrolled in school, but respondent-mother withdrew them when Virginia was in fourth grade. Respondent-mother purported to homeschool the children, but provided no testing or documentation to the company from which she purportedly received materials. Virginia reported that

she was responsible for teaching Tammy and for completing her own school work when respondent-mother was away. Additionally, the trial court found that the juveniles were exposed to violence, drunkenness, and drug use in the migrant camps. The trial court found that respondent-mother failed to understand the inappropriate nature of the migrant camps for her daughters.

The trial court entered a separate disposition order on 9 January 2015. The trial court maintained custody of the children with WCHS, found that visitation between respondent-mother and the children was not yet in the children's best interests, and ordered respondent-mother to comply with her service plan.

After the adjudication and disposition, Tammy was returned to her father on a trial basis, and custody was eventually returned to him.

On 24 September 2015, WCHS filed a motion to terminate respondent-mother's parental rights to Virginia, alleging the following grounds for termination: (1) neglect; and (2) willfully leaving the juvenile in foster care for more than twelve months together with failure to make reasonable progress towards correcting the conditions that led to removal. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2) (2015). Following a hearing, the trial court entered an order on 9 May 2016 terminating respondent-mother's parental rights based upon both alleged grounds. The trial court also concluded that it was in Virginia's best interests to terminate respondent-

mother's parental rights. Respondent-mother appeals. The trial court also terminated the parental rights of Virginia's father, but he does not appeal.

II. Indian Child Welfare Act

Respondent-mother first argues that the trial court lacked jurisdiction to enter the termination order because WCHS failed to comply with the notice requirement of the Indian Child Welfare Act ("ICWA" or the "Act"). We are not persuaded.

ICWA was enacted "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture[.]" 25 U.S.C. § 1902 (2016). To that end, ICWA requires notification to an Indian tribe when an Indian child affiliated with that tribe is the subject of a child custody proceeding:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention.

25 U.S.C. § 1912 (2016). In order to invoke these notification requirements, two conditions must be met:

> First, it must be determined that the proceeding is a "child custody proceeding" as defined by the Act. Once it has been determined that the proceeding is a child custody proceeding, it *must then be determined whether the child is*

*an Indian child*.

*In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005) (emphasis added, citations omitted). The term "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4) (2016). "The burden is on the party invoking the Act to show that its provisions are applicable to the case at issue[.]" *In re C.P.*, 181 N.C. App. 698, 701-02, 641 S.E.2d 13, 16 (2007).

Here, Virginia does not meet the definition of "Indian child" for purposes of ICWA. The only pertinent information provided to the trial court was contained in a Memorandum of Understanding from a Child Planning Conference, dated 30 July 2014. It states as follows:

> According to the mother the children have Cherokee Indian heritage, the mother is Cherokee, however, *she is not a registered member*, the mother does not know if she is eligible.

(Emphasis added.) Thus, the Memorandum of Understanding shows that neither Virginia nor respondent-mother is a member of an Indian tribe. Therefore, respondent-mother has failed to meet her burden of proving that Virginia is an Indian child within the definition of the ICWA. *See In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002) (a parent's belief that he or she has some Indian heritage

is not sufficient to prove that the child is subject to ICWA). Accordingly, we hold that the trial court did not err by failing to address ICWA's notification requirement.

III. Termination of Parental Rights

In her next two arguments on appeal, respondent-mother challenges the trial court's grounds for terminating her 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. 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 (2003). 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) (citation omitted).

We conclude that the trial court was justified in terminating respondent-mother's parental rights based upon neglect. Our juvenile code provides for termination based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1). Neglect, in turn, is defined as follows:

> Neglected juvenile. – 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) (2015). Generally, "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997); *see also In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) ("The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*"). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). Because the determinative factor is the parent's ability to care for the child at the time of the hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* Under such circumstances, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Ballard*, 311 N.C. at 713-714, 319 S.E.2d at 231. However, the prior adjudication of neglect, standing alone, does not support termination based on neglect. "The trial court must also consider any evidence of

changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. Thus, a trial court may terminate parental rights based upon prior neglect of the juvenile only if "the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

In the instant case, the trial court made numerous detailed findings regarding respondent-mother's uneven compliance with her service plan. The trial court found that while respondent-mother obtained housing and employment, her housing was in Henderson—an hour north of Wake County—and that her job was another hour north of Henderson. Furthermore, respondent-mother made little effort to have a home study completed on her residence or to provide WCHS with documentation of her income. The trial court also found that respondent-mother delayed in receiving services in connection with her case plan—she began therapy only after reunification efforts had been ceased by the court. Furthermore, her attendance in therapy was disputed, and the trial court determined that it was neither long term nor intensive, both of which were recommended after respondent-mother's psychological evaluation. Lastly, respondent-mother was ordered to comply with a Child Medical Evaluation and Child and Family Evaluation, but she was not cooperative with the evaluator.

