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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-878

Filed: 16 April 2019

Guilford County, No. 16 JT 223

IN THE MATTER OF: D.V.G.

Appeal by respondent-parents from order entered 7 June 2018 by Judge Angela Foster in Guilford County District Court. Heard in the Court of Appeals 14 March 2019.

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

Rebekah W. Davis for respondent-appellant mother.

Ewing Law Firm, P.C., by Robert W. Ewing, for respondent-appellant father.

Michael N. Tousey for guardian ad litem

BRYANT, Judge.

Where respondent-father failed to preserve before the trial court the sole argument he makes on appeal, we dismiss the argument and accordingly, respondent-father's appeal. Where the evidence before the trial court supports the court's findings of fact and the findings support the conclusion to terminate respondent-

mother's parental rights to her minor child D.V.G. ("Dawn")¹ on the basis of neglect and willful failure to make reasonable progress in correcting the conditions that led to Dawn's removal on the basis of neglect, we affirm the trial court's order.

On 19 April 2016, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging Dawn was a neglected and dependent juvenile. DHHS alleged, in part, that respondents were homeless; that respondent-mother had mental health issues, which she was not able to address because she could not afford her medication; and that respondent-mother was unable to independently parent Dawn while respondent-father was working. DHHS obtained non-secure custody of Dawn that same day.

After a hearing on 17 August 2016, the trial court entered an order adjudicating Dawn to be a neglected and dependent juvenile. The court continued custody of Dawn with DHHS and granted respondents supervised visitation. Respondents were ordered to comply with their DHHS case plans, which included: (1) continue mental health treatment, comply with the recommendations of any evaluations, and take any prescribed medications; (2) participate in a parenting and psychological evaluation and comply with all recommendations; (3) obtain and maintain suitable and stable housing with adequate food; and (4) obtain and maintain gainful employment that would provide sufficient income to meet the needs

¹ We uses pseudonyms throughout this opinion for ease of reading and to protect the juvenile's identity.

of the family. Respondent-father's case plan also included that he participate in a substance abuse assessment, comply with all recommendations of the assessment, participate in random drug screens, and refrain from the use of any substance for the purposes of becoming intoxicated.

The trial court held a review hearing on 14 October 2016 and found respondents had not made adequate progress under their respective case plans. So, the court continued DHHS's custody of Dawn. In a review order entered 30 January 2017, the court found respondent-mother was making adequate progress under her case plan, but respondent-father was not participating in his case plan and was not cooperative with DHHS. The court set the primary permanent plan for Dawn as reunification and set the secondary plan as adoption.

Trial counsel for respondent-father subsequently filed a motion for the appointment of a guardian ad litem ("GAL") to represent his interests in the case. The trial court heard the motion on 26 April 2017. On 19 May 2017, the court entered an order in which it found respondent-father's crippling anxiety and refusal to take his prescribed medications were negatively affecting his demeanor in court and impeding his ability to communicate effectively and responsively regarding his case. The court concluded respondent-father was in need of the services of a GAL and appointed a Rule 17 GAL to represent him in future hearings.

The trial court conducted a permanency planning review hearing on 16 August 2017. In its order from the hearing, the court found that respondents were not in compliance with any component of their case plans and had failed to alleviate the conditions that led to the removal of Dawn from their care. The court set adoption as Dawn's primary permanent plan, with reunification as the secondary plan, and ordered DHHS to proceed with filing for the termination of respondents' parental rights to Dawn.

DHHS filed a petition to terminate respondents' parental rights on 6 October 2017. As to both respondents, DHHS alleged grounds of neglect, willful failure to make reasonable progress to correct the conditions that led to Dawn's removal from their care, failure to pay a reasonable portion of the cost of care for Dawn while she was in DHHS custody, and dependency, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (6) (2017). DHHS also alleged the ground of failure to legitimate Dawn as to respondent-father, pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (2017).

After a hearing on 1 May 2018, the trial court entered an order terminating respondents' parental rights to Dawn on 7 June 2018. The court found grounds to terminate respondents' parental rights based on neglect, willful failure to make reasonable progress, failure to pay a reasonable portion of the cost of Dawn's care, and dependency. The court further concluded that terminating respondents' parental rights was in Dawn's best interests. Respondent-mother filed written notice of appeal

from the trial court's order on 18 June 2018, and respondent-father did so on 13 July 2018.

