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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-944

Filed: 16 July 2019

Rockingham County, No. 16 JT 107

IN THE MATTER OF: D.M.G.

Appeal by Respondent-Mother from order entered 3 July 2018 by Judge Christine F. Strader in Rockingham County District Court. Heard in the Court of Appeals 27 June 2019.

No brief filed on behalf of the Rockingham County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Sarah F. Hutchins, for Guardian ad Litem.

Anné C. Wright for Respondent-Appellant Mother.

DILLON, Judge.

Respondent-Mother (“Mother”) appeals from the trial court’s order terminating her parental rights to her minor child D.M.G. (“Doug”)¹ on the ground of dependency. Because we hold the evidence was insufficient to support the trial court’s finding that

¹ A pseudonym is used for ease of reading and to protect the juvenile’s identity.

her incapability due to her incarceration was reasonably likely to continue for the foreseeable future, we reverse the trial court's order.

I. Background

The Rockingham County Department of Social Services ("RCDSS") first became involved with Mother in September 2016 after Doug's caretaker, his paternal grandmother, was killed in a car accident. Doug had been in the care of the grandmother since 1 April 2016 as Mother and Doug's father were incarcerated in Virginia at the time. RCDSS exercised emergency jurisdiction and obtained non-secure custody of Doug.

In November 2016, Mother was released from jail and reunited with Doug. Mother cared for Doug from November 2016 to January 2017. In January 2017, Mother made arrangements for Doug's paternal cousin to temporarily watch Doug while she was hospitalized for an emergency surgery. However, Mother was arrested and incarcerated after her surgery for a probation violation that had occurred prior to her November 2016 release from jail.

On 7 February 2017, RCDSS filed a juvenile petition alleging Doug to be dependent after the paternal cousin informed RCDSS that she could not commit to the long-term care of Doug during Mother's incarceration. The petition alleged that both Mother and the father were incarcerated, and the parents lacked an alternative child care arrangement at that time. Mother was expected to be released in June

2017, while the father was not expected to be released until August 2018. RCDSS obtained non-secure custody of Doug.

After the State of Virginia declined to exercise jurisdiction, North Carolina assumed jurisdiction over Doug, and a hearing on the petition was held on 30 March 2017. In an order entered 27 June 2017, the trial court adjudicated Doug dependent as alleged in the petition.

From 6 January 2017 to 14 August 2017, Mother was incarcerated at the Western Virginia Regional Jail. During her incarceration, Mother corresponded with the social worker assigned to the case. Mother inquired about Doug's well-being and informed the social worker of the services she was accessing while incarcerated, including the independent living programs, moral decision-making group, and the Alpha program for substance abuse. On 14 June 2017, Mother signed a case plan requiring her to complete a parenting class and demonstrate learned skills, complete a mental health assessment and follow any recommendations, complete a substance abuse assessment and follow all recommendations, submit to random drug screens, obtain and maintain stable employment and housing, and refrain from all criminal activity.

On 14 August 2017, Mother was released from jail and placed on probation. Mother contacted RCDSS the day after her release and scheduled a visit with Doug for the beginning of September. Upon her release, Mother did not have her own

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housing or transportation, and she moved in with an ex-boyfriend, Mr. S. Mr. S. drove Mother to her first supervised visit on 7 September 2017. Although she was offered a two hour visit, Mother was only able to stay for 75 minutes because Mr. S. wanted to leave.

Mother missed both her mental health and substance abuse assessment with Blue Ridge Behavioral Healthcare on 13 September 2017 and her second scheduled supervised visit with Doug on 14 September 2017.

On 21 September 2017, Mother attended her scheduled visit with Doug. During the visit, Mother appeared paranoid. She submitted to a drug screen and tested positive for Oxycodone. At some time after this visit, Mother was briefly incarcerated and missed her 27 September 2017 supervised visit, but was released sometime prior to and attended her 5 October 2017 visit with Doug. Mother's last visit with Doug was on 19 October 2017.

From 14 August 2017 to 20 December 2017, Mother attended only five of approximately ten offered visits with Doug. Of the visits she did attend, she did not always stay for the entire duration due to transportation issues.

Following a 9 November 2017 permanency planning hearing, at which Mother was absent, the trial court changed the primary permanent plan to adoption and reduced the frequency of Mother's visits to one per month.

