

NO. COA14-589

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

IN THE MATTER OF:  
H.D., K.R.

Madison County  
No. 10 JA 24-25

Appeal by respondent from orders entered on or about 16 November 2012 by Judge F. Warren Hughes and 11 February 2014 by Judge Ted McEntire in District Court, Madison County. Heard in the Court of Appeals 9 December 2014.

*Leake & Stokes, by Larry Leake, for petitioner-appellee Madison County Department of Social Services.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Tobias R. Coleman, for guardian ad litem.*

*Mark Hayes, for respondent-appellant mother.*

STROUD, Judge.

Respondent seeks review of three orders: an order which changed the permanent plan for the children to adoption and the adjudication and disposition orders terminating respondent's parental rights to her daughters. Madison County Department of Social Services filed a motion to dismiss respondent's appeal from the order adopting a permanent plan of adoption, and respondent then filed a petition for a writ of certiorari requesting this

Court to hear her appeal on the contested order. For the following reasons, we deny Madison County Department of Social Services's motion to dismiss and respondent's petition for certiorari and affirm the three orders.

#### I. Background

On 6 April 2010, the Madison County Department of Social Services ("DSS") filed juvenile petitions seeking adjudications of neglect and dependency for respondent's two daughters. The petitions alleged that respondent admitted to DSS that she and her husband were drinking alcohol while supervising the children in April of 2010, in violation of a safety plan established in response to prior incidents. DSS alleged that "the family continues to be in constant crisis and the parents are unable to provide for the supervision and care of the juvenile[s] and lack appropriate alternative child care arrangement." On 23 November 2010, the district court entered an order adjudicating the girls dependent juveniles.

Over the next two years, DSS made several attempts to return the girls to the care of respondent but each time eventually had to intervene again. On 12 July 2012, the district court amended the girls' permanent plan of reunification with respondent by adding a concurrent plan of adoption. On or about 16 November

2012, the district court signed an order changing the permanent plan for the girls to adoption. On 11 February 2014, the trial court entered adjudication and disposition orders terminating respondent's parental rights to the children based on her lack of reasonable progress. Respondent appeals.

## II. Permanency Planning Order

Respondent purports to appeal from the 16 November 2012 order changing the permanent plan to adoption. Respondent addresses the order changing the permanent plan to adoption as an order ceasing reunification efforts though the order does not explicitly cease reunification efforts or require DSS to file a motion seeking termination of respondent's parental rights. But even without any explicit language directing cessation of reasonable efforts to achieve reunification or requiring termination of parental rights, as a practical matter the order does cease reunification efforts. Here, the trial court found that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens[,]" and as such the girls "will be unable to go home within six months[;]" "[i]t is proper to change the plan for the girls to one of adoption[;]" and "[v]isits with the Respondent Mother are hereby terminated due to her failure to attend and her non-compliance." In addition to

these findings, the court made uncontested findings regarding DSS's several failed attempts to return the girls to respondent's care. "While these findings of fact do not quote the precise language of subsection 7B-507(b) [regarding ceasing reunification efforts], the order embraces the substance of the statutory provisions requiring findings of fact that further reunification efforts would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. N.C.G.S. § 7B-507(b)(1)." *In re L.M.T.*, \_\_\_ N.C. \_\_\_, \_\_\_, 752 S.E.2d 453, 456 (2013) (quotation marks omitted).

A. Appeal of 16 November 2012 Order

Nonetheless, respondent failed to designate the 16 November 2012 order ceasing reunification in her notice of appeal, and due to this failure, DSS moved to dismiss respondent's appeal of the 16 November 2012 order or in the alternative, sought sanctions for the error. Thereafter, respondent petitioned this Court to review the 16 November 2012 order by writ of certiorari. Again we turn to *In re L.M.T.*, which provided:

Parents may seek appellate review of cease reunification orders only in limited circumstances. In this case, respondent appealed under subsection 7B-1001(a)(5)(a), which provides that

- a. The Court of Appeals shall review an order entered under section 7B-507 to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:
  1. A motion or petition to terminate the parent's rights is heard and granted.
  2. The order terminating parental rights is appealed in a proper and timely manner.
  3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

In other words, if a termination of parental rights order is entered, the appeal of the cease reunification order is combined with the appeal of the termination order.

*Id.* at \_\_\_, 752 S.E.2d at 456 (citation and quotation marks omitted).

