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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-628

Filed: 2 January 2018

Guilford County, Nos. 05 JT 75, 14 JT 244

IN THE MATTER OF: J.H.S. and G.A.B.

Appeal by respondent-mother from order entered 13 March 2017 by Judge Tonia Cutchins in Guilford County District Court. Heard in the Court of Appeals 14 December 2017.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Richard Croutharmel for respondent-appellant mother.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

ELMORE, Judge.

Respondent-mother appeals from an order terminating her parental rights to J.H.S. ("Julie") and G.A.B. ("Gary").[1] We affirm.

I. Background

[1] Pseudonyms are used to protect the juveniles' identities and for ease of reading.

On 31 March 2005, the Guilford County Department of Health and Human Services ("DHHS") obtained nonsecure custody of four-year-old Julie and filed a petition alleging that she was a neglected and dependent juvenile. The petition alleged that in the preceding week, respondent-mother and Julie had been living in an abandoned house, which was a suspected "crack house," and that after the house was padlocked, respondent-mother left Julie with a neighbor. Respondent-mother asked the neighbor to watch Julie for a few hours, but she never returned. Julie's maternal grandmother subsequently contacted DHHS looking for Julie, as respondent-mother had been arrested. The petition further alleged that respondent-mother had a history of drug use, had been in a methadone program for three years, and that Julie's father, "John," had a history of domestic violence with respondent-mother.

Following a hearing, the trial court entered an order on 16 November 2005 adjudicating Julie neglected and dependent, based on the stipulation of the parties. The trial court ordered Julie to remain in DHHS custody. On 13 November 2006, the trial court entered an order granting guardianship of Julie to her maternal grandmother.

In January 2007, respondent-mother gave birth to Gary. Several years later, in 2012, DHHS began receiving Child Protective Services ("CPS") reports regarding respondent-mother and Gary's father, "Ron." The reports claimed that the family

was homeless, that Ron engaged in domestic violence, and that Gary had missed several days of school. DHHS made referrals for intensive in-home services and closed the case. In May 2014, however, DHHS received another CPS report regarding the family. This report alleged that respondent-mother was abusing drugs, that she was out in the middle of the night with Gary searching for drugs, that Gary missed several days of school, that respondent-mother had missed several methadone dosages and counseling sessions, and that Ron was physically and emotionally abusive toward respondent-mother. After several failed attempts, a DHHS social worker was able to contact respondent-mother, who indicated that Ron had prevented her from opening the door, going to counseling, or receiving methadone. Additionally, respondent-mother was not sending Gary to school for fear that DHHS would assume custody of him due to Ron's abuse. Respondent-mother agreed to obtain a domestic violence protective order against Ron and move into a shelter. But she failed to follow through, and, on 6 June 2014, she was back home with Ron. Thereafter, DHHS obtained nonsecure custody of Gary and filed a petition alleging that he was neglected and dependent.

Following a hearing, the trial court entered an order on 15 August 2014 adjudicating Gary neglected and dependent, based on the stipulation of the parties. The trial court ordered the juvenile to remain in DHHS custody.

On 24 November 2014, DHHS filed a motion for review in Julie's case. The motion alleged that beginning in 2012, Julie's maternal grandmother began attempting to reunite Julie with respondent-mother. Julie then stayed in several group homes, was hospitalized for three months, received psychiatric residential services, and eventually returned to the grandmother's care. The grandmother placed Julie in the care of John in April 2014, where Julie resided until October 2014. While staying with her father, Julie failed to attend school and was not receiving therapy or prescribed psychotropic medication. After learning of the situation, DHHS sought to dissolve guardianship and obtain custody of Julie.

On 11 September 2014 and 27 January 2015, the Sault Ste. Marie Tribe of Chippewa Indians (hereinafter, the "Tribe") filed motions to intervene in the juvenile cases. The motions alleged that respondent-mother was an enrolled member of the Tribe and that both Gary and Julie qualify as Indian Children under the Indian Child Welfare Act ("ICWA"). The trial court found that the ICWA applied to the cases, granted both motions, and added the Tribe as a party.

