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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1093

Filed: 3 December 2019

Rockingham County, Nos. 15 JT 68, 16 JT 123

IN THE MATTER OF: D.A.I.P. & A.M.T.I.

Appeal by respondent from order entered 19 July 2018 by Judge Christopher A. Freeman in District Court, Rockingham County. Heard in the Court of Appeals 31 October 2019.

No brief filed on behalf of petitioner-appellee Rockingham County Department of Social Services.

Mercedes O. Chut for respondent-appellant.

Raleigh Divorce Law Firm, by Blake H. Larsen, for guardian ad litem.

STROUD, Judge.

Respondent, the mother of minor children D.A.I.P. ("Denise") and A.M.T.I. ("Andrew"),[1] appeals from the trial court's order terminating her parental rights to both children on the grounds of neglect, willfully leaving the children in foster care for more than 12 months without making reasonable progress toward correcting the

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

conditions that led to the removal of the children from her care, and dependency.[2] *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (6) (2017). Because the trial court made appropriate findings of fact, supported by clear and convincing evidence, to conclude that Respondent failed to identify an appropriate alternative care placement for Denise and Andrew, rendering the children dependent, we affirm the trial court's order.

I. Background

Respondent, a native of Guatemala, crossed the border into the United States when she was seven months pregnant. Denise was born in September 2014. On 28 February 2015, Denise was taken to Wake Forest Baptist Medical Center due to a concern about her left arm. X-rays revealed fractures to Denise's left humerus, right ulna, and left fourth, fifth, sixth, and seventh ribs, all in various stages of healing. Respondent maintained she was the sole caretaker of Denise, but she had no explanation for the injuries.

Respondent entered into a protection plan with Rockingham County Department of Social Services ("DSS"), which placed Denise in the home of Respondent's pastor and his wife ("Mr. and Ms. H."). Approximately one month later, follow-up x-rays revealed no new fractures. Respondent told Ms. H. she had dropped

[2] The parental rights of each child's putative biological father and unknown biological father were also terminated. Neither the putative nor the unknown biological fathers are parties to this appeal.

Denise three times and wondered if that may have caused the fractures. Ms. H. told DSS this information approximately two weeks later.

On 19 May 2015, DSS filed a petition alleging Denise to be abused, neglected, and dependent. On the same date, DSS obtained a nonsecure custody order, removed Denise from Ms. H.'s home, and placed her in a licensed foster home. On 2 June 2015, Respondent entered into a case plan for reunification with Denise, which required her to obtain a parenting capacity psychological assessment, obtain safe and stable housing, participate in a parenting class, have an assessment with a counselor, refrain from criminal activity, attend supervised visitation, obtain employment or a consistent form of income, pay child support, verbalize the source of Denise's fractures, and report all changes and progress to DSS. Denise was adjudicated neglected and dependent at a hearing on 9 July 2015, with the resulting order filed 11 February 2016.

According to the 8 March 2016 order for custody review and permanency planning, Respondent had made "adequate progress within a reasonable period of time and she [was] actively participating in or cooperating with the case plan and [DSS]." The order indicated Respondent had met or was actively engaged in each requirement of her case plan, except for identifying the source of Denise's injuries. She had provided several explanations for the fractures, though all had been ruled out by Denise's physicians.

The 18 July 2016 order for custody review and permanency planning indicated Respondent identified the putative father of Denise to be "Oscar", who was residing in Guatemala. In communication between Respondent and Oscar, he acknowledged Denise to be his child, though paternity has never been confirmed. The order also found that Respondent no longer maintained stable housing, as she had moved in with her recent boyfriend, and was pregnant. Despite the progress Respondent had made toward reunification, DSS recommended the primary permanent plan be changed to adoption with a concurrent plan of reunification, as Respondent still refused to adequately explain Denise's injuries. The trial court ordered the permanent plan to be changed to adoption a concurrent plan of reunification.

Respondent gave birth to Andrew in September 2016. Respondent's then-boyfriend was listed on the juvenile petition as Andrew's putative father, but subsequent genetic testing confirmed that he was not Andrew's father. Paternity has never been established for Andrew. On 5 October 2016, DSS filed a petition alleging Andrew to be neglected and dependent, obtained a nonsecure custody order, and placed Andrew in the same foster home as his sister.

As a result of Denise's injuries, Respondent was arrested on 27 October 2016 for felony child abuse, and she has remained incarcerated since that date. Andrew was adjudicated neglected and dependent on 12 December 2016. A post-disposition review and permanency planning review hearing was held on 8 June 2017. The trial

court relieved DSS of making reasonable efforts toward reunification and established a permanent plan of adoption with a concurrent plan of custody with a relative or other court-approved person.

On 9 October 2017, Respondent pled guilty to felony child abuse by intentionally inflicting serious physical injury on Denise. Her projected release date is 23 June 2022. DSS filed petitions to terminate Respondent's parental rights to Denise and Andrew on 18 January 2017 and 25 October 2017, respectively. Following a hearing, Respondent's parental rights to both children were terminated. Respondent timely appealed.