Here, respondent's parental rights were terminated in response to a petition to terminate; respondent mother timely and properly filed from the order terminating her parental rights; and the order ceasing reunification was "identified as an issue in the record on appeal" in the list of respondent's "Proposed Issues[.]"

*Id.* We therefore deny DSS's motion to dismiss respondent's appeal and respondent's petition for writ of certiorari, and we consider respondent's appeal because "the appeal of the cease reunification

order is combined with the appeal of the termination order." *Id.*

B. Respondent's Argument Regarding the 16 November 2012 Order

Respondent contends that "the court relieved DSS of its duty to seek reunification of the family, without first finding that continued efforts would be futile or inconsistent with the children's welfare." (Original in all caps.)

All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.

*In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)

(citations omitted). North Carolina General Statute § 7B-507(b)

provides that

[i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

- (1) Such efforts clearly would be futile or would be inconsistent with the

juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b) (2011).

We first note that

[w]hile trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language as was required by the Court of Appeals in this case. Put differently, the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language.

*In re L.M.T.*, \_\_\_ N.C. at \_\_\_, 752 S.E.2d at 455 (quotation marks omitted). In *In re L.M.T.*, the Court stated by way of "example" that

the trial court's finding that the environment that the Respondent Mother and her husband have created is injurious indicates that further reunification efforts would be inconsistent with the juveniles' health and safety. Likewise, the trial court's findings of fact related to respondent's drug abuse, participation in domestic violence, deception of the court, and repeated failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile. Moreover, these findings clearly support the trial court's conclusions that return of the juveniles is contrary to the welfare and best

interest of the juveniles[.]

*Id.* at \_\_\_\_, 752 S.E.2d at 456 (citation, quotation marks, ellipses, and brackets omitted).

As we have already stated, the 16 November 2012 order found unchallenged and thus binding that "Respondent Mother fails to attend visits or complete her case plan" and "has pending criminal charges and has not been participating in drug screens" and as such the girls "will be unable to go home within six months[.]" *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal."). These findings, particularly the pending criminal charges, all indicated "repeated failures at creating an acceptable and safe living environment certainly suggest that reunification efforts would be futile." *Id.* Even without the benefit of hindsight regarding what happened after reunification efforts had ceased, as permitted by *In re L.M.T.*, the findings in the cease reunification order standing alone "*suggest* that reunification efforts would be futile." *Id.* (emphasis added). This argument is overruled.

### III. Termination Orders



Respondent challenges (1) the district court's determination under North Carolina General Statute § 7B-1111(a)(2) that she willfully left the girls in foster care for more than twelve months without making reasonable progress to correct the conditions leading to their placements and (2) that it was in the best interests of the girls for her parental rights to be terminated when the trial court did not consider whether they would be adopted by their current caregiver.

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. Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary. Once a trial court has determined that at least one ground exists for termination, the trial court then decides whether termination of parental rights is in the best interest of the child.

*In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (citations and quotation marks omitted), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010).

A. Findings of Fact

[T]o find grounds to terminate a parent's rights under G.S. § 7B-1111(a)(2), the trial court must perform a two part analysis. The trial court must determine by clear, cogent and convincing evidence that a child has been willfully left by the parent in foster care or placement outside the home for over twelve

months, and, further, that as of the time of the hearing, as demonstrated by clear, cogent and convincing evidence, the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child. Evidence and findings which support a determination of reasonable progress may parallel or differ from that which supports the determination of willfulness in leaving the child in placement outside the home.

A finding of willfulness does not require a showing of fault by the parent. 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 the children.

With respect to the requirement that the petitioner demonstrate that the parent has not shown reasonable progress, we conclude that, under the applicable, amended statute, evidence supporting this determination is not limited to that which falls during the twelve month period next preceding the filing of the motion or petition to terminate parental rights. Our Supreme Court, in *In re Pierce*, 356 N.C. 68, 565 S.E.2d 81 (2002), recognized this when it observed:

During the 2001 session of the General Assembly, the legislature struck the within 12 months limitation from the existing statute detailing the requirements for establishing grounds for the termination of parental rights. Thus, under current law, there is no specified time frame that limits the admission of relevant evidence pertaining to a parent's reasonable progress or lack thereof.

