IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-325

Filed: 7 November 2017

Wilkes County, No. 15 JT 000010

IN THE MATTER OF: P., a minor juvenile, John L. Blevins, Petitioner

v.

M.D.P., L.R.C., and L.D.P., minor child, by and through his guardian *ad litem*, Tamara Lakey, Respondents.

Appeal by respondent-mother from order entered 28 December 2016 by Judge William F. Brooks in District Court, Wilkes County. Heard in the Court of Appeals 19 October 2017.

Erika Leigh Hamby, for petitioner-appellee Wilkes County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant-mother.

Elysia Jones, for guardian ad litem.

STROUD, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to her son. We affirm.

I. Background

The Wilkes County Department of Social Services ("DSS") initially became involved with the family in November 2014 due to reports that Landon[1] had twice been bitten by a rat and had been physically abused when his father had put his arms around his neck until Landon could not breathe; both parents initially denied that Landon's father had choked him though Landon's mother eventually told DSS "what 'really happened'" which included Landon's father punching him in the face, pushing him down while shaking him, and throwing toys at him. In January of 2015, DSS filed a petition alleging that Landon was abused and neglected and took him into non-secure custody.

On 12 March 2015, the trial court entered an order adjudicating Landon as an abused and neglected juvenile. The district court allowed both parents one hour of supervised visitation twice a month and ordered DSS to "utilize reasonable efforts to eliminate the need for the child's placement." On 11 September 2015, the district court entered a permanency planning order ceasing reunification efforts with the parents and setting the permanent plan as adoption; at the time of the order Landon's

[1] A pseudonym is used to protect the juvenile's privacy and for ease of reading.

mother was incarcerated and his father had a pending criminal charge. Landon's parents remained together despite a long history of domestic violence.

DSS filed a petition to terminate the parents' parental rights, and on 28 December 2016, the trial court entered an order terminating both parents' parental rights on the grounds of neglect and failure to make reasonable progress. Only respondent-mother appeals.

II. Subject Matter Jurisdiction

Respondent-mother first argues that the trial court lacked subject matter jurisdiction to terminate her parental rights on the ground of neglect due to an unverified amendment to the termination petition regarding that ground. However, respondent-mother's parental rights were also terminated on the ground of failure to make reasonable progress, and because only one ground is needed for termination of parental rights, we need not address this argument or the final argument respondent-mother had made regarding the ground of neglect. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93–94 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court.").

III. Failure to Make Reasonable Progress

Respondent-mother also argues that the trial court erred in terminating her parental rights on the ground of failing to make reasonable progress.

> The standard of 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. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding the termination to be in the best interest of the child.

In re Shepard, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (2004) (citation and quotation marks omitted). "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011).

Under North Carolina General Statute § 7B-1111(a)(2), a court may terminate parental rights when

> [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than [twelve] 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) (2015).

> A finding of willfulness here does not require proof of parental fault. On the contrary, willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort. A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of [her] child.

In re A.W., 237 N.C. App. 209, 215-16, 765 S.E.2d 111, 115 (2014) (citations, quotation marks, and brackets omitted).

Respondent makes many arguments on appeal regarding the ground of reasonable progress, including that perfection is not required; she did make some progress; two findings of fact are not supported by clear, cogent, and convincing evidence; respondent's poverty should not be held against her; and the district court did not properly consider respondent's "physical and mental challenges[.]" While we agree that perfection is not the standard, and the order confirms that respondent made some important progress such as taking the suggested classes, communicating with DSS, visiting Landon, and passing drug tests, the crux of the order is based on two findings of fact respondent has challenged regarding housing and her mental state. The trial court found:

> 20. Respondent mother's Case Plan set forth the following items to be completed and her progress to each item is also reflected below:
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> . . . .
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> g. Maintain safe and appropriate housing for herself and the minor child, should the child be returned to her. As of the date of the hearing she has not been able to establish safe and appropriate housing. The Respondent mother lives with her mother and has done so since January 5, 2016. The Respondent mother has made numerous statements to the fact, and has acknowledged to both the Social Worker as well as therapists that her mother has been abusive towards the minor child. Respondent mother has maintained housing separate and apart from Respondent father since October of 2015.

