IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-829

Filed: 26 March 2019

Guilford County, Nos. 16 JT 521-22

IN THE MATTER OF: K.A.G., N.R.P.

Appeals by respondent-mother and respondent-father from order entered 14 May 2018 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 26 February 2019.

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

Richard Croutharmel for respondent-appellant mother.

Robert W. Ewing for respondent-appellant father.

Alston & Bird LLP, by Caitlin A. Counts and Kelsey L. Kingsbery, for guardian ad litem.

DAVIS, Judge.

N.P. ("Respondent-mother") and A.G. ("Respondent-father") appeal from a 14 May 2018 order terminating their parental rights to their minor children K.A.G.

("Kevin")[1] and N.R.P. ("Nancy") (collectively "the children"). After a thorough review of the record and applicable law, we affirm the trial court's order.

Factual and Procedural Background

Respondent-mother married Respondent-father in April 2005. The couple have two children together — Nancy and Kevin, born in February 2010 and July 2012, respectively.

On 22 November 2016, the Guilford County Department of Health and Human Services ("DHHS") obtained non-secure custody of the children and filed a petition alleging that they were neglected and dependent juveniles. The petition alleged that DHHS initially became involved with the family on 16 October 2016. On that date, Respondent-mother stabbed respondent-father in the chest with a box cutter during a domestic dispute. As a result of this incident, Respondent-mother was charged with misdemeanor assault with a deadly weapon. A no-contact order prohibiting her from contacting or communicating with Respondent-father was entered as one of the conditions of Respondent-mother's subsequent pretrial release.

The petition further alleged that DHHS received a report on 10 November 2016 that the children were living in an injurious environment due to "domestic violence, substance abuse, and untreated mental health issues." On 15 November 2016, Teresa Wright, a DHHS social worker, contacted Respondent-mother to discuss the

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

allegation contained in the report. Respondent-mother stated that she still lived in the same home as Respondent-father and that he lived in the basement. When Wright inquired about her mental health, Respondent-mother indicated that she had been diagnosed with schizophrenia, bipolar disorder, Tourette Syndrome, post-traumatic stress disorder, obsessive compulsive disorder, dyslexia, and anxiety. She further stated that she "was compliant with her treatment and did not need to see anyone due to her 'lifetime shot.'"

According to the petition, Wright met with Respondent-father the following day to discuss the allegations contained in the report. With regard to the allegations related to substance abuse, Respondent-father denied using cocaine and selling drugs although he admitted that he had smoked marijuana. Respondent-father also expressed concern about the impact of his wife's mental health issues upon her ability to care for the children.

In the course of its investigation, DHHS learned that law enforcement officers had responded to ten domestic disturbance calls to the residence of Respondent-mother and Respondent-father between 18 January 2016 and 2 November 2016. In addition, Wright discovered that Respondent-mother "had not attended any appointments with her mental health provider . . . since January, 2016." On 21 November 2016, DHHS held separate team decision meetings with each parent to discuss the allegations of domestic violence.

During his meeting, Respondent-father described an incident that occurred on 7 February 2015 involving a high-speed car chase and vehicular assault. On that date, he stated that his wife had placed the children in her car because "the voices" in her head "told her to leave the residence with them." Respondent-father parked his truck in front of his wife's vehicle so that she could not leave with the children and "she rammed his truck" and drove away. Respondent-father called the police and engaged in a high-speed pursuit of his wife until "she slammed on her brakes and he ran into the back of her vehicle." The children were still in Respondent-mother's car at the time of the collision.

Respondent-father further recounted an argument that took place in August 2016 between his wife and him in which he "punch[ed] a hole through the door of the bathroom[.]" With regard to the 16 October 2016 domestic violence incident that led to DHHS's involvement with the family, Respondent-father stated that his wife "became angry with him when he asked for the car keys and she cut him on the chest with a box cutter."

During her team decision meeting, Respondent-mother indicated that she acted in self-defense when she stabbed her husband during the 16 October 2016 incident. She stated that Respondent-father "was threatening to kill her" and "took a mountain bike and pinned her against [her] car so she could not move." At that point, she "took a box cutter from her back pocket and cut his left collarbone."

On 29 December 2016, both Respondent-mother and Respondent-father entered into case plans with DHHS. Both parents' case plans required them to complete a parenting/psychological evaluation, participate in a domestic violence prevention program, attend parenting classes, maintain suitable housing, and demonstrate their ability to provide financial support for the children. Respondent-father's case plan additionally required him to participate in substance abuse assessments and submit to random drug screens.

Following a hearing on 18 January 2017, the trial court entered an adjudication and disposition order concluding that the children were neglected and dependent. In its order, the trial court (1) continued custody of the children with DHHS and sanctioned their placement in foster care; (2) awarded both Respondent-mother and Respondent-father supervised visitation with the children; (3) set the plan for the children as reunification with their parents; and (4) directed Respondent-mother and Respondent-father to comply with their respective case plans.

