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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-191

Filed: 5 July 2017

Northampton County, Nos. 13 JT 20-24

In re: S.S.P., A.M.P., Jr., M.L.P., Z.M.P., Z.M.P.

Appeal by respondent-mother from orders entered 17 November 2016 by Judge W. Turner Stephenson, III in Northampton County District Court. Heard in the Court of Appeals 7 June 2017.

Luther Culpepper for petitioner-appellee Northampton County Department of Social Services.

N. Elise Putnam for respondent-appellant mother.

ARROWOOD, Judge.

Respondent-mother appeals from orders terminating her parental rights as to her minor children, S.S.P. (“Sara”), A.M.P., Jr. (“Andy”), M.L.P. (“Mary”), Z.M.P.

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(“Zack”), and Z.M.P. (“Zoe”) (collectively the “children”).¹ For the reasons stated herein, we affirm the orders of the trial court.

I. Background

On 2 August 2013, the Northampton County Department of Social Services (“DSS”) obtained nonsecure custody of respondent-mother’s² minor children Sara, Andy, and Mary. On 5 August 2013, DSS filed juvenile petitions alleging that Sara, Andy, and Mary were dependent in that “the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” The petitions alleged that a report was received on 1 August 2013 with allegations of physical abuse and that respondent-mother was being charged with assault on a child under the age of twelve. The matter came on for hearing on 20 August 2013 and an order adjudicating Sara, Andy, and Mary dependent was filed 26 November 2013.

On 27 August 2013, DSS obtained nonsecure custody of respondent-mother’s minor children Zack and Zoe. DSS also filed juvenile petitions alleging that Zack and Zoe were dependent in that respondent-mother did not have appropriate childcare arrangements and housing for them. The matter came on for hearing on

¹ Pseudonyms have been used to protect the identity of the minor children.

² Respondent-father is not a party to this appeal.

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17 September 2013 and an order adjudicating Zack and Zoe dependent was filed 24 February 2014.

The trial court entered disposition orders on 26 November 2013 for Sara, Andy, and Mary and on 24 February 2014 for Zack and Zoe. The trial court held that it was in the children's best interests that custody remain with DSS, with a permanent plan for reunification with respondent-mother. The visitation plan was supervised visitation at the request of respondent-mother. The trial court ordered the following at disposition for Sara, Mary, and Andy:

4. That the Respondent Mother shall enroll in and complete a parenting class.
5. That the Respondent Mother shall gain or maintain employment to demonstrate her ability to financially care for the child.

At disposition for Zack and Zoe, respondent-mother was ordered to complete the following:

4. That the Respondent Mother shall obtain a mental health evaluation with substance abuse assessment and abide by all recommendations.
5. That the Respondent Mother shall enroll in and complete a parenting class.
6. That the Respondent Mother shall gain or maintain employment and stable housing to demonstrate her ability to care for the child.

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On 18 March 2016, DSS filed petitions to terminate the parental rights of respondent-mother, alleging that they were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Respondent-mother filed responses to the petitions on 24 May 2016, denying that grounds existed to terminate her parental rights.

On 17 November 2016, the trial court entered five separate orders terminating respondent-mother's parental rights to each child pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) and N.C. Gen Stat. § 7B-1110(a). Respondent-mother gave notice of appeal on 12 December 2016.

II. Discussion

First, respondent-mother argues that the trial court erred by terminating her parental rights. Specifically, respondent-mother argues that she had not willfully left the children in foster care for more than twelve months because she “made substantial efforts to rectify the conditions that led to the children’s removal.” She contends that: she was employed; completed a parenting education class; visited the children when she had transportation; completed an anger management class; and completed a mental health assessment. We are not convinced by respondent-mother’s arguments.

“On appeal, [o]ur standard of review for the termination of parental rights is whether the trial court’s findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.” *In re Baker*, 158

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N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citation and internal quotation marks omitted). “The trial court’s conclusions of law are reviewable *de novo* on appeal.” *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation and internal quotation marks omitted). “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.” *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (citation omitted).

A trial court may terminate parental rights upon a finding of any one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111. Here, the trial court terminated respondent-mother’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), which provides as follows:

- (a) The court may terminate the parental rights upon a finding of one or more of the following:

.....

