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NO. COA10-674

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

IN THE MATTER OF:

S.A.F.

New Hanover County
No. 08 JT 221

Appeal by respondent from order entered 31 December 2009 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 4 November 2010.

Regina Floyd-Davis for petitioner-appellee.

Richard E. Jester for respondent-appellant.

N.C. Administrative Office of the Courts, by Appellate Counsel Pamela Newell, for guardian ad litem.

GEER, Judge.

Respondent mother appeals from an order terminating her parental rights as to the minor child S.A.F. ("Samantha").¹ Respondent mother challenges the trial court's determination that grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(6) (2009) (dependency), § 7B-1111(a)(7) (abandonment), and § 7B-1111(a)(9) (prior involuntary termination of parental rights to another child and lack of ability or willingness to establish a safe home). We hold that the trial

¹The pseudonym "Samantha" is used throughout this opinion to protect the minor's privacy and for ease of reading.

court's findings of fact, supported by sufficient evidence, support its conclusion of law that grounds existed under § 7B-1111(a)(9) to terminate respondent mother's parental rights. Because we further conclude that the trial court did not abuse its discretion in deciding that Samantha's best interests would be served by termination of respondent mother's parental rights, we affirm.

Facts

The New Hanover County Department of Social Services ("DSS") became involved with respondent mother and Samantha shortly after Samantha's birth in August 2008. At birth, Samantha suffered from meconium aspiration, and she was placed on a ventilator and transported to the neonatal intensive care unit at Memorial Hospital in Chapel Hill, North Carolina.

DSS filed a juvenile petition on 19 August 2008, alleging that Samantha was a dependent juvenile due to her serious medical needs and respondent mother's mental health problems. The trial court granted DSS nonsecure custody of Samantha that same day. After a hearing on 24 September 2008, the trial court entered an adjudication order in which the court concluded that Samantha was a dependent juvenile. Respondent mother had stipulated to the allegations of dependency set forth in the petition.

The trial court continued custody of Samantha with DSS, but authorized placement of Samantha, upon her release from the hospital, with Samantha's maternal great aunt. The court ordered respondent mother to continue to participate in mental health treatment through the Southeastern Center's Assertive Community

Treatment Team; to follow any recommendations given by her psychiatrist and take all medications as prescribed; to undergo substance abuse treatment and submit to random drug screens requested by DSS, the guardian ad litem, or her treatment program; and to obtain and maintain stable housing. The trial court further directed DSS to facilitate supervised visitation between respondent mother and Samantha.

The trial court subsequently entered a disposition order dated 5 November 2008. The court found that respondent mother had a diagnosis of chronic, active paranoid schizophrenia and, as a result of a recent assessment, also had a diagnosis of "Bipolar Affective Disorder, Rule Out Substance Abuse Induced Mood Disorder, Polysubstance Dependence; and Personality Disorder, NOS, With Cluster B features." Respondent mother had been accepted into Union Mission House, which the court characterized as "similar to a half-way house." The court continued custody of Samantha with DSS and ordered respondent mother to comply with the same conditions set forth in the prior adjudication order. The court also found that the putative father had been excluded as the father of Samantha through paternity testing.

On 19 February 2009, the trial court held a review hearing and subsequently entered an Order on Review dated 25 March 2009. The court found that respondent mother had been visiting with Samantha on a regular basis up until 22 December 2008. DSS had not had any contact with respondent mother since that date, and respondent mother's whereabouts at the time of the hearing were unknown.

The trial court held a permanency planning hearing on 14 May 2009 and entered its permanency planning order on 28 June 2009. The court found that respondent mother's guardian ad litem and her attorney had not had any contact with respondent mother since November and December 2008, respectively. The court further found that Samantha had adjusted well to the placement with her great aunt and that the great aunt had expressed a desire to adopt Samantha. Because respondent mother's mental health issues would prevent her from being capable of providing adequate care for Samantha, the trial court found that the return of Samantha to respondent mother would be contrary to Samantha's welfare. The trial court, therefore, established adoption as the permanent plan for Samantha and directed DSS to pursue the plan of adoption by either voluntary relinquishment or further court action.

On 17 July 2009, DSS filed a petition to terminate the parental rights of both respondent mother and the unknown father. DSS alleged that the following grounds existed to terminate respondent mother's parental rights: (1) respondent mother was incapable of providing for the proper care and supervision of Samantha such that Samantha was a dependent juvenile, N.C. Gen. Stat. § 7B-1111(a)(6); (2) respondent mother had willfully abandoned Samantha, N.C. Gen. Stat. § 7B-1111(a)(7); and (3) respondent mother's parental rights to another child had been terminated and respondent mother lacked the ability or willingness to establish a safe home, N.C. Gen. Stat. § 7B-1111(a)(9).

