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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1334

Filed: 19 June 2018

Durham County, Nos. 14 JT 61, 15 JT 163

IN RE:

A.J., P.H.

Appeal by respondent-mother from order entered 15 August 2017 by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 5 June 2018.

Derrick J. Hensley and Robin K. Martinek, for petitioner-appellee Durham County Department of Social Services.

Robert W. Ewing, for respondent-appellant mother.

CALABRIA, Judge.

Where the trial judge's session as Emergency Judge lasted "until the business is completed[,]" and the hearing was conducted during that session, the trial court had subject matter jurisdiction to enter an order based upon the results of the hearing. Where clear, cogent and convincing evidence supported the trial court's

determination of at least one basis for terminating mother's parental rights, the trial court did not err in doing so. We affirm.

I. Factual and Procedural Background

On 17 April 2014, the Durham Department of Social Services ("DSS") filed a petition alleging that A.J.,[1] age 9 years, was a neglected juvenile. The petition alleged that A.J.'s father was deceased; that his mother ("mother") would frequently leave A.J. in the care of others for days at a time without notice, and without a means to reach her; that during these absences, mother "fail[ed] to ensure that the temporary caretakers for her child have the ability to obtain medical services for the child[;]" and that mother agreed to temporary placement of A.J. with the maternal aunt and uncle. The petition sought nonsecure custody and an appropriate visitation plan. Pending further hearings, the trial court placed A.J. in the nonsecure custody of the maternal aunt and uncle.

On 28 May 2014, the trial court entered a consent order. The trial court noted that the order was "based on the consent of the parties to an adjudication of dependency[,]" and that therefore it was "not a judicial determination as to neglect or non-neglect" of A.J. The trial court found that mother left A.J. in the care of others for extended periods of time without leaving a means to reach her and without enabling A.J.'s caretakers to obtain medical services for A.J.; that these temporary

[1] Pseudonyms are used for the privacy of the minor children.

arrangements "were not appropriate alternative placements[;]" that mother has "mental health or intellectual issues that affect her ability to make appropriate judgments and decisions to ensure that the child receives proper care or supervision[;]" and that mother consented to A.J. being placed in the temporary custody of the maternal aunt and uncle, with whom mother currently resided. The court then concluded that A.J. was a dependent juvenile, and that it was in his best interests to be placed in the custody of the maternal aunt and uncle. The court specified that, to correct the conditions which led to A.J.'s removal, mother was to receive a mental health evaluation and follow recommendations for treatment, receive a substance abuse evaluation and follow recommendations for treatment, and attend and complete a parenting education program. In a subsequent consent order, dated 8 September 2014, A.J. was removed from the custody of the maternal aunt and uncle, and placed in DSS custody.

On 13 October 2015, DSS filed a petition regarding mother's second child, P.H. The petition alleged that P.H., age 1 month, was a neglected and dependent juvenile; that P.H.'s putative father was incarcerated, had been since P.H.'s birth, and was "unlikely to be released within the near future[;]" that mother previously had a child removed from her custody due to dependency; that mother had been using marijuana since P.H.'s birth, and had been breastfeeding while doing so; that mother had a history of involvement with domestic violence; that mother had not been staying in

her residence and it was unknown where she was staying with P.H.; and that DSS was unable to reach mother after a recently reported incident of domestic violence. The petition sought temporary custody of P.H. with DSS, and placement authority. The trial court then entered a limited order placing P.H. in DSS custody.

On 20 November 2015, the trial court entered a permanency planning review order regarding A.J. The court noted that mother had recently given birth to another child, P.H.; that mother was presently living with her mother, which was not an appropriate home for A.J.; that mother was on the waiting list for public housing; that DSS had recently learned of multiple incidents of domestic violence in the preceding year, which mother had failed to disclose; that mother was inconsistent with her outpatient therapy and medication management appointments; that mother was unemployed, and had apparently lied about finding employment; that mother failed to show up for a scheduled drug screen; that mother had been bringing A.J. to unsupervised visitation at her mother's house, despite that home not being approved for visitation; and that mother had not been consistent in participating in unsupervised visits. The trial court continued A.J.'s custody with DSS, permitting supervised visitation, and authorized a permanent plan of reunification with an alternative plan of guardianship.

On 17 December 2015, the trial court entered an order concerning P.H. The court found, essentially, the facts alleged in the DSS petition. The court further found

that P.H. had been placed with her half-sibling, A.J.; that there were no relatives to provide safe and appropriate care for P.H.; and that the putative father, still incarcerated, had not established paternity. The trial court concluded that P.H. was neglected and dependent, and that she would remain in the custody of DSS.