Respondent-Father's Notice of Appeal

Notice of appeal from an order terminating parental rights "shall be made within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." N.C. Gen. Stat. § 7B-1001(b) (2017). Recognizing that, on its face, respondent-father's written notice of appeal was filed more than 30 days after entry and service of the trial court's 7 June 2018 order terminating his parental rights, respondent-father has filed a petition for writ of certiorari with this Court, as an alternative basis for appellate review. *See id.* § 7B-1001(a)(6) (2017); N.C.R. App. P. 21(a)(1) (2019). However, respondent-father does not concede that the notice of appeal was untimely, arguing that DHHS did not properly serve him with the trial court's order. Respondent-father notes that the certificate of service attached to the order indicates it was served on respondent-father's trial counsel by mailing a copy of the order to "Jenifer McCrea, Attorney for [Respondent-Father], P.O. Box. 38114, Greensboro, N.C. 27438." The record before this Court discloses that McCrea's actual address is "603 F Eastchester Drive, High Point, N.C., 27262." In an affidavit attached to the petition for writ of certiorari, McCrea avers that, as of 26 September 2018, she had not been served with a copy of the trial court's order. Neither DHHS nor the GAL

filed a response to the petition or otherwise contested respondent-father's contention that service of the order was improper.

Because the record, on its face, establishes that respondent-father was not properly served with the order terminating his parental rights, we cannot say that respondent-father's notice of appeal was untimely filed. *Cf. Brown v. Swarn*, ___ N.C. App. ___, ___ 810 S.E.2d 237, 240 (2018) (holding that when there is no certificate of service attached to the order from which the appeal was taken, it is the appellee's burden to show that an appellant's notice of appeal was untimely filed based on when the appellant received actual notice that the order had been entered). Accordingly, we dismiss respondent-father's petition for writ of certiorari as moot and address the merits of his appeal.

Respondent-Father's Appeal

Respondent-father's sole argument on appeal is that the trial court abused its discretion by failing to appoint him a Rule 17 GAL at the start of the underlying juvenile neglect and dependency case, because his mental health limitations were present throughout the entire case. Respondent-father contends the trial court's failure to appoint a Rule 17 GAL violated his right to due process. We dismiss this argument.

The North Carolina Rules of Appellate Procedure provide the following:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request,

objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. Rule 10(a)(1) (2019). Generally, where a party fails to present an argument to the trial court, that argument will not be addressed for the first time on appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195–96, 657 S.E.2d 361, 364 (2008) (“In light of the practical considerations promoted by the waiver rule, a party’s failure to properly preserve an issue for appellate review ordinarily justifies the appellate court’s refusal to consider the issue on appeal.” (citations omitted)). This rule applies to constitutional questions. *See In re Davis*, ___ N.C. App. ___, ___, 808 S.E.2d 369, 374 (2017) (“Our Supreme Court has regularly held that constitutional arguments not brought forth at the lower court level will be dismissed on appeal pursuant to Rule 10(a)(1).” (citations omitted)).

Here, respondent-father raised the issue of the timing of the appointment of his GAL for the first time in his closing argument at the adjudicatory stage of the termination hearing. Prior to the entry of the 19 May 2017 order on respondent-father’s motion for the appointment of a GAL, there was no indication in the record that he was incompetent and in need of services of a GAL. As soon as the court heard respondent-father’s motion for a GAL and determined respondent-father was in need of GAL assistance, a GAL was appointed. *See* N.C. Gen. Stat. § 7B-602(c) (2017) (“On

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 G.S. 1A-1, Rule 17.”). In his argument at the termination hearing, respondent-father claimed that DHHS had failed to give him the assistance he needed to be able to understand and successfully complete his case plan and that termination of his parental rights would be premature and unfair, because he now had a Rule 17 GAL who could provide him the assistance necessary to succeed in completing his case plan. This argument does not amount to a claim that the trial court abused its discretion in failing to *sua sponte* appoint him a Rule 17 GAL at the start of the juvenile case or that failure to do so violated his rights to due process. Respondent-father did not present to the trial court the argument he now raises on appeal and thus, has not preserved his sole issue for appellate review. Therefore, we dismiss this argument and accordingly, respondent-father's appeal.²

Respondent-Mother's Appeal

Respondent-mother argues on appeal that the trial court erred in concluding grounds exist to terminate her parental rights. We disagree.

² We note that had respondent-father preserved this issue for appellate review, it would be without merit, as this Court has previously rejected a similar argument. *See In re O.C.*, 171 N.C. App. 457, 462, 615 S.E.2d 391, 394 (2005) (“We also reject respondent's contention that the termination order on appeal must be reversed because of the trial court's failure to appoint her a GAL for the dependency adjudication proceedings occurring nineteen (19) months earlier.”).

