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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1254

Filed: 15 May 2018

Catawba County, No. 15 JT 263

IN THE MATTER OF: E.D.

Appeal by respondent-mother from order entered 21 July 2017 by Judge Burford A. Cherry in Catawba County District Court. Heard in the Court of Appeals 19 April 2018.

Marcus Almond and Lauren Vaughan for petitioner-appellee Catawba County Department of Social Services.

J. Thomas Diepenbrock for respondent-appellant mother.

Triangle Smart Divorce, by Lauren Hinzey O'Malley, for guardian ad litem.

INMAN, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to E.D. ("Edward").[1] After careful review, we affirm.

Factual and Procedural History

[1] Pseudonyms are used to protect the identity of the juvenile involved and for ease of reading.

On 24 November 2015, the Catawba County Department of Social Services ("DSS") obtained nonsecure custody of two-year-old Edward[2] and filed a petition alleging that he was a dependent juvenile. The petition alleged that respondent-mother had been involuntarily committed in October 2015, after which DSS became involved with the family. DSS alleged that respondent-mother's mental health care providers were of the opinion that she should not be left alone with her children due to her delusions and paranoia. Therefore, even after respondent-mother's release, Edward was placed with respondent-mother's grandmother and mother pursuant to a safety plan. However, on 21 November 2015, respondent-mother attempted to remove Edward from her grandmother's residence, she then became aggressive, and law enforcement was called. Two days later, a social worker met with respondent-mother and her speech was lethargic and difficult to follow. She also expressed irrational beliefs regarding her grandmother's care of Edward. For instance, she believed that her grandmother was inappropriately exposing herself to Edward, and she did not want her grandmother to hug him. She also attempted to bathe Edward with his clothes on to protect his modesty.

On 15 April 2016, the trial court entered an order adjudicating Edward dependent. By the time of the hearing, respondent-mother had named a putative

[2] Edward has an older half-sister who was removed from respondent-mother's custody at the same time as Edward. However, the half-sister was placed with her father and is not a part of this juvenile action.

father, but paternity had not been established. The trial court found that during her commitment, respondent-mother was diagnosed with unspecified psychosis and possible alcohol use disorder; that her treating physician recommended no unsupervised contact with her children due to recurring delusions; and that two subsequent mental health care providers concurred. The trial court also made findings regarding respondent-mother's behavior in November which led to the filing of the petition. The trial court entered a separate disposition order on 10 May 2016, in which it awarded custody of Edward to DSS. The court also ordered respondent-mother to comply with a case plan.

On or about 24 January 2017, DSS filed a petition to terminate respondent-mother's parental rights to Edward, alleging the following grounds for termination: (1) neglect; (2) willful failure to make reasonable progress toward correcting the conditions that led to removal of the juvenile from his home; and (3) dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (6) (2017). Following a hearing, the trial court entered an order on 21 July 2017 terminating respondent-mother's parental rights to Edward based upon all three grounds alleged by DSS. The trial court also concluded that termination was in Edward's best interest. Respondent-mother appeals. The trial court also terminated the parental rights of Edward's putative father[3] and any unknown father. The putative father does not appeal.

[3] Edward's putative father was located in Philadelphia and served with process, but he refused to participate in paternity testing. Therefore, paternity was never established.

Analysis

1. Motion of Continuance

In her first argument on appeal, respondent-mother contends that the trial court erred by denying her motion for a continuance. On the second hearing day, 3 July 2017, respondent-mother testified that she began seeing a new mental health care provider, Sidney L. Myles, M.D., in May 2017, but had not given Dr. Myles her mental health history or medical records. She also testified that Dr. Myles had written a report for her on 23 May 2017 and did not recommend any counseling or medication. Respondent-mother brought the report to the hearing, and her attorney attempted to introduce it into evidence, despite having learned about it for the first time at the hearing. DSS objected, pointing out that the first hearing date was in June, and that Dr. Myles could have testified or his report could have been subpoenaed for the first hearing date. DSS also noted issues with authentication of the report.