Following a hearing on 2 November 2009, the trial court entered an order on 31 December 2009, finding the existence of all three of the alleged grounds and terminating respondent mother's parental rights to Samantha.² Respondent mother filed two notices of appeal from the order terminating her parental rights: the first on 23 December 2009, upon circulation of a draft of the order, and the second on 23 February 2010, nearly two months after the entry of the order.

Discussion

At the outset, we address Samantha's guardian ad litem's motion to dismiss respondent mother's appeal. The guardian ad litem argues that respondent mother failed to file proper notice of appeal from the order terminating her parental rights and that, consequently, this Court lacks jurisdiction over her appeal. The guardian ad litem points out that respondent mother's first notice of appeal was premature and did not include respondent mother's signature, while the second notice of appeal was filed too late. In response, respondent mother contends her second notice of appeal was not untimely filed because she was not properly served with the order terminating her parental rights. Alternatively, respondent mother has filed a petition for writ of certiorari.

"It is well established that [f]ailure to give timely notice of appeal . . . is jurisdictional, and an untimely attempt to appeal must be dismissed.'" *In re I.T.P-L.*, 194 N.C. App. 453,

²The trial court also terminated the parental rights of the unknown father.

459, 670 S.E.2d 282, 285 (2008) (quoting *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004)), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009). Rule 3.1(a) of the Rules of Appellate Procedure provides:

Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C. § G.S. [sic] 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general [sic] Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal.

Pursuant to N.C. Gen. Stat. § 7B-1001(b) (2009), "notice of appeal shall be given in writing . . . and shall be made within 30 days after entry *and service* of the order" from which the party is appealing. (Emphasis added.)

Here, the trial court entered its order terminating respondent mother's parental rights on 31 December 2009. Neither of the copies of the order filed with this Court – in the record on appeal or attached to the motion to dismiss the appeal – includes a certificate of service of the order. Nor does the record indicate that respondent mother received actual notice of the entry of the order. As there is nothing to indicate the date of service of the order at issue, we cannot hold that respondent mother's second

notice of appeal was untimely filed. Accordingly, we deny the guardian ad litem's motion to dismiss respondent mother's appeal. See *Rice v. Coholan*, ___ N.C. App. ___, ___, 695 S.E.2d 484, 489-90 (holding that "[b]ecause there was no certificate of service filed, the time for filing the notice of appeal was tolled"; thus, appellants' 17 September 2008 notice of appeal from order entered 14 August 2008 was timely, and Court had jurisdiction to hear appeal), *disc. review denied*, 2010 NC LEXIS 785 (Oct. 7, 2010). Because we hold that respondent mother's appeal is properly before us as an appeal of right, we dismiss respondent mother's petition for writ of certiorari as moot.

Turning to the merits of the appeal, a termination of parental rights proceeding involves two separate phases: an adjudicatory stage and a dispositional stage. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, "the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). This Court determines on appeal whether "the court's findings of fact are based upon clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

Factual findings that are supported by the evidence are binding on appeal, even though there may be evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317,

321 (1988). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

We first address respondent mother's arguments relating to the trial court's conclusion that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(9). This subsection provides for termination of parental rights where "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." *Id.* N.C. Gen. Stat. § 7B-101(19) (2009), in turn, defines a safe home as a "home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." This Court has previously explained that termination of parental rights under § 7B-1111(a)(9) "necessitates findings regarding two separate elements: (1) involuntary termination of parental rights as to another child, and (2) inability or unwillingness to establish a safe home." *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006).

In this case, there is no dispute that respondent mother's parental rights to another child were involuntarily terminated by a court of competent jurisdiction. The issue on appeal is whether the trial court properly determined that respondent mother is unable or unwilling to establish a safe home. On that issue, the

trial court made a number of pertinent findings, including finding of fact five:

5. [Samantha] was adjudicated a dependent Juvenile within the meaning of G.S. 7B-101 (9) on 24 September 2009. [Respondent mother] was diagnosed with chronic active paranoid schizophrenia. She has a history of substance abuse and of verbal and physical aggression, particularly when she is not adhering to her mental health regimen. [Respondent mother] indicates that she has had mental problems since she was thirteen (13) years old. At one point she was prescribed Haldol, but has been on some type of psychotropic medication since the age of thirteen. Since reaching the age of majority, [respondent mother] has repeated a pattern of being on and off her medications at will. She has not demonstrated the stability necessary to provide appropriate care for [Samantha].