> h. Obtain a mental health assessment and follow recommended treatment, and provide monthly updates from therapist. The Respondent mother received therapy and treatment from Julie Jenkins at Rowen Psychiatric through the course of this matter. On or about July 22, 2015 Ms. Jenkins conducted an assessment of the Respondent mother that indicated a diagnosis of anxiety and depression, and indicated that she scored very high on a domestic violence inventory. Respondent mother terminated her treatment and therapy with Ms. Jenkins subsequent to that assessment and currently attends treatment at Daymark Recovery Services, Inc. with Ms. Donna Shew. Updates have not been provided to the Social Worker on a monthly basis, though the updates that have been provided indicate that Respondent mother has missed some appointments. The most recent update from Ms. Shew indicated that she was working on "Mindfulness skills" such as making good decisions, and she was working to address her housing and transportation issues. She is currently on nineteen (19) different medications, some for her mental health diagnoses as well as medications related to her physical disability.

Respondent-mother first challenges the portions of finding of fact 20(g) stating that the maternal grandmother's home is not safe and appropriate housing for Landon and that "[r]espondent mother has made numerous statements to the fact, and has acknowledged to both the Social Worker as well as therapists that her mother has been abusive towards the minor child." Respondent-mother argues that the court's finding regarding respondent-mother's statements of the grandmother's abuse is based on hearsay, which respondent-mother contends is inherently unreliable, and

therefore the finding is not supported by clear, cogent, and convincing evidence. Respondent-mother also contends that the social worker's testimony was the only potential evidentiary support for this finding of fact.

We first note that respondent-mother did not object to the social worker's testimony as hearsay. But even if she had, the social worker's testimony about respondent-mother's statements was admissible at the hearing as an exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 801 (2015). Under Rule 801 of the Rules of Evidence, "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is [ ] his own statement, in either his individual or a representative capacity[.]" *Id.* "In termination of parental rights proceedings, the party whose rights are sought to be terminated is a party adverse to DSS in the proceeding." *In re S.W.*, 175 N.C. App. 719, 723, 625 S.E.2d 594, 597 (2006). The social worker's testimony regarding respondent's own statements of the abuse of the grandmother was admissible as an exception to the hearsay rule as an admission of a party opponent. *See id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 801.

Because the social worker's testimony was properly admitted, the trial court did not need other evidence of the maternal grandmother's abuse, but we note that at the termination hearing the trial court took judicial notice of the court file, including all prior documents in the case which included a DSS report noting "[t]here have also been multiple reports of [Landon] being victimized by his Grandmother

throughout his childhood. [Respondent] has never identified efforts that she had made to prevent this. She . . . acknowledges that she feels it is best for [Landon] to have no contact with his Grandmother" and an order finding that DSS "has received multiple reports of [Landon] being abused by his maternal grandmother. [Respondent] acknowledges that it is not in [Landon's] best interest to have contact with his grandmother;" this is clear, cogent, and convincing evidence to support the trial court's finding that the maternal grandmother's home is not safe and appropriate housing for the child.

Respondent next challenges the trial court's finding of fact 20(h) as not being supported by clear, cogent, and convincing evidence because the social worker admitted that the evidence pertaining to respondent's therapy was not up-to-date. Respondent does not contend the finding of fact has erroneous facts, but rather there are more current findings of fact to be made. However, finding 20(h) specifically states that "[u]pdates have not been provided to the Social Worker on a monthly basis" and that the provided updates indicated that respondent missed some appointments and was last working on "mindfulness" and "housing" issues. We note that under respondent's case plan it was her responsibility to "provide monthly updates from [her] therapist." We also note respondent's case plan required her to address her mental health issues, specifically those related to abuse, as that issue also touched on the important issue of maintaining a safe and stable home. Since

Landon had been abused by both his own father and respondent's mother, respondent had never provided an appropriate home environment for Landon. Finding of fact 20(h) is supported by the evidence, even if it is not the most recent evidence due to respondent's failure to update DSS.