On 26 April 2016, DHHS filed two petitions to terminate respondent-mother's parental rights to both juveniles, alleging the following grounds for termination: (1) neglect, and (2) willful failure to make reasonable progress towards correcting the conditions that led to removal. *See* N.C. Gen. Stat. §§ 7B-1111(a)(1), (2) (2015). Following a hearing, the trial court entered an order on 13 March 2017 terminating

respondent-mother's parental rights to the juveniles based upon both grounds. The trial court also concluded that termination was in the juveniles' best interests. Respondent-mother appeals.[2]

II. Discussion

On appeal, respondent-mother contends the trial court reversibly erred by terminating her parental rights because (1) its findings were insufficient to support the termination grounds adjudicated, and (2) its determination that the juveniles would suffer serious physical or emotional damage if returned to her care was unsupported by evidence beyond a reasonable doubt, as required under the ICWA.

A. Grounds for Termination

Respondent-mother first challenges the trial court's grounds for terminating her parental rights.

We review a trial court's termination 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) (citation omitted). If we determine that the factual findings support one ground for termination, we need not review other challenged grounds. *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). After reviewing the record, we conclude

[2] The trial court also terminated John's and Ron's parental rights to Julie and Gary, respectively, but they do not appeal.

that the trial court was justified in terminating respondent-mother's parental rights based upon neglect.

N.C. Gen. Stat. § 7B-1111(a)(1) (2015) permits a trial court to terminate parental rights based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C. Gen. Stat. § 7B-101 (2015). That statute defines a "neglected juvenile" as one

> 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. . . .

N.C. Gen. Stat. § 7B-101(15) (2015).

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). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (internal citation omitted). The trial court may consider a prior neglect adjudication but "must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)

(citation omitted). Thus, a trial court may terminate parental rights based upon prior neglect of the juvenile only if "the trial court finds 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) (citation omitted).

Here, the trial court made the requisite ultimate finding that respondent-mother had previously neglected the juveniles and that such neglect was likely to recur if the juveniles were returned to her care. This ultimate finding is supported by multiple underlying findings.

As an initial matter, the trial court found that respondent-mother entered into a case plan on 10 October 2014, which set forth directives she was required to undertake in order to reunify with her children. Those directives required respondent-mother to: (a) remain free from controlled substances and attend counseling and treatment; (b) obtain parenting and psychological evaluations, follow all recommendations, and demonstrate learned skills; (c) provide adequate, independent, and stable housing and income; and (d) attend domestic violence counseling in order to free herself from past relationships. The trial court then made detailed findings regarding respondent-mother's uneven compliance with her case plan directives, some of which she challenges on appeal.

We first consider the trial court's finding that respondent-mother had not made substantial compliance with the substance abuse directives of her case plan. In 2015,

respondent-mother failed to submit to two drug tests and tested positive for cocaine in another test. The court found that on another occasion in 2015, respondent-mother admitted to using someone else's urine for a mandatory test at her methadone clinic. Later that year, she twice tested positive for marijuana and once tested positive for benzodiazepines. Her drug use in 2015 culminated in a hospital stay from late October to mid-November 2015. Respondent-mother was admitted for respiratory failure, was treated for congestive heart failure due to the injection of methamphetamines, had observable track marks on her arms, and tested positive for three controlled substances. These findings demonstrate that she was noncompliant for most of 2015.

The trial court also found that respondent-mother had negative drug tests from 14 November 2015 to 10 January 2017. However, on 10 January 2017, respondent-mother submitted a urine sample that was too cold to be tested. While she submitted a second sample, it was too small to be tested. Respondent-mother declined to submit a third sample, claiming that she had a therapy appointment. Yet she never attended that appointment. Thus, her period of sobriety culminated in non-compliant behavior just a few weeks before the termination hearing.

Respondent-mother also challenges several findings of fact—or portions thereof—related to her substance abuse. She challenges the trial court's finding that she had not made substantial progress towards the substance abuse component of

her case plan. She argues that her negative drug tests after 14 November 2015 lead to the opposite finding. We disagree.