II. Termination

Respondent asserts the trial court erred in adjudicating grounds to terminate her parental rights under North Carolina General Statute § 7B-1111(a)(1) (neglect), (2) (failure to make reasonable progress), and (6) (dependency).

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear . . . and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). "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." *Id.* "[U]nchallenged findings of fact are presumed to be supported by

competent evidence and binding on appeal." *In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012). We review the trial court's conclusions of law *de novo*. *In re S.N.,* 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

"A finding of any one of the grounds enumerated [in section 7B-1111], if supported by competent evidence, is sufficient to support a termination." *In re J.W.*, 173 N.C. App. 450, 456-57, 619 S.E.2d 534, 540 (2005) (alteration in original), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006). "[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." *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

Among the grounds in the petition to terminate Respondent's parental rights, the trial court concluded grounds existed based on Denise and Andrew's dependency, under North Carolina General Statute § 7B-1111(a)(6). This subsection provides that the trial court may terminate parental rights where

> 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). To determine whether a juvenile is dependent, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Respondent concedes her incarceration, projected to last until 2022, "adequately supports the first prong." However, she argues the trial court made insufficient findings to support its conclusion that Respondent was unable to identify an alternative care provider for her children while she is incarcerated. She further contends that certain of the court's finding are unsupported by the evidence. We disagree.

"Our courts have . . . consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives." *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011). Moreover, an alternative care placement must be "willing and able to care" for the children. *In re D.J.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005).

Respondent asserts she provided two viable alternative care placements in Ms. H. and her cousin ("Mr. A."), and she challenges the trial court's findings of fact 26, 79, 80, 83, 84, and 86.

> 26. Pursuant to N.C.G.S. § 7B-1111(a)(6), [Respondent] is incapable of providing for the care and supervision of the minor children such that the children are dependent juveniles within the meaning of G.S. 7B-101 as summarized further within this order. There is a reasonable probability that this incapability will continue into the foreseeable future because the mother's anticipated release date from the Department of Corrections is June 23, 2022. Lastly, the mother has not been able to formulate a viable alternative plan of care for her children while she is incarcerated.
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> 79. [Respondent] has not been able to formulate an adequate alternative plan of care for either child while she serves her prison sentence at the Department of Corrections.
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> 80. During the course of these two juvenile actions, [Respondent] asked that the children be placed with [Ms. H.] and her husband. [Ms. H.] was not an appropriate alternative child care arrangement due to her failure to disclose to the Department her knowledge about [Denise's] injuries, which led to [Denise] being removed from [Ms. H.'s] home in May of 2015. The Department did not believe [Ms. H.] would be protective of [Denise] since she was not forthcoming with the Department as to the statements [Respondent] made about dropping the child on three separate occasions.
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> . . . .

> 83. On December 21, 2017, [Respondent] asked that her cousin, [Mr. A.], be considered for the placement of both children. Since [Mr. A.] resides in the state of Georgia, it was necessary to initiate the Interstate Compact on the Placement of Children (hereinafter "ICPC") for the purposes of a home study.
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> 84. Social worker Odom made the ICPC request to assess [Mr. A.] for placement. Unfortunately, the ICPC request was returned to the Department due to funding issues with the children. Specifically, neither child is eligible for federal funding, so the ICPC office requested that [Mr. A.] write a letter acknowledging that if approved for the placement of the children, he would be solely responsible for the children financially and would not be eligible for any economic services. Social worker Odom attempted to contact [Mr. A.] with the phone number provided by the Department; however, this phone number was for another individual who works with [Mr. A.]. Social worker Odom left a message for [Mr. A.], but as of today's hearing, [Mr. A.] never responded to the social worker's contact attempt. [Mr. A.] never provided the statement acknowledging his financial responsibility for the children; therefore, the ICPC request cannot be completed and [Mr. A.] cannot be assessed for placement of the children.
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> 86. [Respondent] is incapable of providing care and supervision to the minor children, and this incapability is due to [her] incarceration. This incapability will continue into the foreseeable future as [Respondent] is not scheduled to be released until 2022. As of today's hearing, [Respondent] has not been able to formulate a viable alternative care arrangement for the children.

A. Ms. H.

Respondent argues finding of fact 80 is unsupported by the evidence. Specifically, she asserts DSS's concerns about Ms. H. were "unsubstantiated." But

Respondent does not challenge findings of fact 38-40, which establish the reason for the removal of Denise from Ms. H.'s home:

> 38. [Denise] remained in [Ms. H.'s] home from March 6, 2015 until May 19, 2015 at which time the child was removed from [Ms. H.'s] home because [Ms. H.] failed to tell the Department about a possible source of [Denise's] injuries for two weeks and continued to let respondent mother be around the child.
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> 39. While [Denise] and [Respondent] lived in [Mr. and Ms. H.'s] home, [Respondent] told [Ms. H.] that she had dropped [Denise] on three separate occasions. . . . Finally, two weeks after [Respondent] disclosed this information to [Ms. H.], [Ms. H.] felt it necessary to share the information with the assigned CPS social worker, Melissa McClary.
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> 40. After [Ms. H.] disclosed the mother's statements about dropping [Denise] on three separate occasions, the Department moved [Denise] from [Ms. H.'s] home, and assumed nonsecure custody pursuant to a juvenile petition. [Denise] was then placed in a licensed foster where she has remained.