Respondent mother challenges only the portion of this finding that describes her failure to consistently take her medication as being "at will." She does not dispute the remainder of the finding, but insists that the evidence did not show that her failure to consistently take her medication was a "conscious, wilful, knowing decision that was not caused by the mental illnesses from which she suffers."

We do not interpret the trial court's finding in the same manner as respondent mother. The term "at will" is defined by *Webster's Third New International Dictionary* 2617 (1967) as follows: "as one wishes: as or when it pleases or suits oneself . . .: subject to one's discretion or pleasure: at one's disposal." In other words, the trial court was simply finding that respondent mother had a pattern of going on and off her medications as she felt like it. The trial court noted the pattern, but did not make

a finding as to the cause of the pattern – indeed, the finding of fact, when read as a whole, suggests that the trial court recognized that this pattern was related to respondent mother's mental illness. Significantly, respondent mother does not dispute that the pattern exists. And, she does not dispute the final sentence in the finding that "[s]he has not demonstrated the stability necessary to provide appropriate care for [Samantha]."

Respondent mother also does not dispute the trial court's findings, in finding of fact seven, that she was ordered to participate in mental health treatment, to follow any recommendations given to her by her psychiatrist, to take all medications as prescribed, to undergo substance abuse treatment, and to submit to random drug screens. In finding of fact eight, the trial court detailed respondent mother's failure to comply with these objectives:

8. That [respondent mother] failed to consistently participate in mental health treatment and/or consistently take prescribed medications. She failed to complete substance abuse treatment and/or submit to random drug screens. From September of 2008 through December of 2008, [respondent mother] was compliant with the recommendations and making efforts towards reunification; however, she stopped without explanation. She was visiting [Samantha] for the first four (4) months of the child's life, but failed to show for any visits since December 22, 2008. She was complying with the Assertive Community Treatment Team; however, she failed to show for appointments after January 5, 2009 and was discharged from the program for non-compliance. She failed to remain in contact with the Department from said point forward until October of 2009, after the petition to terminate her parental rights was filed. She

has been able to maintain stable housing through receipt of her disability benefits.

With respect to this finding, respondent mother acknowledges that the portion of the finding regarding her failure to consistently participate in mental health treatment and/or consistently take prescribed medications is "partially true." She argues, however, that there was no evidence "that she had any significant mental health issues" during her lapse in communication with DSS. She also points to evidence that she sought out some services on her own. Respondent mother does not deny, as the trial court found, that she failed to complete substance abuse treatment and/or submit to random drug screens, but she argues that she "apparently did not need substance abuse treatment" and that DSS "did not establish that she used drugs during this case or needed any assessment or treatment." She further contends that her "lack of contact with [DSS] while not excusable to a rational mind is very understandable in light of diagnosis [sic]."

These arguments, however, go to the weight to be given the evidence and the inferences to be drawn from the facts. It is up to the trial court, however, to make those determinations, so long as the inferences are reasonable. See *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject."). While respondent mother has argued that the trial court should have drawn different inferences, she has not

demonstrated that the trial court's decision otherwise was unreasonable.

Additionally, respondent mother argues, with respect to the failure to maintain contact with DSS or the guardian ad litem, that "[a] more correct statement of [her] situation is that she has not maintained contact with the person who denied her access to her daughter. She was shunned by her relative who was also [a DSS] employee." Respondent mother's argument, addressing her "situation" and not the precise finding, does not actually dispute the trial court's finding, which is, in any event, supported by the evidence.

We do, however, agree with respondent mother that the portion of finding of fact eight in which the court stated that respondent mother was discharged from the Assertive Community Treatment Team due to noncompliance was unsupported. At the termination hearing, the court sustained the objection made by respondent mother's counsel to the social worker's testimony that respondent mother was discharged on the basis of noncompliance. Since the record contains no other competent evidence regarding the reason for respondent mother's discharge from the program, the trial court erred in finding that the discharge was due to noncompliance.³ Nonetheless, the reason for her discharge does not disturb the

³None of the prior orders of which the trial court took judicial notice supported this finding. The guardian ad litem cites to a court report filed by DSS in connection with the permanency planning hearing. There is no indication in the record that the trial court had that report before it in the termination of parental rights proceeding, and, in any event, that report would not be admissible in the adjudicatory phase.

finding that after 5 January 2009 she stopped receiving mental health services that she needs.⁴