On 7 June 2016, the trial court entered a permanency planning review order concerning both A.J. and P.H. The court noted that both children were living in a traditional foster home together, and doing well, and that the foster parents "indicated a strong willingness to adopt" A.J. and P.H. The court noted that P.H.'s putative father had completed paternity testing, with a 99.99% probability of paternity, and that multiple possible relative placement options were explored, but ultimately declined, either due to lack of interest or unsuitability for placement. The court found that mother had not attended her prior outpatient therapy and medication management services in three months, that she was currently employed, that she had been clean on multiple recent drug screens, that she was attending domestic violence counseling, and that she had attended parenting classes. However, although mother initially reported to DSS that she had completed a psychological evaluation, she later informed DSS that she did not, "because she wasn't crazy." Further, the trial court found that mother "did not exhibit an understanding of the role she played in her children being in foster care," and that she "has demonstrated a lack of insight of her treatment needs." The trial court found mother "has not been

consistent with her court ordered services, she has not been consistent in maintaining employment, she has not been candid with Durham DSS, and [she] has only become more vigilant with services right before court." The trial court determined that A.J. could not be returned to mother's home immediately, or within the next sixth months, that mother "has not shown that she can make sufficient progress to be reunited" with A.J., and that continued efforts at reunification "would clearly be unsuccessful." The court therefore ordered that A.J. and P.H. remain in the custody of DSS. The court further changed the permanent plan for A.J. to adoption, with a secondary plan of guardianship.

On 26 April 2017, the trial court entered a permanency planning review order with respect to both A.J. and P.H. The court once more found that it was "not possible for the children to be returned to the mother's home immediately nor is it likely within the next six months" because mother "has not been consistent with her court ordered services, she has not been consistent in maintaining employment, and she has not been candid with Durham DSS." The trial court determined that it was in the best interests of A.J. and P.H. to continue in the custody of DSS, with a permanent plan of adoption and a secondary plan of reunification.

On 30 March 2017, DSS filed a motion to terminate mother's parental rights to A.J. and P.H., and the father's parental rights with respect to P.H. DSS noted, *inter alia*, that mother had not allowed the guardian *ad litem* or DSS to access her

home and determine it to be safe; that mother had not completed an "acceptable" comprehensive psychological evaluation; that mother "did not exhibit an understanding of the role she played in her children being in foster care[;]" that mother "has a history of job instability and unstable sources of income[;]" that mother had various psychological and cognitive issues which impaired her ability to care for her children; that mother failed to provide releases to DSS to allow access to her employment, housing, mental health, and substance abuse records; that mother had failed to make payments pursuant to her child support order; and that mother had failed to make progress with her court ordered services and to cooperate with court orders and DSS.

On 15 August 2017, the trial court entered an order terminating mother's parental rights with respect to A.J. and P.H.[2] The court entered findings consistent with the petition for termination, and found as bases for termination the fact that mother neglected the children, and the children were neglected juveniles; that mother was incapable of providing for the proper care and supervision of the children, that such incapability would continue for the foreseeable future, that mother lacked an appropriate alternative childcare arrangement, and that the children were dependent juveniles; and that mother had willfully left the children in foster care for more than twelve months without making reasonable progress in correcting the conditions

[2] There is no record as to whether the trial court also terminated the parental rights of P.H.'s father. However, because he does not appeal in the instant case, that absence is immaterial.

which led to their removal. The court therefore ordered termination of mother's parental rights with respect to the children.

Mother appeals.

II. Expiration of Judicial Term

In her first argument, mother contends that the trial court lacked subject matter jurisdiction to sign and enter the order terminating her parental rights. We disagree.

A. Standard of Review

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

The hearing on DSS' petition to terminate mother's parental rights took place on 11 July, 12 July, and 19 July 2017. Mother contends, however, that the trial court lacked subject matter jurisdiction to enter its order, because the commission of the trial judge, Judge William A. Marsh, III ("Judge Marsh"), had terminated.

Specifically, mother notes that Judge Marsh was designated as an Emergency Judge of the District Court, by order of North Carolina Supreme Court Chief Justice

Mark Martin ("Chief Justice Martin"), on 7 July 2017. That term was to commence on 10 July 2017 "and continue Five Days or until the business is completed." Chief Justice Martin then renewed Judge Marsh's term, in an order dated 17 July 2017, with a term commencing on 17 July 2017 and continuing, again, "Five Days or until the business is completed." Mother notes that, at her request, the Administrative Office of the Courts informed her that Judge Marsh's term as Emergency Judge ended on 28 July 2017. Mother therefore contends that the order terminating her parental rights, entered on 15 August 2017, was entered after Judge Marsh's term had ended, and that the trial court therefore lacked the subject matter jurisdiction to do so.

Mother's contentions are misplaced. This Court addressed a nearly identical fact pattern in *Hockaday v. Lee*, 124 N.C. App. 425, 477 S.E.2d 82 (1996). Specifically, in *Hockaday*, the trial judge, Judge McLelland, was commissioned to preside over a special session of court, running from 8 May 1995 and continuing for two weeks, "or until the business is completed." On 23 May 1995, the jury returned a verdict for the defendants, and Judge McLelland signed a judgment dismissing the complaint and ordering costs to be taxed against the plaintiff. On 19 June 1995, Judge McLelland ordered the plaintiff to pay deposition costs, and on 30 June 1995, the plaintiff filed a Rule 60 motion for relief from that order, alleging that it was invalid, due to Judge McLelland's term as Emergency Judge having expired. *Id.* at 426-28, 477 S.E.2d at 83-84.