Additionally, the trial court made multiple findings regarding respondent-mother's failure to accept responsibility for her actions. The trial court found:

> 20. The social worker never believed that she could recommend that the mother be allowed to resume visitation with the child. The mother did not indicate to the social worker that she accepted any responsibility for the child being removed from her custody and the mother was not addressing her own mental health needs. The mother did not indicate to the social worker that [ ] she understood the importance of taking care of herself as being crucial to caring for the child. The mother was unable to participate in treatment team meetings for the child since they were usually scheduled in the child's foster home, the child was present, and the child's therapist was not recommending that the child could have contact with the mother.
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> 21. The psychological evaluation stated that it was necessary that the mother acknowledge the responsibility for neglecting her children. Dr. Yoch noted that the mother was in "near complete denial of serious issues of neglect raised by all three of her daughters." The mother has a daughter who is over the age of eighteen and a younger daughter who is now in the custody of her father and is not subject to this action. No information was provided from the mother's therapist indicating that she has accepted any responsibility for the child being removed from her custody.
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> 22. Except during her testimony at this hearing, the mother has not acknowledged her responsibility for the neglect of the child. Even though she voiced her acceptance of responsibility, her testimony indicated that she did not have any further insight into the issues which necessitated the removal of her children from her care than she did at the time of

> adjudication and disposition in this matter. She was unable to recall details of important events even though no memory issues were identified by her psychological evaluation and she provided conflicting information regarding matters of little import. The only specific statement she made was that the child's trauma was because of the "move and everything." She later testified that she could have been a better parent to this child by changing jobs and not coming to North Carolina. She made no mention of the known trauma to the child, i.e., the rape of the child at the migrant camp and her initial disbelief of that event, moving frequently from migrant camp to migrant camp, leaving the child unattended at the migrant camp with strangers, the child being responsible for her own homeschooling and that of her younger sister, the child's exposure to the intimate activities of the mother and her boyfriends in the child's presence and/or hearing, and her exposure to the strangers the mother was transporting while the child was present and the substance abuse and fighting that occurred among these strangers in the child's presence. She has previously stated on many occasions that the children were not truthful regarding what happened while in her care, and provided no acknowledgement now that she believes that the children were truthful and/or that the statements made by the children were their perception of the events occurring while in her care. The mother has not accepted responsibility for the neglect experienced by the child while in the custody of the mother.

Of these findings, respondent-mother specifically challenges numbers 21 and 22 as lacking in evidentiary support. She does not challenge the remaining findings of fact or portions thereof. We presume that any unchallenged findings are supported by competent evidence, and consequently, they are binding on appeal. *See In re M.D.*,

200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). We address the challenged findings of fact in turn.

Respondent-mother argues that findings 21 and 22 are not supported by competent evidence because she accepted responsibility for her actions at the termination proceeding. Specifically, she admitted that moving her children around was not in their best interests. While respondent-mother did, in fact, make such an admission, it does not undermine the factual basis for the remainder of findings 21 and 22. As the guardian *ad litem* points out, any acceptance of responsibility by respondent-mother was qualified, ignored the crucial problems that led to WCHS's intervention with the family, and placed blame on WCHS. For instance, when asked if she accepted responsibility for the trauma in Virginia's life, respondent-mother suggested that the trauma arose from WCHS's intervention, not her own neglectful actions:

> Yes. I understand that she has been through a lot and a lot has happened. I also understand that she's probably having lots of problems in their care as well being transferred as many times as she has been while in their care.

When asked if she contributed to the trauma, respondent-mother admitted only that moving around a lot and not having a stable job were part of the trauma. Thus, as the trial court correctly found, respondent-mother failed to take any responsibility for Virginia's lack of supervision, lack of schooling, sexual assault, and

exposure to inappropriate activities. Based on the foregoing, we reject respondent-mother's challenge to findings of fact 21 and 22.

We also reject respondent-mother's contention that the trial court erred in finding a likelihood of repetition of neglect if Virginia were returned to respondent-mother's custody. Respondent-mother argues that this finding was in error because she took responsibility for her actions, made some progress on her case plan, and was willing to apply the skills learned in her parenting classes. We are not persuaded.

As detailed in the trial court's pertinent findings of fact, respondent-mother failed to take any responsibility for her neglectful actions or the role that they played in the trauma suffered by Virginia. This lack of acknowledgement, coupled with only limited progress in her case plan, provides ample support for the trial court's conclusion that Virginia was likely to suffer repeated neglect in the future if returned to respondent-mother's custody. Accordingly, we hold that the trial court properly terminated respondent-mother's parental rights based upon the ground of neglect, and we affirm the order of the trial court.

AFFIRMED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).