*In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (citations, quotation marks, and brackets omitted), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

While respondent-mother challenges particular portions of numerous findings made by the district court, the following findings are unchallenged:

- i. The child[ren have] been in the custody of DSS for well over three and one-half years now.
- ii. . . . Respondent Mother was given a case plan with tasks to complete that she never completed. Even after some early success on her part that resulted in placement of the juveniles with her, there was a subsequent disruption that results from additional substantiation by Buncombe County DSS. Respondent Mother's visits were ceased with the juveniles in October 2012 . . . .
- iii. During the trial home placement . . . there were repeated problems of getting the juveniles to school on time and the respondent mother failing to take the children to their therapy appointments. Since the trial home placement ended [she] . . . has had [an] additional drug conviction[] for violation of the criminal law, was incarcerated in 2013 as a result of conviction and had inconsistency showing up late for visitation late or not at all until [DSS] . . . was relieved of reunification efforts.
- iv. While the children were in the custody of [DSS] . . ., the respondent mother was

evicted from her residence, served time in custody for [a] criminal conviction[] and required additional inpatient substance abuse treatment for the continued use of controlled substances . . . . [This] occurred after the respondent mother had received 60 hours of substance abuse treatment as part of her initial case plan that was completed in April 2011. . . .

- v. Since the respondent mother's visitations were ceased in October 2012 [she] . . . has written one letter to these juveniles and the children have responded with one letter. . . .

. . . .

- viii. The Court finds credible the testimony of Faith Ashe, the social worker who has spent more than two years working on this case who has been able to observe that respondent mother does not have the ability to properly care for these minor children.

Unchallenged findings "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009), and we conclude that these binding findings support the district court's adjudication under North Carolina General Statute § 7B-1111(a)(2). See N.C. Gen. Stat. § 7B-1111(a)(2) (2013). See *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) ("It is clear that respondent has not obtained positive results from her sporadic efforts to improve her situation."). As such, this argument is overruled.

B. Best Interests

Respondent contends that "the court abused its discretion in concluding that termination was in the best interests of the children, when it failed to consider the likelihood that the children would be adopted by their new pre-adoptive caregiver." (Original in all caps.) Once a district court has found grounds for termination of parental rights under North Carolina General Statute § 7B-1111(a), it must then "determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2013).

In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

*Id.*

North Carolina General Statute § 7B-1110(a) "requires the trial court to consider all six of the listed factors," but does not require "written findings with respect to all six factors; rather, . . . the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 753 S.E.2d 732, 735 (2014) (citations and quotation marks omitted). In this situation, a factor is "relevant" if there is "conflicting evidence concerning" the factor, such that it is "placed in issue by virtue of the evidence presented before the trial court[.]" *Id.* at \_\_\_ n.3, 753 S.E.2d at 735 n.3.

The dispositional order makes it clear that the district court considered the likelihood that the girls would be adopted:

9. . . . The juveniles had previously been placed in a pre-adoptive home for two years which placement [was] disrupted on the day of the adjudication hearing in January 2014. . . . The children ha[ve] been in [a new] pre-adoptive placement since January 29, 2014. The pre-adoptive placement is suitable to meet the needs of the juveniles and at this time the placement is going well. . . .

10. . . . The court received evidence that adoption would not happen immediately but was likely to occur . . . [within a] reasonable period of time.

11. The juveniles are currently 11 years old and 10 years old and at times have displayed negative behaviors. These behaviors contributed to the disruption of the prior pre-adoptive placement but have not resulted in the children requiring a higher level of care rather continued therapy to deal with previous trauma in their lives.

12. . . . [Therapist Sheila McKeon] expressed the opinion that the girls['] negative behaviors were learned and observed from their biological parents and that the extended length of this case contributed to their regression. The children are described as friendly, social, intelligent and capable of having relationships and connecting with others. The therapist supports adoption of these juveniles and believes the children are very adoptable.

13. . . . The Guardian ad litem has expressed . . . that there remains a strong likelihood of adoption in the future and that he believes that it's in the best interest of the juveniles that parental rights be terminated.

. . . .

15. The court considered whether there was any bond with the new adoptive placement and finds credible evidence that the placement while limited in time is going well and that the children are fully capable of bonding with a permanent placement provider.

The enumerated findings demonstrate the trial court did consider the girls' likelihood of adoption. This argument is overruled.

#### V. Conclusion

For the foregoing reasons, we deny DSS's motion to dismiss

-16-

respondent's appeal as to the 16 November 2012 order and respondent's petition for certiorari as to the 16 November 2012 order and affirm the 16 November 2012 order and the 11 February 2014 orders.

AFFIRMED.

Judges Dillon and Dietz concur.