On or about 20 December 2017, Mother was arrested for violating her probation. On 12 February 2018, RCDSS filed a motion to terminate Mother's parental rights based on the grounds of willfully leaving the child in foster care for more than twelve (12) months without making reasonable progress to correct the conditions which led to his removal and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(2), (6) (2017).

Following hearings held 30 April and 24 May 2018, the trial court entered an order on 3 July 2018 finding that grounds existed to terminate Mother's parental rights based only on dependency and that termination was in Doug's best interests.² Accordingly, the court terminated Mother's parental rights. Mother timely appealed.

II. Analysis

This Court reviews an order terminating parental rights for "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004) (internal citations omitted). "Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary." *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009). The trial court's findings of fact which an appellant does not specifically dispute on appeal "are deemed to be supported by sufficient evidence and are binding on appeal."

² The order also terminated the parental rights of Doug's father but he is not a party to this appeal.

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In re M.D., 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). However, “[t]he trial court’s conclusions of law are fully reviewable *de novo* by the appellate court.” *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (internal quotations omitted), *aff’d per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

On appeal, Mother argues the trial court erred in concluding grounds existed to terminate her parental rights based on dependency. Pursuant to Section 7B-1111 of our General Statutes, a trial court may terminate parental rights if it finds

[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2018). Termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(6) “does not require that the parent’s incapability be permanent or that its duration be precisely known. Instead, this ground for termination merely requires that there is a *reasonable probability* that such incapability will continue for the foreseeable future.” *In re N.T.U.*, 234 N.C. App. 722, 736, 760 S.E.2d 49, 58 (internal citations omitted), *disc. review denied*, 367 N.C. 826, 763 S.E.2d 517 (2014).

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Here, the trial court determined that Mother is incapable of providing proper care or supervision for Doug due to her incarceration, that it is probable this incapability will continue for the foreseeable future, and that Mother is “unable to formulate an alternative plan of care for [Doug] while she is incarcerated.” In support of this conclusion, the trial court made the following pertinent findings of fact:

10. Pursuant to N.C.G.S. § 7B-1111(a)(6), [Mother] . . . is incapable of providing for the proper care and supervision of [Doug], such that [Doug] is a dependent juvenile within the meaning of G.S. 7B-101 as further summarized below. This incapacity is due to [Mother’s] current incarceration, and there is a reasonable probability that this incapacity will continue for the foreseeable future as [Mother] does not have a projected release date at this time. [Mother] has multiple pending criminal charges in the state of Virginia. [Mother] cannot identify an alternative care arrangement for [Doug] at this time.

. . .

17. [Mother] was incarcerated at Western Virginia Regional Jail in the state of Virginia from January 6, 2017 until August 14, 2017 at which time she was released from jail.

. . .

30. Upon being released from jail on August 14, 2017, [Mother] was placed on probation in the state of Virginia. The terms of her probation included: do not commit any new crimes, remain in the state of Virginia[,] remain drug and alcohol free and have clean drug screens.

. . .

54. On or about December 20, 2017, [Mother] was arrested

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again for probation violation [Mother] continues to remain incarcerated in the state of Virginia at this time. She is facing multiple probation violations, along with a firearm by a felony charge and felony check charges. [Mother] is due to be sentenced in August of 2018.

Mother does not challenge the trial court's findings that her incarceration rendered her unable to care for Doug at the time of the termination hearing and that she lacks an alternative child care arrangement. These findings are therefore binding on appeal. *In re M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785.

Mother does, however, challenge the court's finding that there was a reasonable probability that her incapability due to her incarceration was likely to continue for the foreseeable future. Mother argues that her incarceration was not for an extended period, and that she projected that she would be released before the end of 2018, seven months from the date of the termination hearing.

RCDSS's evidence regarding Mother's incapability came exclusively from Mother's testimony when RCDSS called her as a witness. Mother testified that at the time of the termination hearing, she was currently incarcerated in Virginia with pending charges of possession of a firearm by a nonviolent felon, two probation violations, and "felony check charges." Mother further testified that she would not know her release date until she was sentenced in August 2018, but that "[t]hey're combining all of [her] charges, and the plan is of right now the [possession of a firearm] charge is supposed to be dropped because [she] cooperated with the Franklin

County Sheriff's Department, and the plan is for [her] to participate in the Drug Court program." She also testified that she and her lawyers "anticipate [her] being released sometime before next year," so she can participate in the Drug Court program.

