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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-537

No. COA22-182

Filed 2 August 2022

Gaston County, Nos. 20-JT 102-103

IN RE: J.M.L., J.H.F, Minor Juveniles.

Appeal by Respondent Mother from Order entered 17 November 2021 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 14 July 2022.

Elizabeth Myrick Boone for petitioner, Gaston County Department of Health and Human Services.

Edward Eldred for respondent-mother.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for Guardian ad Litem.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent Mother appeals from the trial court's Order entered 17 November 2021, terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111. The Record tends to reflect the following:

¶ 2 On 16 April 2020, Gaston County Department of Health and Human Services (DHHS) filed juvenile petitions alleging Joe and his younger brother, John,[1] were neglected and dependent as defined in N.C. Gen. Stat. § 7B. The Petition alleged on or about 14 April 2020, Respondent Mother was arrested after she was found to be in possession of methamphetamine and drug paraphernalia. Joe and John were with Respondent Mother at the time of her arrest and were transported to Columbus County Department of Social Services (DSS). While in their custody, DSS observed both the juveniles were in dirty clothing and appeared to have ringworm. John smelled strongly of urine and had several sores, scratches, and bruises on his legs. Moreover, at the time of the Petition, Joe had twenty-four absences during the 2019-2020 school year and Respondent Mother had charges against her for failure to ensure the juvenile attended school. The Petition also alleged Respondent Mother and Joe's Father had a history of serious domestic violence and substance abuse. Additionally, John's Father had been charged with seven counts of criminal sexual conduct with a minor.

¶ 3 On 16 April 2020, the same day as the Petition, the trial court entered a Non-Secure Custody Order finding Joe and John were:

> exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, custodian, or caretaker has created

[1] Pseudonyms stipulated to by the parties used for protection of the minor children and for ease of reading. *See* N.C. R. App. P. 42(b).

> conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate, supervision or protection.

¶ 4 On 21 July 2020, an adjudication hearing was held, and the trial court adjudicated Joe and John neglected and dependent by Order entered 26 August 2020. The trial court ordered the case be continued for disposition until 11 August 2020. After the disposition hearing on 11 August 2020, the trial court entered a Juvenile Disposition Order on 7 October 2020 concluding that it was in the best interests of the juveniles for Joe and John to remain in the physical and legal custody of DSS. In the Order, the trial court adopted into its Findings of Fact DSS's recommended case plan or actions required of Respondent Parents to correct the conditions that led to the juveniles' removal. The case plan for Respondent Mother included, *inter alia*, refraining from using/abusing all illegal/mind altering substances; completing mental health, substance abuse, and domestic violence assessments; submitting to drug screening; and maintaining safe, appropriate, and stable housing and employment.

¶ 5 On 21 June 2021, DSS filed a termination of parental rights (TPR) petition to terminate Respondent Mother's parental rights to Joe and John. The TPR hearing was initially scheduled for 15 September 2021 but was continued for two days because Respondent Mother did not have transportation to the hearing. The trial court then exercised its discretion to continue the hearing another twenty-four days. On 11

October 2021, Respondent Mother's attorney made a motion for another continuance because Respondent Mother was ill and not present. The trial court denied this motion finding that Respondent Mother had already been granted one continuance for reported illness and had not provided verification of illness on either occasion.

¶ 6 At the hearing, DSS presented evidence that Respondent Mother had failed to consistently communicate with DSS; failed to provide information that she had appropriate housing, employment, or income; failed to participate in recommended treatments for her substance use disorder; failed to complete requested drug screens; and did not regularly attend visits with the juveniles. Respondent Mother's attorney did not present any evidence on Respondent Mother's behalf.

¶ 7 Following the hearing the trial court entered an Order on 17 November 2021 in which it concluded grounds existed to terminate Respondent Mother's parental rights on the grounds of neglect and willfully leaving

> each juvenile in foster care or placement outside of the home for more than twelve (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 each juvenile, within the meaning of G.S. 7B-1111(a)(2).

The trial court further concluded it was in the juveniles' best interests to terminate Respondent Mother's parental rights as:

> 24. That Respondent Respondent/mother has failed to correct the conditions that led to the removal of the juveniles from her

> custody, such that neglect would continue if the juveniles were returned to Respondent/mother's care. The neglect continued through the date of the filing of the underlying petition and is not solely due to the poverty of Respondent/mother.
>
> 25. That the Court has regularly reviewed Respondent/mother's progress toward regaining custody of the juveniles, and the Court has never concluded at any hearing that Respondent/mother has made reasonable progress to warrant returning custody to Respondent/mother.
>
> . . .
>
> 9. That the juveniles do have a bond with Respondent/mother but that bond has diminished since the juveniles have been placed in the Department's custody.
>
> 10. . . . The juvenile [Joe] has expressed a desire to remain in his placement and be adopted and possibly visit with Respondent/mother in the future if her circumstances improve.
>
> 11. That the juvenile [John] . . . does demonstrate a clear parent/child bond with his placement provider and he does regard them as his parents.
>
> 12. That the juveniles are bonded to their current placement. The juveniles do call their placement providers "Mom" and "Dad." The juveniles do rely on their placement providers for love and comfort.

