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IN THE COURT OF APPEALS

OF NORTH CAROLINA

No. COA18-256

Filed: 7 August 2018

Iredell County, Nos. 14 JT 130-31

IN THE MATTER OF: I.M.P., A.M.S.

Appeal by guardian *ad litem* from order entered 7 December 2017 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 26 July 2018.

Matthew D. Wunsche for appellant guardian ad litem.

Lauren Vaughan for Iredell County Department of Social Services.

No brief filed for respondent-appellee.

DAVIS, Judge.

The guardian *ad litem* ("GAL") representing the minor children, I.M.P. ("Ira") and A.M.S. ("Amy"),[1] appeals from the trial court's order determining that there was insufficient evidence to support a termination of the parental rights of M.P.

[1] Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

("Respondent") to her children. After a thorough review of the record and applicable law, we affirm in part, vacate in part, and remand for further proceedings.

Factual and Procedural Background

On 16 July 2014, the Iredell County Department of Social Services ("DSS") filed juvenile petitions alleging that Ira and Amy were neglected juveniles. DSS alleged that Respondent had a lengthy history of neglecting at least four of her seven children dating back to 2003, including eight investigations that substantiated neglect. Respondent tested positive for illicit substances at the birth of Ira in May 2011 and the birth of Amy in November 2012.

DSS further alleged that on or about 5 June 2014 Respondent was evicted from her public housing due to the discovery of drugs in her home. Upon her eviction, Respondent placed Ira and Amy with a family friend ("Ms. H"). Ms. H reported to DSS that she had seen Respondent only once in the four weeks the children had been placed with her.

A pre-adjudication hearing was held on 2 September 2014 in Iredell County District Court. On or about 15 September 2014, the trial court entered orders adjudicating the juveniles neglected, establishing a concurrent permanent plan of guardianship and reunification, and ordering Respondent to obtain and maintain stable housing and employment, complete parenting classes and demonstrate skills learned, submit to random drug screens, and complete substance abuse and

psychological assessments and comply with the resulting recommendations. A permanency planning hearing was held on 21 April 2015, and the trial court entered an order on 16 June 2015 ceasing reunification efforts and changing the permanent plan to a concurrent one of adoption and guardianship.

On 5 April 2017, DSS filed petitions to terminate Respondent's parental rights, alleging that she (1) had neglected the juveniles; (2) had willfully failed to make reasonable progress in correcting the conditions leading to the juveniles' removal from the home; and (3) was incapable of providing for the proper care and supervision of the juveniles such that the juveniles were dependent. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017).

On 15 November 2017, a hearing was held before the Honorable H. Thomas Church. Kristen Windsor, a DSS social worker assigned to the case, testified at the hearing. Respondent did not attend the hearing. On 7 December 2017, the trial court entered an order concluding that DSS had not proven that grounds existed to terminate Respondent's parental rights. The GAL filed a timely notice of appeal.

Analysis

On appeal, the GAL contends the trial court erred in determining that no grounds existed to terminate Respondent's parental rights. "At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights

exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

The standard of appellate review of a termination of parental rights order is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and whether those findings support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). Unchallenged findings are binding on appeal. *In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. Of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks and citation omitted).

In the present case, the trial court made the following relevant findings of fact:

> 11. The Minor Children were adjudicated neglected on September 2, 2014. The conditions in the home that led to that adjudication included substance abuse, unstable housing, and unstable employment.
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> 12. Disposition was entered September 2, 2014 at which time the Court ordered that Respondent Mother complete certain tasks if she wished to work towards

> reunification. Among the tasks set forth in the Disposition Order were the following: . . . respondent mother shall obtain and maintain stable, appropriate housing, obtain and maintain stable employment, complete DSS-approved parenting classes and demonstrate the skills learned, not use or possess illegal controlled substances or alcohol, submit to random drug screens, submit to a substance abuse assessment and comply with the resulting recommendations, complete a mental health assessment and comply with recommended treatment . . . .
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> . . . .
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> 16. [DSS] requested that Respondent Mother submit to random drug screens on many different occasions over the life of the case. Respondent Mother only tested positive for the use of controlled substances on one (1) occasion. The Respondent Mother was a no-show for many random drug screens. However, the Respondent Mother had five (5) negative screens from the end of 2016 into 2017 that she attended.
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> 17. As part of her Case Plan, Respondent Mother was to address mental health issues. Respondent Mother did not obtain a mental health assessment.
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> 18. As part of her Case Plan, Respondent Mother was to maintain appropriate and stable housing. The Court finds that Respondent Mother has maintained the same home for the past two years. The home was assessed on November 14, 2016 and deemed appropriate.
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> 19. As part of her Case Plan, Respondent Mother was to maintain stable employment. The Court finds that Respondent Mother has maintained the same employment for the past two years and was verified by Social Worker Kristen Windsor.