Further, Ms. H. testified she knew Denise had suffered multiple fractures, and she eventually shared the information of the possible cause of Denise's injuries because she considered it "prudent." She also acknowledged her withholding of the information may have impeded DSS's decision-making. This evidence supports the trial court's finding of fact 80.

Respondent also asserts finding of fact 80 fails to support the ultimate findings 26, 79, 86, and conclusion 5 that she has failed to formulate an adequate alternative child care placement for the children. She contends the explanations contained in

finding of fact 80 are "inadequate to disqualify Ms. H. as an alternative caregiver." She argues, with no support, that because finding of fact 80 is written in past tense, it fails "to address why she was not appropriate at the time of the termination hearing." She also argues the trial court failed to indicate it agreed with DSS's findings, as the order states, "[DSS] did not believe Ms. H. would be protective of [Denise] since she was not forthcoming" about a possible cause of Denise's injuries. We find these arguments unpersuasive.

The trial court's finding of fact 80 indicates it did agree with DSS when it found Ms. H. "was not an appropriate alternative child care arrangement due to her failure to disclose to the Department her knowledge about [Denise's] injuries." Finding of fact 80 is supported by evidence, including the uncontested findings of fact 38-40. This Court has repeatedly found "past tense" evidence of unsuitability to be sufficient to support a finding that no appropriate alternative caregiver exists. *See, e.g.*, *In re L.R.S.*, 237 N.C. App. 16, 21, 764 S.E.2d 908, 911 (2014) (finding no error where the trial court determined a potential placement unsuitable due to the couple previously declining placement, even when they testified they were willing and able to care for the child at the termination hearing); *In re N.T.U.*, 234 N.C. App. 722, 735-36, 760 S.E.2d 49, 58-59 (2014) (finding no error where the trial court deemed three possible alternative caretakers unsuitable because one was observed physically disciplining

another child, another "demonstrated that she was not interested," and the third had prior criminal convictions and DSS had concerns regarding her housing).

B. Mr. A.

Respondent challenges a portion of finding of fact 83. She asserts the evidence was insufficient to support the finding that Mr. A. was first put forth as a potential alternative placement at the 21 December 2017 hearing. It is true the evidence to support this fact is limited, at least in the record on appeal. But there is no transcript in the record of the 21 December hearing, and it is the appellant's responsibility to ensure our record includes the information necessary to review her arguments on appeal. *See* N.C. R. App. P. 9(a)(1)(e). Mr. A.'s name does not appear in the documentary record until his inclusion as a potential alternative care placement in the 22 January 2018 order filed after the 21 December 2017 permanency planning review. However, even if the trial court erred in finding this date as the first time Mr. A. was proposed as an alternative placement, "erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). This finding is unnecessary for the trial court's determination.

Respondent further asserts finding of fact 84 is insufficient to support the conclusion that she has failed to provide an alternative care placement. She contends DSS's efforts to contact Mr. A. were "inadequate," and thus DSS failed to comply with

the trial court's 22 January 2018 order that required it to "complete an expedited home study via ICPC on the home of [Mr. A.]"

At the termination hearing, social worker Jan Odom testified to being unable to evaluate Mr. A. as a potential placement for the children because of his failure to provide a letter acknowledging his acceptance of financial responsibility for the children. This letter is required before an Interstate Compact on the Placement of Children ("ICPC") request will be accepted. Ms. Odom acknowledged she previously sent the ICPC request without the letter, and the request was returned. Ms. Odom testified that she had attempted to establish contact with Mr. A. regarding the need for the form, but he had not "made any efforts" to contact her or the agency that performs the ICPC.

Respondent asserts the two attempts on one day to contact Mr. A. by telephone were insufficient. She argues DSS was unable to confirm if Mr. A. received the message left for him, and DSS should have sent a written request for the completion of the form. But it is the responsibility of the parent to take actions to identify alternative child care placements. *See In re L.H.*, 210 N.C. App. at 364, 708 S.E.2d at 197. DSS attempted to contact Mr. A at the phone number provided by Respondent, and there is no evidence in the record to indicate Respondent ever provided any additional phone numbers for Mr. H. This Court has found merely proposing an alternative care placement, without a showing that the proposed party

"was willing or able" to care for the children, is insufficient. *See In re D.J.D.*, 171 N.C. App. at 239, 615 S.E.2d at 32. Clear and convincing evidence supports finding of fact 84.

III. Conclusion

The trial court made appropriate findings of fact, supported by clear and convincing evidence, to conclude that Respondent failed to identify an appropriate alternative care placement for Denise and Andrew, rendering the children dependent. Because we conclude the trial court did not err in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), it is unnecessary to address her arguments under N.C. Gen. Stat. § 7B-1111(a)(1) and (2). *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246. We affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).