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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1180

Filed: 5 July 2017

Forsyth County, No. 14 JT 237

IN THE MATTER OF: M.L.E., III

Appeal by respondent-mother from order entered 4 August 2016 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 8 June 2017.

*Assistant County Attorney Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.*

*Anné C. Wright for respondent-appellant mother.*

*Southern Coalition for Social Justice, by Kathleen Lockwood, for guardian ad litem.*

DIETZ, Judge.

Respondent appeals from the trial court's order terminating her parental rights to her son, Miles.<sup>1</sup> As explained below, Respondent waived her argument

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<sup>1</sup> We use a pseudonym to protect the child's identity.

concerning denial of her motion to continue because she did not raise this argument in the trial court.

With respect to the termination order, the findings of fact necessary to support termination are supported by clear, cogent, and convincing evidence in the record and those findings, in turn, support the court's conclusion that termination based on neglect was appropriate. Finally, the trial court's best interests determination was well within its sound discretion. Accordingly, we reject Respondent's arguments and affirm the trial court's order terminating Respondent's parental rights.

### **Facts and Procedural History**

On 28 October 2014, the Forsyth County Department of Social Services obtained nonsecure custody of Miles and filed a juvenile petition alleging that he was a neglected juvenile. Following a hearing, the trial court entered an order on 4 March 2015 adjudicating Miles neglected.<sup>2</sup> The court based its adjudication on findings that Respondent failed to provide Miles with a safe and stable home; that she had a history of substance abuse and failed to fully engage in treatment; that there was domestic violence in the home; that Respondent's contact with DSS was sporadic; that Miles had missed 23 days of school and had health issues when DSS took him into custody; that Respondent had missed several scheduled visits with Miles; that she had been

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<sup>2</sup> Miles was previously adjudicated dependent in a proceeding in Stokes County.

arrested on 12 January 2015; and that Miles's father was in prison.<sup>3</sup> In the dispositional portion of the order, the trial court ordered Miles to remain in DSS custody and ordered Respondent to comply with service directives in order to achieve reunification with Miles.

On 28 October 2015, DSS filed a petition to terminate Respondent's parental rights to Miles based on neglect and failure to make reasonable progress towards correcting the conditions that led to removal. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2). DSS was unable to personally serve Respondent because she did not reside at her address of record and DSS could not locate her. Ultimately, DSS resorted to service by publication on 12 May 2016. Following a hearing, the trial court entered an order on 4 August 2016 terminating Respondent's parental rights based on both grounds alleged by DSS. The trial court also concluded that termination was in Miles's best interest. Respondent timely appealed.

## **Analysis**

### **I. Denial of Motion to Continue**

Respondent first contends that the trial court erred by denying her motion to continue at the outset of the termination hearing. We reject this argument because, as explained below, it is newly raised on appeal and therefore waived.

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<sup>3</sup> Miles's father ultimately relinquished his parental rights and is not a party in this proceeding.

In termination of parental rights cases, continuances are “disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation.” *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005). We review the trial court’s denial of a motion to continue for abuse of discretion. *Id.*

On appeal, Respondent argues that the trial court should have granted a continuance because her time to answer the petition had not yet expired at the time of the hearing. But Respondent never raised this argument below. When Respondent moved to continue the proceeding in the trial court, she did so on the ground that her counsel had just re-established contact with her and needed more time to prepare for the hearing, as indicated by the transcript of her counsel’s argument in support of the motion:

My client is here, earlier I had noted I had not seen her this morning. I’ve not had contact with her for quite so many months and I just needed a brief continuance to prepare properly for this hearing. She had moved out of town after she had gotten some treatment, Your Honor, and I just heard back from her Wednesday evening. And I am not prepared to go forward – I haven’t had a chance to speak with her in depth and prepare evidence.

At no point did Respondent argue that the trial court should grant a continuance because her time to answer the petition had not yet expired.

“Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount . . . .” *State v. Holliman*, 155 N.C. App.

120, 123, 573 S.E.2d 682, 685 (2002). Because this argument is newly raised on appeal, under *Holliman* it is waived and we may not consider it.

## **II. Grounds for Terminating Parental Rights**

Respondent next challenges the trial court's grounds for terminating her parental rights. 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). 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). Where, as here, the trial court terminated parental rights on multiple grounds, if we determine that termination was supported based on any one ground, 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 first address the trial court's termination based on neglect. Neglect, for purposes of termination of parental rights, 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). 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). But, if the child has not been in the parent’s custody for a significant period of time, the trial court must find “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).

Here, Respondent challenges a number of evidentiary findings by the trial court but we need not address those findings individually because the court’s unchallenged findings, together with findings plainly supported by clear, cogent, and convincing evidence in the record, support the trial court’s ultimate findings concerning neglect.

Specifically, the trial court found that Respondent suffered from serious substance abuse issues; that she used illegal drugs including heroin, marijuana, and cocaine repeatedly and as recently as six weeks before the termination hearing; that Respondent has not completed a treatment program to address her substance abuse issues; that Respondent failed to complete a domestic violence counseling that was part of her DSS plan; that Respondent had moved from place to place repeatedly in the past, stayed with friends, could not remember all the places she had lived, and did not report many locations to DSS; that she failed to take random drug tests

requested by DSS; that she failed to complete a parenting assessment and classes; that she worked sporadically since Miles was removed from her care; that she provided no financial support for Miles; and that she had pending felony and misdemeanor charges at the time of the termination hearing.

Based on these findings of fact, all of which are supported by clear, cogent, and convincing evidence, the trial court found that Respondent had neglected Miles and that there was “a high probability of repeated neglect” in the future. These findings support the court’s conclusion that grounds exist to terminate Respondent’s parental rights under N.C. Gen. Stat. § 7B-1111.

### **III. Best Interests Determination**

Lastly, Respondent challenges the trial court’s determination that terminating her parental rights was in Miles’s best interests. The trial court’s best interests analysis is governed by the criteria in N.C. Gen. Stat. § 7B-1110(a). This Court reviews the trial court’s best interests determination for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

Respondent does not dispute that the trial court properly considered the statutory criteria for assessing a child’s best interests enumerated in N.C. Gen. Stat. § 7B-1110(a). Instead, she contends that the trial court should have considered guardianship with Miles’s relatives as an alternative to the court’s recommendation of adoption. Trial courts may consider the availability of guardianship with a relative

as an alternative to adoption, but they are not required to do so. *In re M.M.*, 200 N.C. App. 248, 258, 684 S.E.2d 463, 470 (2009). In any event, our review of the record and, in particular, the fact that Miles's caretakers were interested in adoption, makes clear that the trial court's best interests determination was well within its sound discretion.

### **Conclusion**

We affirm the trial court's order.

AFFIRMED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).