The trial court subsequently held a series of permanency planning hearings. On 26 September 2017, the court entered a "Permanency Planning Hearing Order" in which it found that it was not possible for the children to return to their parents' home within the next six months. The order listed, *inter alia*, a number of barriers to reunification, including (1) Respondent-mother's untreated mental health issues; (2) a "[h]istory of substance abuse for parents and continued current use[;]" (3)

Respondent-mother's failure to address her problems with domestic violence; and (4) Respondent-mother's lack of employment or means of income. The trial court ordered that the reunification plan for the children be changed to adoption and directed DHHS to file a petition to terminate the parental rights of Respondent-mother and Respondent-father.

On 7 December 2017, DHHS filed a petition to terminate the parental rights of Respondent-mother and Respondent-father on the grounds of neglect, failure to make reasonable progress, and failure to pay a reasonable portion of the cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017). The petition also sought to terminate Respondent-mother's parental rights on the ground of dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

On 14 February 2018, the trial court conducted a hearing to determine whether Respondent-mother required the appointment of a guardian *ad litem* pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. At the conclusion of the hearing, the trial court entered an order appointing a guardian *ad litem* to represent Respondent-mother.

A termination of parental rights hearing was held on 17 April 2018. On 14 May 2018, the trial court entered an order containing the following pertinent findings of fact with respect to Respondent-mother's lack of compliance with her case plan:

> [Respondent-mother] has not cooperated with mental health services. She has not taken medication as

> recommended. She thinks that [s]he does not need mental health treatment. She maintains that she was "cured" of her schizophrenia by a "lifetime shot."
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> [Respondent-mother] continues to reside at [Respondent-father's address]. . . . Because of the severe domestic violence and the substance abuse occurring at the home, and because [Respondent-mother] has not received treatment for those issues, this is no suitable or safe housing for the children. [Respondent-mother] is not compliant with this component of her case plan.
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> [Respondent-mother's] continued residence with [Respondent-father], along with her complete lack of participation in mental health treatment, medication management, [Domestic Violence Intervention Program] treatment, parenting education, and substance abuse treatment shows a total lack of insight on her part. It is highly likely that the conditions leading to the removal of the children would be repeated.

The order also contained the following findings of fact concerning Respondent-father's level of progress with his case plan:

> [Respondent-father] did participate in substance abuse counseling in the initial stages of the case. [DHHS] has no information that he completed it. He admits that this is the most difficult part of his case plan. He reports that he is scheduled to begin outpatient treatment in two days, but at present he is not involved. [Respondent-father] is not compliant with this component of his case plan.
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> When [drug] tested at court appearances, he tested positive

> for cocaine on January 18, 2017 and May 10, 2017. On March 1, 2017 and April 6, 2017 he submitted diluted drug screen samples. He has testified in Court today that if tested he would test positive for marijuana. [Respondent-father] is not compliant with this component of his case plan.
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> [Respondent-father] did complete the [Domestic Violence Intervention Program]. He testified that he did learn useful tools from that program, such as anger management. There have been no 911 calls to the home since the children were taken into custody. However, by residing with [Respondent-mother] who has not participated in any rehabilitation or therapeutic intervention he demonstrates that he does not fully understand the severity of the problem and the threat of harm to the children.
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> Although [Respondent-father] testifies that he intends to have [Respondent-mother] leave the home, she refuses to do so and in fact they are still living together and sleeping in the same bed. This is not safe or suitable housing for the children, given the severity of the domestic violence and [Respondent-mother]'s mental health issues, as well as [Respondent-father's] drug abuse. [Respondent-father] is not compliant with this component of his case plan.

Based upon its findings of fact, the trial court concluded that all four grounds alleged in the petition existed to terminate the parental rights of Respondent-mother and that all three grounds alleged in the petition existed to terminate the parental rights of Respondent-father. Both parents filed timely notices of appeal.

Analysis

I. Respondent-Mother's Appeal

In her appeal, Respondent-mother's sole argument is that the trial court erred by failing to appoint a guardian *ad litem* for her pursuant to Rule 17 of the North Carolina Rules of Civil Procedure prior to 14 February 2018.

As an initial matter, we must determine whether we possess jurisdiction to hear Respondent-mother's appeal. DHHS contends that the appeal is not properly before us because her notice of appeal referenced only the trial court's 14 May 2018 order terminating her parental rights. Consequently, DHHS asserts, she has waived appellate review of issues relating to the trial court's failure to appoint a guardian *ad litem* prior to 14 February 2018.

Respondent-mother has filed a petition for *certiorari* pursuant to Rule 21 of the North Carolina Rules of Civil Procedure in the event that her notice of appeal is deemed insufficient to confer jurisdiction upon this Court. She contends that "[g]iven the totality of the circumstances in this case . . . it would be unjust and inequitable to deny her appellate review." In our discretion, we elect to grant Respondent-mother's petition and reach the merits of her appeal.