Respondent-mother's attorney also moved for a continuance to afford him an opportunity to speak to Dr. Myles and secure his testimony. DSS and the guardian ad litem objected to a continuance, noting that respondent-mother had exhibited dilatory behavior in the past. The trial court questioned the germaneness of Dr. Myles' evidence, because respondent-mother had not given him any of her previous mental health evaluations. The trial court sustained DSS's objection to the

introduction of the report and denied respondent-mother's motion for a continuance. The trial court made the following finding of fact regarding the report:

> In May 2017, the mother requested and obtained a report from a mental health professional at Catawba Valley Medical Center. The report was based solely on the mother's self-report, and the professional reviewed no background, history, or records. The Court finds that even if the Court had heard testimony from this provider, such testimony would not have been beneficial to the Court's determination due to the incomplete nature of the assessment.

Continuances in termination of parental rights proceedings are governed by the following statutory provision:

> The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

N.C. Gen. Stat. § 7B-1109(d) (2017). "Continuances are generally 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) (citation omitted). We review the trial court's denial of a motion to continue for abuse of discretion. *Id.* at 10, 616 S.E.2d at 270.

Respondent-mother attempts to circumvent the abuse of discretion standard of review by arguing that her motion to continue was based on her fundamental constitutional right to the care, custody, and control of her child and her implicit right to the effective assistance of counsel. Respondent-mother argues that given the constitutional implications of the continuance, the trial court's denial of her motion presents a question of law which is fully reviewable on appeal. Respondent-mother alternatively argues that the trial court abused its discretion in denying the motion.

We decline to address respondent-mother's contention that the denial of her continuance is subject to a heightened standard of review, because respondent-mother failed to raise a constitutional challenge to the trial court. The sole reason for the continuance was respondent-mother's failure to notify her attorney of Dr. Myles' evaluation. "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 in the appellate courts." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (internal quotation marks and citations omitted). Because respondent-mother did not raise her purported constitutional challenge to the trial court, she has waived any such argument to this Court. We therefore decline to address her contention that a heightened standard of review is warranted.

Furthermore, after reviewing the record, we conclude that there was no abuse of discretion in the trial court's ruling. Respondent-mother saw Dr. Myles in May, and the termination hearing commenced on 5 June 2017. Had respondent-mother properly notified counsel of her therapy with Dr. Myles prior to the hearing, counsel would have had time to talk to Dr. Myles, secure his testimony, and subpoena the report. Therefore, the only reason proffered for the continuance was attributable to respondent-mother. "Where the lack of preparation for trial is due to a party's own actions, the trial court does not err in denying a motion to continue." *In re Bishop*, 92 N.C. App. 662, 666, 375 S.E.2d 676, 679 (1989) (citations omitted). Furthermore, as the trial court noted, the report was of dubious weight given respondent-mother's failure to provide Dr. Myles with her mental health history. Accordingly, we conclude that the trial court did not abuse its discretion in denying respondent-mother's motion to continue.

2. Termination of Parental Rights

Next, we turn to respondent-mother's challenges to the trial court's grounds for terminating her parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. If this Court determines that the findings of fact support one ground for termination, 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 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) (citation omitted).

We conclude that the trial court was justified in terminating respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). Under this subsection, the trial court must find that the parent willfully left the juvenile in foster care for over twelve months, and that the parent has not made reasonable progress to correct the conditions which led to the removal of the juvenile from their home. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396 (2005). It is well-established that willfulness under this ground does not require a showing of fault by the parent. *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398. "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001).

The trial court made the following findings of fact in support of this ground:

> 4. Custody of the minor child was placed with the Movant pursuant to an Order for Nonsecure Custody entered on or about November 23, 2015. . . .
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> 20. The mother was involuntarily committed to Catawba Valley Medical Center on October 14, 2015

and was discharged on October 26, 2015. She was diagnosed with Psychosis, Unspecified; Possible Alcohol Use Disorder; Rule Out Cannabis Use Disorder; and Low Potassium. Upon her release she was the subject of an outpatient commitment for 83 days.

21. Dr. Rigardy Munoz treated the mother while she was hospitalized. Upon her discharge, he recommended that [respondent-mother] have no unsupervised contact with her children based on her continuing delusions. He recommended that she follow up at Catawba Valley Behavioral Health within two weeks and that her contact with her children be reassessed at that time.

22. Following her release from the hospital, the maternal grandmother and maternal great grandmother supervised the mother's contact with [Edward] . . . .

. . .

26. On or about November 21, 2015 the mother locked herself in a bedroom with the children because she did not want her mother or grandmother to supervise her any longer. Police were called to the residence on this date due to the mother's becoming irritated and aggressive. On that date, the minor child was placed in the custody of [DSS].