This Court has previously held that a parent's extended incarceration is "sufficient to constitute a condition that rendered her unable or unavailable to parent [the juvenile]." *In re L.R.S.*, 237 N.C. App. 16, 21, 764 S.E.2d 908, 911 (2014). For example, in *In re L.R.S.*, this Court determined the trial court did not err in finding that the respondent-mother's incapability due to her incarceration would continue for the foreseeable future where the respondent-mother's projected release date from federal custody was over one year after the date of the termination hearing, and she potentially faced an additional thirty months of imprisonment. *Id.*

Moreover, in *In re N.T.U.*, this Court affirmed the trial court's termination of the respondent-mother's parental rights based on dependency due to her incarceration. At the time of the termination hearing, the respondent-mother had been incarcerated and awaiting trial for two years on charges of homicide and bank robbery stemming from two separate incidents with no trial date scheduled. *In re N.T.U.*, 234 N.C. App. at 736, 760 S.E.2d at 58. This Court determined that based on these facts, and because "no evidence was presented giving rise to any expectation of her release from incarceration in the foreseeable future," the trial court did not err in

determining that there is a reasonable probability that the respondent-mother's incapability would continue for the foreseeable future. *Id.*

Mother argues her case is distinguishable from *In re L.R.S.* and *In re N.T.U.*, because the evidence presented did not support a finding that there was a reasonable probability her incarceration would continue for the foreseeable future. We agree.

Unlike *In re N.T.U.*, where the respondent-mother at the time of the termination hearing had no scheduled trial date for pending charges of homicide and bank robbery, Mother here was scheduled to be sentenced in August 2018, only four months after the adjudication phase of the termination hearing, on less severe charges of possession of a firearm by a nonviolent felon, probation violations, and "felony check charges." Additionally, unlike the evidence in *In re N.T.U.*, the evidence presented here gave rise to an expectation of Mother's release from incarceration in the foreseeable future. Mother testified on behalf of RCDSS that the plan was for her firearm charge to be dropped and the remaining charges combined, and that she and her lawyers "anticipate [her] being released sometime before" the end of 2018 so she can participate in the Drug Court program. No evidence was presented to the contrary.

Unlike *In re L.R.S.*, where the petitioner presented evidence establishing that the respondent-mother was set to serve at least one more year of incarceration after the date of the termination hearing and potentially faced up to thirty additional

months of imprisonment, RCDSS here presented no evidence establishing the length of the sentence Mother may serve. Rather, its only evidence came from Mother's testimony which indicated that she expected to be released no more than eight months after the 30 April 2018 termination hearing.

RCDSS bore the burden of demonstrating by clear, cogent, and convincing evidence that the ground of dependency existed to terminate Mother's parental rights. *In re F.G.J.*, 200 N.C. App. 681, 686, 684 S.E.2d 745, 749 (2009). Despite the fact that Mother's charges were pending in Virginia, RCDSS failed to present any evidence relating to Mother's expected length of incarceration, such as the nature of the pending out-of-state charges, the possible sentence she may receive, how the probation violations may affect the sentence, or any information concerning the felony check charges that may affect the sentence.

The evidence presented here, then, indicated that Mother was expected to be released from incarceration only seven months after the termination hearing. This is a shorter time than both the thirteen months and thirty potential additional months the respondent-mother in *In re L.R.S.* was expected to remain incarcerated, and the unknown release date of the respondent-mother in *In re N.T.U.*, whose trial had yet to be scheduled. We hold this evidence was insufficient to support a finding that there was a reasonable probability that Mother's incarceration would continue for the foreseeable future.

III. Conclusion

Because the evidence and findings were insufficient to support the trial court's ultimate finding and conclusion that there was a reasonable probability that Mother's inability to provide care for Doug would continue for the foreseeable future, we hold that the trial court erred in concluding that grounds existed to terminate Mother's parental rights based on dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (authorizing termination of parental rights if "the parent is incapable of providing for the proper care and supervision of the juvenile . . . *and* that there is a reasonable probability that the incapability will continue for the foreseeable future") (emphasis added). As this was the only ground found by the trial court to terminate Mother's parental rights, we reverse the trial court's order.

REVERSED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).