This Court reviews a trial court's order finding grounds exist to terminate parental rights to determine "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 S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 58–59 (2008) (citation omitted). "If 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.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation omitted). Findings of fact not specifically challenged on appeal "are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (citations omitted). "The trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citation omitted).

Grounds exist to terminate parental rights when the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1) (2017). A neglected juvenile is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline . . . or who lives in an environment injurious to the juvenile's welfare[.]" *Id.* § 7B-101(15) (2017). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.'" *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715,

319 S.E.2d 227, 232 (1984)). 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) (citation omitted). A trial court may terminate parental rights based upon prior neglect of a juvenile 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) (citations omitted). “Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of [the] child[].” *In re J.H.K.*, 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011) (first alteration in original) (citation omitted).

The trial court made the following relevant findings of fact to support its conclusion that the ground of neglect exists to terminate respondent-mother’s parental rights:

8. The circumstances leading to the assumption of custody by DHHS were the mental health issues of both parents, their homelessness, lack of clothing, medication, diapers, and food.

9. The family has the following Child Protective Services History: On September 2, 2015, a report was received alleging improper care and injurious environment. It was reported that the father was homeless with the child and was living from place to place with no financial resources

or food. The mother was residing with the father and stepmother and was reporting that she could not care for the child. On November 2, 2015 the case was closed with services recommended that [respondent-mother] continue to work with Family Preservation. Daycare was put in place for [respondent-mother].

10. At an adjudicatory hearing held on August 17, 2016, the juvenile was adjudicated to be Dependent and Neglected.

11. The mother entered into a case plan on 05/19/2016. The case plan had the following components:

A. Emotional and Mental Health: The mother was to continue mental health treatment including psychiatric medication management at Monarch; comply with the recommendations of any evaluations that she has completed; take any and all medication prescribed to her in the manner in which it is prescribed; allow DHHS to count her medication; be honest and forthcoming during all mental health appointments, including any evaluations; participate in a parenting evaluation.

[Respondent-mother] has not been consistent with taking her medication. She has not been consistent in attending the recommended therapy. A higher level of mental health care was [] recommended for [respondent-mother], such as Community Support Team or ACTT. However, she has only recently begun to investigate that option and has not been accepted into any program as of this date.

B. Housing/Environment/Basic Physical Needs: The mother was to obtain and maintain stable, suitable housing for a minimum of six consecutive months; she was to provide a copy of her lease to the Department, have an adequate food supply in the home to meet the needs of her family, ensure the home is free of hazards with properly working utilities, notify the Department within 48 hours of any change in her housing situation, make her home

available for inspection by the Department, and comply with announced and unannounced home visits to her home.

[Respondent-mother] has not maintained stable housing. She has been homeless throughout this case, with the exception of five months when she did obtain subsidized housing with the assistance of the Department. She was evicted from that housing because she did not pay any of the rent payments. She is currently homeless, living at a Salvation Army shelter. She says she will be eligible for an assisted housing program soon, but she has not been accepted for that program yet and there is no timeline as to when she might be accepted.

C. Parenting Skills: The mother [was to] complete a Parenting and Psychological Evaluation and [] comply with all recommendations; attend all visits as scheduled and comply with visitation expectations; participate in physical health, dental health, and developmental appointments with the juvenile; enter a voluntary Child Support Order with Child Support Enforcement; participate in shared parenting with the caregiver, actively participate in the PATE program and successfully complete all program requirements; comply with the JCITI program.

On October 21, 2016, the mother completed the PATE program. The mother did complete a Parenting Psychological Evaluation; the report was prepared on January 17, 2017. That evaluation found that the mother suffered from clinical depression and anxiety, and recommended medication and therapy, along with further testing for Schizoaffective Disorder or Schizophrenia. The mother has testified today that she has been diagnosed with Schizoaffective Disorder. The report further found that currently the mother's decision making ability and lack of parenting knowledge could pose a risk of harm to the child.

D. Employment and Income Management: The mother was to obtain and maintain gainful employment which would

Opinion of the Court

provide sufficient income to meet the needs of the family for a minimum of six months. She was to provide copies of her pay stubs to DHHS; contact DHHS within 48 hours of any change in employment status; she was [to] document three attempts per week to obtain employment.