27. During February and March 2016, the Respondent Mother participated in a psychological evaluation completed by Dr. Jennifer Cappelletty. The Respondent Mother was diagnosed with Delusional Disorder, Mixed Type. Dr. Cappelletty recommended that the Respondent Mother continue receiving psychiatric services, that she participate in psychotherapy in order to receive psychoeducation about the nature of her disorder and the ways that

> it can negatively impact her judgment in parenting her children. Dr. Cappelletty found, and the Court so finds, that it is unlikely that [respondent-mother] would intentionally do anything to harm her children or create an unhealthy environment for them; however, when her delusions are present, they can significantly impair her judgment. Dr. Cappelletty found at the time of her evaluation, and the Court finds as of the date of this hearing, that the Respondent Mother does not currently have any insight into the presence of her delusions.
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> 33. Vern Khlan is employed as a psychiatric physician's assistant with Catawba Valley Behavioral Health and Catawba Valley Medical Center. He has treated the Respondent Mother since the Fall of 2015. Throughout this time, the Respondent mother has been resistant to medications recommended for her and has elected to stop taking those medications in spite of medical advice that she continue them. She took little or no medication for much of the Summer and Fall of 2016, and she has refused all medication since December 2016.
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> 34. P.J. Xiong is the therapist for the Respondent Mother at Catawba Valley Behavioral Health. Despite recommendations that she continue in therapy, she quit attending therapy completely in November 2016 and has not returned.
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> 39. The Respondent Mother has failed to visit [Edward] since November 2016.
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> 40. The Respondent Mother's delusions have interfered with her focus on her son during visitation, with efforts by the social worker to discuss her case plan,

> and with the Respondent Mother's ability to make progress on her case plan.
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> . . .
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> 42. In May 2017, the mother requested and obtained a report from a mental health professional at Catawba Valley Medical Center. The report was based solely on the mother's self-report, and the professional reviewed no background, history, or records. The Court finds that even if the Court had heard testimony from the provider, such testimony would not have been beneficial to the Court's determination due to the incomplete nature of the assessment.
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> 43. The basic requirements of the Mother's case plan and court orders were made very clear to her. Those requirements included attending therapy, taking recommended medications, and visiting her child. The Mother has failed for at least seven months to comply with those requirements. She has therefore failed to make reasonable progress toward correcting the conditions which led to her child's removal.

Respondent-mother has not challenged the foregoing findings of fact as lacking in evidentiary support. Consequently, they are presumed to be supported by competent evidence and, therefore, are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). Based on these findings of fact, *inter alia*, the trial court concluded that respondent-mother "willfully left the minor child in foster care for more than twelve (12) months without showing to the satisfaction of the court that

reasonable progress under the circumstances has been made in correcting the conditions which led to the removal of the child."

Respondent-mother argues that the trial court's findings of fact do not support the trial court's conclusion of law, because the findings do not show willfulness. Specifically, she contends that findings related to her parenting classes demonstrate that her shortcomings were not willful, that findings regarding her delusional disorder contradict a finding of willfulness, and that finding of fact 43, which is crucial to N.C. Gen. Stat. § 7B-1111(a)(2), lacks any reference to willfulness. We are not persuaded by respondent-mother's arguments.

The trial court established objectives for respondent-mother in her case plan, and they are listed in undisputed finding of fact 43. This finding shows that the trial court placed the greatest importance on respondent-mother's therapy, medication, and visitation with Edward. Despite these clear objectives, respondent-mother refused medication and discontinued therapy seven months prior to the termination hearing. She stopped visiting Edward at the same time. These actions constitute inadequate progress regardless of the status of her parenting classes, and we find no error in the trial court's determination.

Respondent-mother appears to suggest that given her mental disorder, her actions were not sufficiently willful. We are not persuaded. The findings show that on the eve of the termination hearing, respondent-mother sought out a psychological

evaluation from a new physician, to whom she provided an incomplete mental health background. She also testified that she stopped going to therapy because it was "pointless" and stopped visitation because DSS was "wasting her time." From these actions, the trial court was able to infer that respondent-mother had adequate knowledge of her case plan's requirements such that her failure to comply was willful, despite the fact that she suffered from a mental illness. This is true regardless of whether the findings use the word "willful." Based on the foregoing, we hold that the trial court did not err in concluding that termination of respondent-mother's parental rights was justified pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

AFFIRMED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).