> 20. As part of her Case Plan, Respondent Mother was to participate in DSS-approved parenting classes. The Court finds that Respondent Mother has completed DSS-approved parenting classes.
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> 21. The Court finds that the Respondent Mother has a total of seven (7) children. That this court only has jurisdiction over four (4) of these children and that only two (2) of these children are before the court on the Petition for Termination of Parental Rights. The Court finds that the Respondent Mother was provided a Trial Home Placement for the remaining two minor children during the last six months. That the Trial Home Placement was ceased on November 8, 2017 due to the grades of the minor children regressing.
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> 22. The Court finds that the Respondent Mother has given birth to two other minor children during this case. That [DSS] has not received any complaints and taken no action regarding those minor children.

Based on these findings, the trial court concluded that none of the grounds alleged by DSS were established.

The GAL first challenges the statement in Finding No. 16 that Respondent "had five (5) negative screens from the end of 2016 into 2017 that she attended." We agree that this finding is unsupported by the evidence. DSS's petition to terminate parental rights alleged that Respondent had returned a negative drug screen a total of three times in 2016 and 2017. The social worker only testified about two of those negative screens. There was no evidence introduced that Respondent had five

negative screens in 2016 and 2017, and we therefore disregard this statement from Finding No. 16 in our analysis.

The remaining findings of fact are unchallenged by the GAL and are, therefore, binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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.").

The GAL argues that the trial court erred in concluding that the evidence did not support terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (a)(2) (failure to make reasonable progress), and (a)(6) (dependency). We address the GAL's argument as to each ground for termination in turn.

I. Neglect

N.C. Gen. Stat. § 7B-1111(a)(1) (2017) permits a trial court to terminate parental rights upon finding that the parent has neglected the juvenile. A neglected juvenile is defined, in part, as one "who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2017).

"If there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and 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). The determinative factor in adjudicating neglect is "the fitness of the parent to care for the child *at the time of the termination proceeding*." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Notwithstanding the trial court's erroneous statement regarding the number of Respondent's negative drug screens, the remaining findings support the trial court's conclusion that neglect did not exist at the time of the termination hearing. The trial court's findings demonstrate that Ira and Amy were originally adjudicated neglected due to substance abuse, unstable housing, and unstable employment. While Respondent tested positive for drugs once and missed several drug screens, her most recent drug screens were negative — including two negative results as to which the social worker testified about. Furthermore, she had addressed the issues of unstable housing and unstable employment by keeping steady and appropriate housing and remaining employed for two years. In addition, Respondent completed parenting classes approved by DSS. Finally, Respondent gave birth to two children during the pendency of the case, and there were no reports made or action taken by DSS relating to her care for those children.

The trial court's findings contradict the GAL's contention that there was a likelihood of repetition of neglect if the children were returned to Respondent's care.

Thus, we affirm the trial court's conclusion that DSS failed to meet its burden in demonstrating the existence of neglect.

II. Failure to Make Reasonable Progress

N.C. Gen. Stat. § 7B-1111(a)(2) provides that parental rights may be terminated when "[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).

In the present case, the trial court ultimately concluded that DSS had "failed to prove by clear, cogent and convincing evidence that the Respondent Mother has willfully abandoned the Minor Children for at least six consecutive months immediately preceding the filing of the petition within the meaning of N.C. Gen. Stat. 7B-1111(a)(2)." The trial court appears to have confused the requirements of N.C. Gen. Stat. § 7B-1111(a)(2) with those of N.C. Gen. Stat. § 7B-1111(a)(7) — the statutory provision dealing with abandonment, a separate ground for termination that was not alleged in DSS's petition. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (allowing termination where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition"). There are no findings otherwise indicating that the trial court examined the operative facts and

used the correct standard in assessing DSS's allegation that Respondent's parental rights were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(2).

Thus, this Court is unable to determine whether the trial court correctly adjudicated the non-existence of this ground. Therefore, we must vacate the trial court's order and remand for further fact-finding utilizing the correct standard in determining whether grounds for termination existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). On remand, the trial court shall exercise its discretion as to whether additional evidence is needed. *See In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009) (vacating and remanding for further findings of fact regarding N.C. Gen. Stat. § 7B-1111(a)(2) and leaving "to the discretion of the trial court whether to hear additional evidence").

III. Dependency

Finally, the GAL argues that the trial court erred in failing to terminate Respondent's parental rights based on dependency. N.C. Gen. Stat. § 7B-1111(a)(6) permits a court to terminate parental rights upon a finding that

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative

child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6).

DSS alleged the ground of dependency in its petition, and the admission of evidence regarding Respondent's substance abuse required the court to determine whether Respondent was incapable of providing for the children's care. *See* N.C. Gen. Stat. § 7B-1109(e) (2017) ("The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent."). However, the trial court made no findings or conclusions as to whether dependency served as a ground for termination in this case. Thus, remand is necessary on this ground as well so that the trial court can determine whether termination of Respondent's parental rights was appropriate pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

Conclusion

For the reasons stated above, we affirm the portion of the trial court's 7 December 2017 order finding that no ground for termination of Respondent's parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1) but vacate the remaining portions of the order and remand this case for the trial court to make additional findings regarding the applicability of N.C. Gen. Stat. § 7B-1111(a)(2) and (a)(6) as grounds for termination of her parental rights.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).