From August of 2016 through December 22 of 2016 [respondent-mother] did have employment at Golden Living Starmount Nursing Home. She resigned from her job prior to finding other employment because she thought the job entailed too much work. She admits now that was a bad idea[.] She does not have other employment. She has no income. She is only now beginning to receive food stamps after a period of not receiving them because she did not seem to understand that she was eligible. She is not looking for work currently because she has a pending disability claim. She says that her disability lawyer has advised her not to work in order to improve the chances of success for her claim. [Respondent-mother] has other job skills. She has an associates degree and she has worked in manufacturing jobs. She has chosen not to work, although she understands that her case plan requires her to show that she can support her child.

....

14. The respondent parents herein have not made satisfactory progress with any component of their case plans.

....

21. Grounds exist to terminate the parental rights of [respondent-mother] and [respondent-father] pursuant to N.C.G.S.§7B-1111(a)(1): The parents have neglected the juvenile[] within the meaning of N.C.G.S.§7B-101, and such neglect is likely to recur if the juvenile[is] returned to the respondent.

Respondent-mother does not challenge findings of fact 8, 9, or 10, and thus, they are binding on appeal. *M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785. Respondent-mother challenges finding of fact 11.A. by offering explanations for the negative implications of the finding (i.e., she took her medication when she could pay for it; when she went to therapy, she was engaged and benefited from it; her therapist did not recommend a higher level of therapy until May 2017, and she began new therapy in February 2018). Respondent-mother presents similar challenges to findings of fact 11.B. (i.e., she qualified for housing which *could* occur in July of 2018 or sooner; she had a specialist helping her find stable housing), 11.C. (i.e., she made some progress in developing her parenting skills; her visitations with Dawn went well; she entered into a voluntary child support agreement as ordered), and 11.D. (i.e., she quit her job because her supervisor put so much work on her that she couldn't mentally handle it; her job skills were from temporary employment and were limited; her social worker testified that her mental health diagnosis may make it difficult for her to maintain employment). Respondent-mother's arguments, however, do not challenge the evidentiary basis for the trial court's actual findings of fact, and the findings are binding on appeal. *Id.*; see also *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984) (“Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by the trial courts' findings of fact where there is some evidence to support

those findings, even though the evidence might sustain findings to the contrary.” (citations omitted)).

Respondent-mother does make one evidentiary challenge to finding of fact 11.C., arguing the psychological evaluation did not directly find that her lack of parenting knowledge posed a risk of harm to Dawn. However, the evaluation report details how respondent-mother’s depression and emotional issues impede her ability to make good decisions in her life and concludes, “until she has better control over her depression and emotional neediness, she will continue to place herself and her child at risk for further harm.” This finding is supported by evidence before the trial court; thus, it is binding on appeal. *S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909.

Dawn’s original adjudication of neglect was based in large part upon respondent-mother’s homelessness, lack of employment, and mental health problems. Respondent-mother failed to comply with any component of her case plan to address these issues. Her ability to complete parenting classes and successfully attend most of the supervised visits with Dawn only demonstrates her partial success toward improving her parenting skills and is insufficient to overcome her deficiencies in other areas of her case plan. We hold the trial court’s findings of fact set forth above support its ultimate finding that respondent-mother has not made satisfactory progress with any component of her case plan, which in turn supports the court’s conclusion that

respondent-mother is likely to neglect Dawn if she is returned to respondent-mother's care.³

Accordingly, we hold the trial court's findings of fact support its conclusion that there was a sufficient basis to terminate respondent-mother's parental rights to Dawn on the basis of neglect and willful failure to make reasonable progress in correcting the conditions that led to Dawn's removal on the basis of neglect. We need not address respondent-mother's arguments as to the remaining grounds found by the court. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93–94 (2004) (holding one ground for termination of parental rights existed there was no need to address the trial court's remaining grounds challenged on appeal). Respondent-mother does not challenge the trial court's conclusion that termination of her parental rights is in Dawn's best interests, and we affirm the court's order terminating respondent-mother's parental rights to Dawn.

DISMISSED IN PART; AFFIRMED IN PART.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).

³ Respondent-mother challenges other findings of fact made by the trial court, but they are not necessary to our analysis and need not be addressed. *See In re A.B.*, ___ N.C. App. ___, ___, 799 S.E.2d 445, 448 (2017) (holding that where a trial court's order adjudicating grounds to terminate parental rights is supported by adequate findings of fact, "[e]rroneous findings unnecessary to the [court's] determination do not constitute reversible error" (citation omitted)).