Respondent also challenges conclusion of law 3 which she deems to be the trial court's "ultimate finding" which states:

> Respondent mother is still living in an environment injurious to the minor child's welfare due to her own reports of abusive behavior by her mother towards the minor child. There is also doubt based on Respondent mother's current mental health treatment that she would have the ability to protect the minor child in an abusive or violent situation.

Respondent contends there was no clear, cogent, and convincing evidence presented that she could not protect Landon. Oddly, despite her earlier argument that the trial court failed to properly consider her "physical and mental challenges[,]" respondent also argues in her brief about her physical prowess in defending her son against his father and that "[i]t is far from 'clear and convincing' that [respondent] would not be able to defend Landon against a grandmother who would have had to have been in her fifties." Respondent argues that the record shows she fiercely defended Landon "twice pulling [the father] off Landon during the incident that resulted in Landon's placement in foster care." Although we appreciate that respondent risked her own safety to intervene during the assaults on Landon, that is

simply not what the trial court meant by its findings about her inability "to protect" Landon. For example, in the permanency planning order entered on 11 September 2015, the trial court summed up its concerns about respondent repeatedly being a victim of abuse and allowing Landon to remain in abusive homes: "This seems to be the theme of [respondent's] life. Therein lies the Court's greatest concern." The district court's same concern remained at the time of the hearing on the petition for termination of parental rights. Respondent's brief does not address the fact that she has never provided Landon a home to live in where he has not been subjected to serious abuse. The record shows that respondent has stated Landon's father

> is mentally and verbally abusive on a daily basis. . . . [Respondent] has been unsuccessful in obtaining Public Housing Assistance due to her current Misdemeanor Child Abuse Charge. She states that she is unable to afford housing on her own.
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> . . . She scored a 190 on the Domestic Violence Inventory, which identifies her as being at high risk for violence. [Respondent] has disclosed multiple stories of how she has been victimized as a child and adult. There ha[ve] been no reports of how she has defended herself in any of these episodes. There have also been multiple reports of [Landon] being victimized by his Grandmother throughout his childhood. [Respondent] has never identified efforts that she had made to prevent this.

The record is replete with evidence that respondent has never provided a safe home environment for Landon.

Respondent's argument that she could physically protect Landon from attacks by his father or grandmother entirely misses the point. The trial court was not asking respondent to take a self-defense class to learn how to physically fight off an attacker to protect herself or her child. The trial court was asking respondent to provide a home where no one, neither she nor Landon, would ever need to fight off an attacker, particularly another family member in the home. We should hope it is clear to respondent that the district court does not desire a home where any parent must protect a child with greater violence than that inflicted upon the child, but rather children should live in a home that is not violent at all.

Finally, respondent argues that the trial court's findings of fact do not support its conclusion she failed to make reasonable progress to correct the conditions which led to Landon's removal from the home. Landon was removed from respondent's home due to physical abuse by his father and living in an injurious environment. Although respondent made some progress on her case plan, she has failed to address or make any progress regarding housing and has continued to live in an environment that has proven to be injurious to Landon's welfare.

Respondent contends that her lack of progress on finding housing was not willful because it was solely the result of her poverty. But respondent was disqualified from public housing programs due to her own criminal charge, not her poverty. Furthermore, in failing to consistently address her mental health issues,

particularly those pertaining to abuse, respondent has not taken the most crucial steps which would ultimately lead to her being able to one day provide a safe home for Landon. The trial court's findings of fact support its conclusion that respondent failed to make reasonable progress to correct the conditions that led to Landon's removal from the home, and the trial court did not err in terminating respondent's parental rights based on this ground. Respondent has not challenged the disposition portion of the order regarding best interest; thus, we affirm the trial court's order.

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).