Consequently, the trial court terminated Respondent Mother's parental rights. Respondent Mother filed written Notice of Appeal on 17 December 2021 and was appointed appellate counsel. Respondent's appellate attorney filed a no-merit brief pursuant to Rule 3.1(e) and advised Respondent Mother of her right to file pro se written arguments on her own behalf. Respondent Mother has not filed a pro se brief.

Analysis

¶ 8 Respondent Mother's appellate counsel's no-merit brief states that after reviewing the record on appeal and transcript, he could not identify any issue of merit on which to base an argument for relief.

¶ 9 Rule 3.1(e) states:

> When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no-merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief. In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

N.C. R. App. P. 3.1(e) (2021).

¶ 10 Here, Respondent Mother's appellate attorney complied with Rule 3.1(e) by providing appellant with a copy of his no-merit brief, the transcript, and the printed record on appeal; and notifying the appellant in writing that she could file a pro se brief.

¶ 11 Nevertheless, when a no-merit brief is filed pursuant to Rule 3.1(e), it "will, in fact, be considered by the appellate court and . . . an independent review will be

conducted of the issues identified therein." *In re K.M.S.*, 2022-NCSC-6, ¶ 8. "This Court conducts a careful review of the issues identified in the no-merit brief in light of our consideration of the entire record." *Id.* "On review, this Court must determine whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Humphrey*, 156 N.C. App. 533, 539-540, 577 S.E.2d 421, 426 (2003). "So long as the findings of fact support [such] a conclusion . . . the order terminating parental rights must be affirmed." *Id.*

¶ 12 In this case, Respondent Mother was not present at the TPR hearing and the trial court denied Respondent Mother's attorney's motion to continue. N.C. Gen. Stat. § 7B-803 (2021) provides:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested, or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

Generally, "[a] trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re*

J.B., 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (internal citations omitted). "If, however, the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable" de novo. *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526 (1970).

¶ 13 "[A] parent enjoys a fundamental right 'to make decisions concerning the care, custody, and control' of his or her children under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49 (2000)). Thus, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54, 71 L. Ed. 2d 599, 606 (1986)). "At an adjudicatory hearing, a respondent-parent must be afforded an adequate opportunity to present evidence 'enabl[ing] the trial court to make an independent determination' regarding the facts pertinent to the termination motion." *In re C.A.B.*, 2022-NCSC-51, ¶ 15 (quoting *In re T.N.H.*, 372 N.C. 403, 409, 831 S.E.2d 54 (2019)). "Thus, when a parent is unable to attend a termination hearing as a result of the trial court's refusal to grant a continuance, that parent's constitutional due process rights may be implicated." *Id.*

¶ 14 "Nonetheless, even if a motion to continue implicates a parent's constitutional parental rights, a reviewing court will only review a denial of the motion de novo if the respondent-parent 'assert[ed] before the trial court that a continuance was necessary to protect a constitutional right.' " *Id.* at ¶ 16 (citing *In re S.M.*, 375 N.C. 673, 679, 850 S.E.2d 292 (2020)). "If the respondent-parent fails to assert a constitutional basis in support of his or her motion to continue, 'that position is waived and we are constrained to review the trial court's denial of [a] motion to continue for abuse of discretion.' " *Id.* Here, the Respondent Mother's attorney did not assert a constitutional basis in support of his motion to continue and did not argue that denial of the motion was improper. Thus, we review the denial of the motion for abuse of discretion.

¶ 15 In its Order denying the motion to continue, the trial court found this was the second time Respondent Mother requested a continuance for reported illness without providing verification. Moreover, DSS stated Respondent Mother had not attended any of the prior hearings "[s]o it's not customary for her to be present." Nevertheless, Respondent Mother's attorney was present at the hearing and had the opportunity to cross-examine the witnesses and present opposing evidence. *See In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400 ("When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the

questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal."), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Indeed, Respondent Mother has not demonstrated she suffered from any actual prejudice from the denial of the motion. Thus, the trial court's decision to deny the motion was not manifestly unsupported by reason and the trial court did not err in denying the motion to continue. *See In re E.S.*, 191 N.C. App. at 573, 663 S.E.2d at 478.

¶ 16 Furthermore, we have reviewed the remainder of the Record and are satisfied competent evidence supports the Findings that Respondent Mother willfully left the juveniles in placement outside of the home for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances had been made in correcting those conditions which led to the removal of each juvenile; and Respondent Mother neglected each juvenile within the meaning of N.C. Gen. Stat. 7B-101(15) and N.C. Gen. Stat. 7B-1111(a)(1). These Findings, in turn, support the Conclusion that grounds existed to terminate Respondent Mother's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and (2). Moreover, we are satisfied competent evidence supports the Finding that termination of Respondent Mother's parental rights was in the juveniles' best interests.

Conclusion

¶ 17 Accordingly, we affirm the trial court's Order terminating Respondent Mother's parental rights to Joe and John.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).