On appeal, Respondent-mother contends that the failure to appoint her a guardian *ad litem* earlier constituted an abuse of the trial court's discretion because "if she needed a Rule 17 [guardian *ad litem*] in February 2018, she also needed one

when the case commenced in November 2016 because nothing substantially changed in [her] mental health between those two dates." We disagree.

This Court has held that "[a] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is [incompetent]." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "Whether the circumstances are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge." *Id.* (citation, quotation marks, and ellipsis omitted). Thus, "[a] trial court's decision concerning whether to appoint a parental guardian *ad litem* based on the parent's incompetence is reviewed on appeal for abuse of discretion." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (citation omitted).

N.C. Gen. Stat. § 7B-1101.1(c) provides that "[o]n motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with . . . Rule 17" of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 7B-1101.1(c) (2017). Pursuant to N.C. Gen. Stat. § 35A-1101(7), an incompetent adult is "[a]n adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate

important decisions concerning the adult's person, family, or property[.]" N.C. Gen. Stat. § 35A-1101(7) (2017).

In *In re T.L.H.*, our Supreme Court addressed the circumstances under which a trial court must conduct an inquiry into a parent's competence to determine whether the appointment of a guardian *ad litem* is required pursuant to N.C. Gen. Stat. § 7B-1101.1(c). *In re T.L.H.*, 368 N.C. at 108, 772 S.E.2d at 456. In that case, DHHS filed a petition alleging that the juvenile was neglected and dependent based in part upon allegations that "respondent had been to the hospital on several occasions in the last year due to mental health complications and that she has diagnoses of schizoaffective disorder, bipolar, cannabis abuse and personality disorder." *Id.* at 102, 772 S.E.2d at 452 (quotation marks and brackets omitted). DHHS subsequently filed a petition to terminate the respondent's parental rights and "request[ing] that the trial court make an inquiry as to whether respondent needs to have a [guardian *ad litem*] appointed for purposes of this proceeding." *Id.* at 104, 772 S.E.2d at 451 (quotation marks and brackets omitted). However, the trial court did not conduct an inquiry into the necessity of appointing a guardian *ad litem* for the respondent and later entered an order terminating her parental rights. *Id.* at 104-05, 772 S.E.2d at 453-54.

On appeal, the Court began its analysis by noting the deferential nature of the applicable standard of review.

> Affording substantial deference to members of the trial judiciary in instances such as this one is entirely appropriate given that the trial judge, unlike the members of a reviewing court, actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record.
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> Moreover, evaluation of an individual's competence involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals. Although the nature and extent of such diagnoses is exceedingly important to the proper resolution of a competency determination, the same can also be said of the information that members of the trial judiciary glean from the manner in which the individual behaves in the courtroom, the lucidity with which the litigant is able to express himself or herself, the extent to which the litigant's behavior and comments shed light upon his or her understanding of the situation in which he or she is involved, the extent to which the litigant is able to assist his or her counsel or address other important issues, and numerous other factors. A great deal of the information that is relevant to a competency determination is simply not available from a study of the record developed in the trial court and presented for appellate review. As a result, when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the trial court should not, except in the most extreme instances, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

Id. at 108-09, 772 S.E.2d at 456 (citation omitted).

Based upon its review of the record, including the "coherent manner in which respondent testified at the permanency planning hearing[,]" the Court stated it was "unable to conclude that the trial court could not have had a reasonable basis" for failing to conduct a competency inquiry. *Id.* at 112, 772 S.E.2d at 458. *See also In re J.R.W.*, 237 N.C. App. 229, 234-35, 765 S.E.2d 116, 120-21 (2014) (holding trial court did not err in failing to conduct competency inquiry where record established that respondent's mental health issues "did not rise to the level of incompetency" because "evidence of mental health problems is not *per se* evidence of incompetence to participate in legal proceedings" (citation omitted)), *disc. review denied*, 367 N.C. 813, 767 S.E.2d 840 (2015).

In the present case, the petition filed by DHHS alleging that the children were neglected and dependent juveniles also contained allegations regarding Respondent-mother's "severe untreated mental health concerns." At the 18 January 2017 pre-adjudication hearing, Respondent-mother provided live testimony before the trial court. She also completed a parenting capacity and psychological assessment as part of her case plan on 20 April 2017. Respondent-mother was diagnosed with paranoid schizophrenia, and the psychiatrist's written report containing her diagnosis was provided to the trial court at a permanency planning review hearing on 30 August 2017.