We hold that the binding portions of these findings of fact are sufficient to support the second element of N.C. Gen. Stat. § 7B-1111(a)(9): that respondent mother lacks the ability to establish a home in which Samantha is not at substantial risk of physical or emotional abuse or neglect. The trial court's determination that respondent mother lacked this ability is amply supported by her serious mental illness beginning at age 13; her pattern of failing to consistently take her medication or participate in mental health treatment; her history of substance abuse and of verbal and physical aggression when she does not adhere to her mental health regimen; her failure to complete substance abuse treatment or participate in drug screens; her failure to attend visits with Samantha after December 2008; her failure to maintain contact with DSS for much of 2009; and her overall failure to demonstrate the stability necessary to provide Samantha with appropriate care. Although respondent mother argues that the change in her housing and her ability to care for herself establish an ability or willingness to provide Samantha with a safe home, this assertion fails to acknowledge the binding facts

⁴Respondent mother also argues that the trial court erred in admitting other hearsay evidence. The trial court, however, *sustained* respondent mother's objection with respect to some of the questions, and respondent mother concedes that, as to other testimony that she challenges, no finding of fact was based on that testimony. Respondent mother has, therefore, failed to demonstrate that she suffered any prejudice with respect to the testimony other than that regarding the reason for her termination from the treatment program.

regarding respondent mother's mental health issues and the lack of change in respondent mother's ability to care for Samantha in addition to herself. See *In re V.L.B.*, 168 N.C. App. 679, 683, 608 S.E.2d 787, 790 (undisputed finding of previous termination of parental rights with respect to another child, coupled with chronic and severe mental health problems on the part of both parents, supported trial court's conclusion that grounds to terminate parental rights existed under § 7B-1111(a)(9)), *disc. review denied*, 359 N.C. 633, 614 S.E.2d 924 (2005).

Because we hold that the trial court properly found a sufficient basis for termination of parental rights under § 7B-1111(a)(9), we need not address respondent mother's arguments as to § 7B-1111(a)(6) or (7). 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 . . . found by the trial court."). We also need not address respondent mother's arguments regarding findings of fact relating to the other two grounds.

Respondent mother, however, urges us to "overturn" the cases that hold, as does *B.S.D.S.*, that if this Court upholds one ground, it need not address the remaining grounds. Respondent mother argues that unspecified "changes in the statutes" require remand to the trial court, when at least one ground has been improperly found, for reconsideration whether, based on the remaining grounds, "termination of parental rights still has merit." Such an argument must be made to the Supreme Court; we are bound by prior

panels of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

Finally, as to the dispositional stage, respondent mother argues that even if grounds were properly found in this case, termination of parental rights was not appropriate. "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 407 (2003). An abuse of discretion occurs when a decision is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

N.C. Gen. Stat. § 7B-1110(a) (2009) provides: "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." In making this determination, the trial court is required to consider (1) the age of the child; (2) the likelihood of adoption of the child; (3) whether the termination of parental rights will aid in the accomplishment of the child's permanent plan; (4) the bond between the child and the parent; (5) the quality of the relationship between the child and the proposed placement; and (6) any other relevant consideration. *Id.*

Respondent mother does not dispute that the trial court made findings regarding each of the factors set out in N.C. Gen. Stat. § 7B-1110(a). The court found that Samantha was 15 months old; she was placed in a pre-adoptive home with her great aunt and is strongly bonded to the family; there is no bond between Samantha and respondent mother; respondent mother has had no contact with Samantha since 22 December 2008;⁵ and termination of parental rights will aid in the accomplishment of the permanent plan of adoption for Samantha.

Respondent mother, however, argues on appeal that the trial court abused its discretion by failing to consider the "least destructive option." She asserts that DSS "admitted no evidence that established that termination of parental rights would provide a better result for Samantha than an order which avoided termination through the creation of a guardianship." With regard to why guardianship would be better for Samantha than adoption, respondent mother argues only that a guardianship "can allow both Samantha's right to her mother and [respondent mother's] right to her daughter to have some future possibility of fully blooming."

We cannot conclude that the trial court was unreasonable in determining that Samantha's best interests would be served by taking the steps necessary for her great aunt to adopt Samantha and

⁵Although the dispositional portion of the order lists 22 December 2009 as the date of respondent mother's last contact, this appears to be a typographical error. Finding of fact eight lists the last date of contact as 22 December 2008, as did the court's previous orders. In addition, the termination hearing was held on 2 November 2009, which preceded any possible December 2009 contact.

become her actual mother – especially since Samantha has no bond with respondent mother, but does have a strong bond with her great aunt. Under these circumstances, we hold that the trial court did not abuse its discretion in terminating respondent mother's parental rights. We, therefore, affirm.

Affirmed.

Judges CALABRIA and THIGPEN concur.

Report per Rule 30(e).