- (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 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).

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Our Court has held that

to find grounds to terminate a parent's rights under [N.C. Gen. Stat.] § 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.

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

In each order terminating the respondent-mother's parental rights the trial court found the following pertinent facts in support of its conclusions that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2):

16. That as part of [the original permanent plan], the Respondent Mother was ordered to have weekly supervised visitation, enroll in and complete a parenting class, find suitable housing, seek employment, and obtain a mental health evaluation and follow all recommendations.

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.....

27. That the Respondent Mother had an initial mental health assessment on November 26, 2013, at Integrated Family Services in Jackson, North Carolina. Recommendations included outpatient mental health therapy, have a psychiatric evaluation, and be linked with job vocational rehabilitation services.

28. That the Respondent Mother did not follow any of those recommendations.

.....

42. That the Respondent Mother refused outpatient mental health therapy as she felt she did not need therapy, that it was not doing her any good, and that she could cope without it.

43. That the Respondent Mother resided in the Judeo-Christian Outreach Center in Virginia Beach, Virginia. She was kicked out of the center because she came in late one night and failed a test for marijuana.

.....

49. That at the March 17, 2015, hearing, the Respondent Mother was again ordered to enroll in and complete a parenting class, maintain employment, locate suitable housing, participate in outpatient therapy and have a psychiatric evaluation, and have supervised visitation with the minor children.

.....

53. That by September 15, 2015, the Respondent Mother was residing in another boarding house and was not attending parenting classes, nor had she had a

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psychiatric evaluation, and she did not have any outpatient mental health therapy.

....

60. That the Respondent Mother never enrolled in and completed a parenting class, although as there was a period of time when none was available, the failure to enroll in such classes cannot be held against her.
61. That during the pendency of the JA file, the Respondent Mother had gained and maintained employment, usually full-time employment.

....

63. That however the Respondent Mother has willfully left the minor child in foster care for more than thirty-five months without showing to the satisfaction of the Court that reasonable progress under the circumstance[s] has been made in correcting the conditions that led to the child's removal by (1) having minimal and willfully unreasonable visitation, with a total of twelve visits in thirty-five months, (2) completing her mental health assessment on November 23, 2013, three months after it had been ordered in the disposition on August 20, 2013, (3) failing to follow recommendations of her mental health assessment by never having a psychiatric evaluation, (4) failing to follow recommendations of her mental health assessment by never attending any outpatient therapy appointments, even though transportation was available through the Department while she lived in North Carolina, and (5) failing to find suitable and stable housing.

Respondent-mother challenges portions of several of the trial court's findings of fact. First, respondent-mother argues that several findings of fact dealing with

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respondent-mother's failure to comply with a mental health assessment and her substance abuse issues were unrelated to the reasons for the children's removal. Namely, she challenges findings of fact 28, 42, 43, 49, 53, and subsections (2) through (4) of finding of fact number 63. Second, respondent-mother argues that finding of fact number 60 was not supported by the evidence.

Despite respondent-mother's challenges, it is well established that we review only those findings necessary to support the trial court's determination that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (stating that "[w]hen, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error"). Assuming *arguendo* that the challenged findings are not supported by evidence in the record, the trial court made other unchallenged findings sufficient to support termination.

The primary reason DSS took custody of the children was due to lack of housing and appropriate alternative childcare arrangements. Respondent-mother was provided with a case plan to address these issues which required her to locate and maintain suitable, stable housing to demonstrate her ability to care for the children. The trial court made numerous unchallenged findings that establish her unstable housing situation: (a) respondent-mother was incarcerated at the time Sara, Andy, and Mary were taken into DSS custody in August 2013; (b) in February 2014,

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respondent-mother was living with a friend in Conway, North Carolina and refused to give the assigned social worker the name or address of this individual; (c) respondent-mother had been referred to the Choanoke Area Developmental Association for housing assistance; (d) as of 26 August 2014, respondent-mother still did not have suitable housing as she would not disclose where she was living to DSS; (e) in September 2014, respondent-mother left North Carolina and moved to Virginia Beach, Virginia; (f) respondent-mother resided in the Judeo-Christian Outreach Center in Virginia Beach, Virginia; and (g) by 15 September 2015, respondent-mother was residing in another boarding house. Respondent-mother even concedes in her brief that the case plan task of finding suitable housing was “incomplete.” These findings of fact fully support the trial court’s conclusion that respondent-mother failed to make reasonable progress under the circumstances to correct the conditions which led to the children’s removal.