As noted above, the existence of mental health issues does not constitute *per se* evidence of legal incompetence. Thus, Respondent-mother's diagnosis of paranoid schizophrenia and documented history of mental health problems do not — without more — compel the conclusion that the trial court abused its discretion in failing to conduct a competency inquiry or appoint a guardian *ad litem* for her prior to 14 February 2018. The trial court had the opportunity to observe Respondent-mother during the testimony she gave at the adjudication hearing, and she points to nothing in her testimony that would have raised a "substantial question" with regard to her competency. *In re J.A.A. & S.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49 (citation omitted).

Therefore, we are satisfied that the trial court did not abuse its discretion in failing to conduct an inquiry into the necessity of appointing a guardian *ad litem* for Respondent-mother prior to 14 February 2018. Accordingly, her sole argument on appeal is overruled.

II. Respondent-Father's Appeal

Respondent-father argues that the trial court erred in terminating his parental rights without clear, cogent, and convincing evidence. Specifically he contends that the trial court erroneously "based its conclusion of law primarily on the past actions of [Respondent-father's] domestic violence with [Respondent-mother] and not upon the current conditions . . . at the time of the termination hearing." We disagree.

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied*, 358 N.C. 543, 599 S.E.2d 42 (2004). Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

In the present case, the trial court concluded grounds existed to terminate Respondent-father's parental rights on the basis of, *inter alia*, neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). N.C. Gen. Stat. § 7B-1111(a)(1) lists neglect as one of the enumerated grounds for termination of parental rights and provides that a trial court may terminate a parent's rights if it determines that the juvenile is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2017). N.C. Gen. Stat. § 7B-101 defines a neglected juvenile as one who "does not receive proper care, supervision, or discipline" from a parent or caretaker or "who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2017).

"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, when the parent has not

had custody of the child "for a significant period of time prior to the termination hearing, . . . a trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect." *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citations and quotation marks omitted). If prior neglect is considered, "[t]he trial court 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).

This Court has held that "failing to take steps to correct the circumstances leading to [a juvenile's] adjudication as a neglected juvenile" constitutes a "lack of changed conditions," indicating "the probability of a repetition of neglect[.]" *In re Davis*, 116 N.C. App. 409, 414, 448 S.E.2d 303, 306, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994); *see also In re C.M.P.*, __ N.C. App. __, __, 803 S.E.2d 853, 859 (2017) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." (citation omitted)).

In the present case, the primary conditions that led to the removal of the children from Respondent-father's care were his problems with domestic violence and substance abuse. In its termination order, the trial court found that Respondent-father was not compliant with either the substance abuse or suitable housing components of his case plan. Specifically, the trial court noted Respondent-father's

positive drug screens and failure to obtain housing separate from Respondent-mother:

> When tested at court appearances, he tested positive for cocaine on January 18, 2017 and May 10, 2017. On March 1, 2017 and April 6, 2017 he submitted diluted drug screen samples. He has testified in Court today that if tested he would test positive for marijuana.
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> [Respondent-father] did complete the [Domestic Violence Intervention Program]. He testified that he did learn useful tools from that program, such as anger management. There have been no 911 calls to the home since the children were taken into custody. However, by residing with [Respondent-mother] who has not participated in any rehabilitation or therapeutic intervention he demonstrates that he does not fully understand the severity of the problem and the threat of harm to the children.
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> Although [Respondent-father] testifies that he intends to have [Respondent-mother] leave the home, she refuses to do so and in fact they are still living together and sleeping in the same bed. This is not safe or suitable housing for the children, given the severity of the domestic violence and [Respondent-mother]'s mental health issues, as well as [Respondent-father's] drug abuse.

Respondent-father contends that the trial court's neglect determination "fail[ed] to properly consider the change in [his] circumstances, including his participation in his court ordered services," because his last act of domestic violence occurred a year and a half prior to the termination hearing. However, this argument

ignores the well-established principle in our jurisprudence that "[i]f the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.Z.H.*, 247 N.C. App. 254, 258, 785 S.E.2d 341, 345 (2016) (citation omitted). Moreover, Respondent-father does not contest any of the trial court's factual findings with regard to his continued substance abuse and inability to obtain housing separate from Respondent-mother.

Thus, we are satisfied that the trial court's termination order contains sufficient findings of fact supported by clear, cogent, and convincing evidence to support the conclusion that Respondent-father neglected the children in the past and that there is a likelihood of repetition of neglect if the children were returned to his care. Accordingly, we affirm the trial court's 14 May 2018 order terminating Respondent-father's parental rights on the ground of neglect.

Because we have determined that termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) was proper, it is unnecessary to address the remaining grounds for termination found by the trial court. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is

unnecessary to address the remaining grounds." (citation and quotation marks omitted)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Conclusion

For the reasons stated above, we affirm the trial court's order terminating the parental rights of both Respondent-mother and Respondent-father.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

This opinion was authored by Judge Davis prior to 25 March 2019.

Report per Rule 30(e).