The undisputed findings, detailed above, show that respondent-mother had multiple positive drug tests in 2015, admitted to tampering with a drug test, and was hospitalized due to substance abuse. While she may have maintained some sobriety in 2016, a treatment provider nonetheless recommended she submit to an in-patient substance abuse treatment program, and then respondent-mother "went AWOL[.]" Further, respondent-mother's actions on 10 January 2017 raise an inference that she was evading the drug test. Respondent-mother does not challenge these findings, and they support the ultimate finding that she did not make substantial progress on the substance abuse component of her case plan.

Next, respondent-mother challenges the finding that she failed to comply with the domestic violence directives of her case plan. The trial court found that while respondent-mother completed her domestic violence treatment program, she elected to continue her relationship with Ron, which shows that she did not learn from the program or apply the information presented therein. She claims that this finding is legally erroneous, since a court cannot order her to stay away from Ron, as such a prohibition would violate her First and Fourteenth Amendment rights to freedom of association. Respondent-mother's argument is misplaced.

Neither did the case plan nor any order prohibit respondent-mother from continuing her relationship with Ron. The case plan did require respondent-mother to demonstrate what she learned in domestic violence treatment by freeing herself of abusive relationships. But this directive did not infringe on freedom of association rights. Respondent-mother was free to maintain her relationship with Ron, subject to the consequences that relationship would have on reunification with her children. Because respondent-mother elected not to end her relationship with Ron, the trial court was justified in finding that she did not comply with the domestic violence component of her case plan.

Next, respondent-mother disputes the trial court's finding that she was not in compliance with the treatment or counseling components of her case plan. In the pertinent finding, the trial court detailed respondent-mother's uneven attendance from May to September 2016, during which respondent-mother missed the majority of her appointments. Nonetheless, respondent-mother argues, she attended seventy-seven percent of her appointments in the five months preceding the termination hearing (from September 2016 to January 2017), and claims that this supports the opposite inference. We are not persuaded.

Respondent-mother does not dispute the underlying facts found by the trial court, which simply weighed the evidence and drew the inference that respondent-mother was not in compliance. This is appropriately the trial court's duty, and we

decline to reweigh the evidence. *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.").

Next, respondent-mother challenges two findings outlining her failure to obtain either stable and independent housing or income. The findings show that respondent-mother was dependent on a friend for housing, utilities, and other expenses. The findings also show that respondent-mother had not been employed during the pendency of the case (since 2005) and was denied disability benefits. The trial court found that respondent-mother was dependent on her friend and thus could not provide for her children. Respondent-mother again does not challenge the factual basis for these findings. Instead, she argues that her friend's support should not be counted against her and that her ongoing disability claim is evidence of income. We are not persuaded. The case plan required respondent-mother to obtain independent housing, which she failed to do, and as the trial court found, she has not been employed during the entirety of the case. Therefore, the challenged findings at issue were supported by the evidence.

Last, respondent-mother challenges several findings regarding inappropriate text messaging between herself and Julie. The trial court found that respondent-

mother's contact with Julie violated the case plan and court orders; that respondent-mother attempted to interfere with Julie's relationship with her therapist (i.e. by telling Julie that the therapist would tell DHHS "everything"); and that she failed to notify DHHS that Julie was sending inappropriate messages to Ron. Again, respondent-mother does not challenge the factual basis for these findings, but argues that the trial court drew incorrect inferences from the evidence, i.e. that her texts encouraged Julie to attend therapy, albeit with a different therapist, and advised Julie to block Ron's texts. The trial court drew reasonable inferences from the evidence, and it is not our role to reweigh that evidence.

Based on the foregoing findings of fact,[3] the trial court found that respondent-mother was not compliant with her case plan. The aforementioned factual findings show that respondent-mother failed to follow through on the majority of her case plan objectives. By the time of the termination hearing, she had no source of income, no independent or stable housing, maintained a relationship with Ron, was still using methadone without any plans to wean herself from it, had likely tampered with her most recent drug test, and had not attended counseling on a regular basis. Based on the pattern of respondent-mother's noncompliance with her case plan during the

[3] Respondent-mother makes additional challenges to the trial court's factual findings, which we have not addressed, as we conclude those findings were unnecessary to sustain the trial court's adjudication. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." (internal citation omitted)).

pendency of the case, we hold that the trial court was justified in determining that neglect was likely to recur if the juveniles were returned to her custody.