On appeal, we first noted that "Judge McLelland's period of assignment extended from 8 May 1995 'until the business [of the court was] completed.' The business of the court was not completed, in this case, until the execution of the judgment and the setting of the costs." *Id*. at 428, 477 S.E.2d at 84. We further held that

> Even if Judge McLelland's special assignment had not extended "until the business [was] completed," he had authority under Rule 6(c) of our Rules of Civil Procedure to sign the judgment and determine the costs, after the jury rendered its verdict and the court was adjourned. Our Supreme Court has held that Rule 6(c) "permits a judge to sign an order out of . . . session . . . so long as the hearing to which the order relates was held in . . . [session]." *Capital Outdoor Advertising v. City of Raleigh,* 337 N.C. 150, 159, 446 S.E.2d 289, 294-95, *reh'g denied,* 337 N.C. 807, 449 S.E.2d 566 (1994); N.C.G.S. § 1A-1, Rule 6(c) (1990). The Rule does not limit its applicability to regular judges and we read it as applying to all judges, including emergency judges. *See Strickland v. Kornegay,* 240 N.C. 758, 760, 83 S.E.2d 903, 904 (1954) (emergency judge has authority to sign judgment after termination of the session to which he had been assigned). In this case, Judge McLelland made and announced, in open court and before its adjournment, his decision to tax plaintiffs with the costs. The determination of the amount of those costs, made after the adjournment of the session, was merely an implementation of the decision rendered in session and thus "relates" (within the meaning of Rule 6(c)) to that decision. *See Daniels v. Montgomery Mut. Ins. Co.,* 320 N.C. 669, 679, 360 S.E.2d 772, 778-79 (1987). Judge McLelland thus had jurisdiction to enter the 19 June 1995 order.

Id.

In the instant case, our precedent is clear. Judge Marsh's term as Emergency Judge extended "until the business is completed." The business of his session was not completed until after the entry of his order. Moreover, even were that not the case, he had the authority to sign an order based upon a hearing held during his term as Emergency Judge. Not only was the hearing held during his term, but he explicitly stated his findings and judgment at the termination hearing.

We therefore hold that Judge Marsh did have the authority to sign the termination of parental rights order, and the trial court therefore had the subject matter jurisdiction to execute it.

III. Evidence

In her second argument, mother contends that the trial court's adjudication was not based upon clear, cogent and convincing evidence. We disagree.

A. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings

of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.*

B. Willful Abandonment

Mother contends that one of the three bases offered by the trial court in support of its decision to terminate mother's parental rights – that mother had left the children in foster care for more than twelve months without making reasonable progress in correcting the circumstances which led to their removal – was not supported by clear, cogent and convincing evidence.

Our General Statutes provide that grounds for termination of parental rights exist where "[t]he 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." N.C. Gen. Stat. § 7B-1111(a)(2) (2017). "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).

Mother contends that there was insufficient evidence that her conduct was willful. She premises her argument on the position that other evidence would support a finding to the contrary. She offers evidence of her "good faith efforts" to participate in her case plan and regain custody of the children. She further cites the testimony

of two psychologists, Drs. Charles McCoy ("Dr. McCoy") and April Harris-Britt ("Dr. Harris-Britt"), who noted mother's improvements while working on her case plan. She asserts that this evidence contradicts the trial court's determination that she willfully failed to make progress in her case plan.

Mother concedes that "some of [the trial court's] findings are supported by evidence in the record[.]" There are more than some findings. For example, numerous findings show that mother had no insight into or acceptance of why her children had been taken from her custody; that she failed to identify her domestic violence relationships as such, despite attending domestic violence counseling; and that she had not properly supervised or engaged with her children during visitation, despite attending parenting classes. These findings, unchallenged by mother, are binding on appeal. *In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006). These findings demonstrate that while mother had the ability and opportunity, through attending counseling and classes, to identify and address the conditions which led to her children's removal, she remained unwilling to do so.

Moreover, this Court has held that "a respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions[.]" *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (quotation marks omitted). This matter lasted for three years. Notwithstanding any incremental progress mother may have made, the

duration of those efforts, coupled with mother's inability to complete the court's case plan, supported the trial court's ultimate determination of willfulness.

Based upon the unchallenged findings, mother's refusal despite counseling and classes to identify the obstacles to reunification, and mother's prolonged inability to improve her situation despite her alleged best efforts, we hold that there was clear, cogent and convincing evidence to support the trial court's determination that mother willfully left the children in foster care for more than twelve months without correcting the conditions which led to their removal. Because this finding was supported by clear, cogent and convincing evidence, it is binding on appeal, despite mother's evidence to the contrary. We therefore hold that the trial court did not err in terminating mother's parental rights on this basis.

C. Other Arguments

To a lesser extent, although not quite explicitly, mother also challenges the other two bases for the trial court's termination of her parental rights, namely its determinations that the children were neglected and dependent. However, "[h]aving concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court." *Id.* at 546, 594 S.E.2d at 93-94.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).