On appeal, respondent-mother contends that her delay in finding stable and suitable housing and her inconsistent visitation was due to poverty and that the trial court cannot terminate her parental rights due to poverty. But respondent-mother fails to take into account the trial court’s findings that by 15 September 2015, respondent-mother had become a manager at Popeye’s Restaurant and that during the pendency of this action, she had “gained and maintained employment, usually full-time employment.” Respondent-mother’s failure to obtain custody of the children

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appears primarily to have been the result of her own inaction. Poverty was not the “sole reason” for terminating respondent-mother’s parental rights.

Based on the foregoing, we conclude that the trial court’s unchallenged findings adequately support its conclusion that respondent-mother willfully left the children in foster care for over twelve months and failed to make reasonable progress to correct the conditions that led to the children’s removal. Accordingly, we affirm the termination of respondent-mother’s parental rights.

In her second and final argument on appeal, respondent-mother contends that the trial court erred by failing to appoint a guardian *ad litem* (“GAL”) for the children.

N.C. Gen. Stat. § 7B-1108(b) provides that when a parent files a response to a petition or motion to terminate parental rights that

denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601.

N.C. Gen. Stat. § 7B-1108(b) (2015).

Here, respondent-mother filed responses to the petitions, denying material allegations and that grounds existed to terminate her parental rights. The trial court did not appoint a GAL for the termination proceeding in violation of N.C. Gen. Stat. § 7B-1108(b). However, respondent-mother failed to object at trial at the failure of the trial court to appoint the children a GAL. “This Court has previously held that

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in order to preserve for appeal the argument that the trial court erred by failing to appoint the child a GAL, a respondent must object to the asserted error below.” *In re A.D.N.*, 231 N.C. App. 54, 65, 752 S.E.2d 201, 209 (2013), *disc. review denied*, 367 N.C. 321, 755 S.E.2d 626 (2014).

On appeal, respondent-mother argues that our Court should follow the principles set forth in *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990), and *In re Fuller*, 144 N.C. App. 620, 548 S.E.2d 569 (2001), and invoke Rule 2 of the North Carolina Rules of Appellate Procedure to allow review of the trial court’s failure to appoint a GAL. Under Rule 2, we may suspend the Rules of Appellate Procedure if necessary “[t]o prevent manifest injustice to a party[.]” N.C. R. App. P. Rule 2 (2017). “Rule 2, however, must be invoked ‘cautiously,’ and we reaffirm our prior cases as to the ‘exceptional circumstances’ which allow the appellate courts to take this ‘extraordinary step.’” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation omitted).

In *In re A.D.N.*, our Court observed that in both *Fuller* and *Barnes*, “this Court invoked Rule 2 of the [North Carolina] Rules of Appellate Procedure in order to reach the [unpreserved] issue [of] whether the trial court erred by failing to appoint a GAL for the child and, in both cases, found prejudicial error in the failure to appoint a GAL.” *A.D.N.*, 231 N.C. App. at 66, 752 S.E.2d at 209. In *A.D.N* the Court distinguished *Fuller* and *Barnes* and declined to invoke Rule 2 stating “there is no

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indication in those cases, as there is here, that the appealing respondent had repeatedly chosen substance abuse over the child's welfare throughout the child's life and had almost entirely abdicated responsibility for the child to the petitioner." *Id.*

After thoughtful review, we find the facts in the present case to be more analogous to those found in *A.D.N.* than either *Fuller* or *Barnes*. Despite several steps respondent-mother could have taken in order to reunify with the children, there was ample evidence at the termination hearing that respondent-mother failed to find suitable and stable housing and that she had "minimal and willfully unreasonable visitation" with the children. Thus, we do not believe that suspension of the rules is required to prevent manifest injustice to respondent-mother or the children.

III. Conclusion

The orders of the trial court, terminating respondent-mother's parental rights to the children, are affirmed.

AFFIRMED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).