B. ICWA

Respondent-mother next contends that the trial court erred in determining the evidence showed beyond a reasonable doubt that the juveniles would suffer serious physical or emotional damage if they were returned to her care. We disagree.

This determination is mandated by the ICWA, which "establishes federal standards that govern state-court child custody proceedings involving Indian children." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557, 186 L. Ed. 2d 729, 733 (2013). The trial court here found that both Julie and Gary are Indian children within the purview of the ICWA, and, therefore, allowed the Tribe to intervene. *See* 25 U.S.C. § 1903(4) (2015). The ICWA requires a trial court to make certain findings before placing an Indian child in foster care or terminating parental rights. The statute governing parental rights termination proceedings provides in pertinent part:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (2015).

Here, the trial court made the following pertinent findings:

> 83. Heidi Cotey is a qualified expert regarding [ICWA]

> and is also a member of the Sault Ste. Mar[ie] Chippewa Tribe. She has qualified as an expert witness in 18 states, once in North Carolina. [ ] She has been included in this case and has participated via speakerphone since the inception of the case in September of 2015, and before that in the underlying case. She has substantial knowledge and experience in the delivery of child and family services to Indians, and extensive knowledge regarding social and cultural standards within the tribe.
>
> 84. It is her expert opinion that active efforts have been made to reunify the children with their parents, and that it is evident beyond a reasonable doubt that continued custody of the juveniles by these parents will result in serious emotional or physical damage to the juveniles.
>
> 85. Beyond reasonable doubt active efforts have been made to reunify the children with their parents, and it is further evident beyond a reasonable doubt that continued custody of the juveniles by these parents will result in serious emotional or physical damage to the juveniles.

Respondent-mother contends these findings are unsupported because Ms. Cotey's expert opinion was not based on "sufficient facts or data" under Rule 702(a)(1) of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(1) (2015). Specifically, she contends Ms. Cotey's opinion that the juveniles would suffer serious emotional or physical damage if returned to her care was inadequate because the record fails to disclose whether Ms. Cotey spoke to the juveniles, any DHHS social workers, or the guardian ad litem. Respondent-mother's argument is misplaced.

As an initial matter, because respondent-mother made no objection to Ms. Cotey being tendered as an expert witness, she has waived any challenge to Ms. Cotey's qualification as an expert. *See State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986) ("An objection to a witness' qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground[.]" (internal citation and quotation marks omitted)). Further, respondent-mother's counsel did not object to Ms. Cotey's testimony or ask Ms. Cotey a single question on cross-examination, which would have been the appropriate time to challenge the grounds underlying her opinion.

Nonetheless, we note that Ms. Cotey testified that she is a member of the Tribe, is employed by the Tribe as a caseworker, has been working with tribal families for eleven years, and has been qualified as an expert 170 times in eighteen different states, including once before in North Carolina. As to Ms. Cotey's familiarity with the facts of the case, she testified during the January 2017 termination hearing that she became involved in the case in September 2015, has telephonically participated in all parental rights termination proceedings,[4] and heard all of the testimony during

[4] Respondent-mother challenges the trial court's finding that Ms. Cotey participated in hearings via speakerphone since September 2015. We agree that there is no evidence in the record to support this finding, as Ms. Cotey testified only that she became *involved* in the case in September 2015, but began *participating* in hearings at the termination stage. Nonetheless, we conclude any imprecision in this finding is irrelevant because in light of our conclusion that Ms. Cotey was sufficiently familiar with the case, regardless of whether she began participating in hearings in September 2015 or at some later date.

the two-day termination hearing. Thus, her opinion was based not only on her knowledge of the Tribe's social and cultural standards, but also the specific facts and circumstances of this case. Under the Code of Federal Regulations, Ms. Cotey was certainly qualified to testify as an expert in this case. *See* 25 C.F.R. § 23.122 ("A qualified expert must be qualified to testify regarding whether the child's continued custody by the parent . . . is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. . . .").

Nonetheless, respondent-mother cites to *In re K.G.W.*, ___ N.C. App. ___, 791 S.E.2d 540 (2016), to support her argument that Ms. Cotey's expert opinion was based on insufficient facts or data under Rule 702 because she did not personally speak with Gary or Julie. Respondent-mother's reliance on *In re K.G.W.* is misplaced.

In *In re K.G.W.*, we held that a trial court during a termination hearing did not err by sustaining an objection to exclude testimony from the respondent-mother's proffered expert in child psychology because she neither participated in the case nor ever met with, observed, or tested the child, and thus her proffered testimony "w[ould] not assist the trier of fact to understand the evidence or determine any facts at issue." ___ N.C. App. at ___, 791 S.E.2d at 542. On appeal, the respondent-mother alleged that the trial court erred under Rule 702 by excluding her expert's proffered testimony. *Id.* at ___, 791 S.E.2d at 541–42. We declined to address the respondent-

mother's alleged Rule 702 errors because we ascertained that the actual issue presented was one of credibility. *Id.* at ___, 791 S.E.2d at 542. Since the trial court as trier of fact has broad discretion in making credibility determinations, we held that it did not err in excluding the proffered expert testimony after it deemed it to be unpersuasive in light of the expert's unfamiliarity with the child. *Id.* However, contrary to respondent-mother's assertion, our decision in *In re K.G.W.* did not promulgate a rule that an ICWA expert must personally examine a juvenile before rendering their opinion.

Respondent-mother also cites to *J.J. v. State*, 38 P.3d 7 (Alaska 2001) (reversing a trial court's finding in an ICWA-governed case that returning the juveniles would result in serious physical or emotional damage beyond a reasonable doubt), to support her argument that an ICWA expert witness's testimony is insufficient to establish a finding of serious emotional or physical harm where that expert only read the case file and never met with the juvenile or parent. Her reliance on *J.J.* is unpersuasive.

In *J.J.*, the expert was unfamiliar with the case and rendered its expert opinion relying solely upon a "significantly incomplete" file that failed to include the parent's recent progress in overcoming her substance abuse issues. *Id.* at 10–11. Additionally, the evidence presented in that case demonstrated that the parent had made "substantial progress in meeting the requirements of her case plan and seem[ed] to

have established a safe home for her children." *Id.* at 11. Here, unlike the expert in *J.J.*, Ms. Cotey was familiar with the case, participated in the termination hearing, and there is no evidence she relied on a significantly incomplete file in rendering her expert opinion. Further, unlike the parent in *J.J.*, the evidence presented here did not demonstrate that respondent-mother made sufficient progress toward meeting her case plan requirements.

Because Ms. Cotey was properly qualified as an ICWA expert witness, had been involved in this case for over a year, and had participated in the termination proceedings, her expert opinion was based not only on her knowledge of the Tribe's prevailing social and cultural norms, but also on her familiarity with the particular circumstances of the case and her consideration of the evidence presented during the two-day termination hearing. We thus hold that her expert opinion, in conjunction with the evidence presented at the hearing, provided sufficient evidence from which the trial court could determine without reasonable doubt that returning the juveniles to respondent-mother's care would likely cause them serious emotional or physical damage. We therefore overrule respondent-mother's challenge.

III. Conclusion

The trial court's factual findings, based upon clear, cogent, and convincing evidence, supported its conclusion that respondent-mother's parental rights should be terminated on the ground of neglect. Additionally, the evidence presented at the

hearing, in conjunction with Ms. Cotey's expert opinion, permitted the trial court to determine beyond a reasonable doubt that placing the juveniles in respondent-mother's care would likely cause them serious damage. We therefore affirm the order terminating respondent-mother's parental rights to Julie and Gary.

AFFIRMED.

Judges BERGER and ARROWOOD concur.

Report per Rule 30(e).