

NO. COA14-854

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

IN THE MATTER OF:

Cumberland County

No. 09 JT 299

A.E.C.

Appeal by father from orders entered 10 April 2012, 24 August 2012, 23 August 2012, and 11 April 2014 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 4 December 2014.

*Christopher L. Carr for petitioner-appellee Cumberland County Department of Social Services.*

*Beth A. Hall for respondent-appellee guardian ad litem.*

*Joyce L. Terres, Assistant Appellate Defender, for respondent-appellant father.*

STEELMAN, Judge.

Where the trial court's permanency planning orders did not contain the findings required by N.C. Gen. Stat. §§ 7B-507 and 7B-906.1, the trial court erred in ceasing reunification efforts with father. Where the trial court erred in ceasing reunification efforts, it erred in terminating father's parental rights.

I. Factual and Procedural Background

J.M. (father) began dating E.C. (mother) in 2008. Mother and her children were living with a mutual friend at the time; mother was married, but separated from her husband. After mother had a falling out with her friend, she and her children moved in with father. Mother lived in father's home for only a few weeks.

Mother then moved to Fayetteville, but maintained the relationship with father, who visited her on several occasions. Mother informed father that she was pregnant with his child; father did not believe it, and checked regularly for a "baby bump." On one of father's visits, mother's husband was present, and confronted father. Father told mother to handle the situation with her husband, and left. Father lost contact with mother, and moved to Virginia.

On 16 January 2009, mother gave birth to A.E.C. Her husband was named on the birth certificate as the child's father.

When A.E.C. was less than five months old, she was found home alone; mother did not return to the house for more than

forty-five minutes. On 11 June 2009, Cumberland County Department of Social Services (DSS) filed a petition alleging that A.E.C. and her siblings<sup>1</sup> were neglected and dependent. This petition alleged that mother's husband and a "John Doe" were the putative fathers of A.E.C. At the time, father's identity was unknown. The children were temporarily placed in nonsecure custody with Mr. and Mrs. S., believed at the time to be A.E.C.'s paternal great grandparents. On 27 October 2009, adjudication and disposition hearings were held, at which A.E.C. was adjudicated neglected and dependent based on the petition. On 20 November 2009, the trial court entered its order on adjudication and disposition. Mother's husband was named as A.E.C.'s putative father.

On 5 January 2010, the trial court held its first review hearing. It found that the whereabouts of mother and her husband were unknown, and relieved DSS of reunification and visitation efforts. On 2 February 2010, a permanency planning hearing was held, where the trial court again found that the whereabouts of mother and her husband were unknown. As Mr. S. had suffered a stroke, the court recommended that alternate placement be sought for the children. No permanent plan was

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<sup>1</sup> Mother's children other than A.E.C. are not the subject of the instant case.

established at this time, and DSS was ordered to present a permanent plan at the next hearing.

On 27 April 2010, the trial court held its next permanency planning hearing, at which mother was present. She reported that she was living in Arkansas. The trial court established the permanent plan as relative placement.

On 29 September 2010, the trial court held another permanency planning hearing. A.E.C.'s guardian *ad litem* (GAL) reported that a paternity test had been ordered for mother's husband in another court. A.E.C. had provided a DNA sample. The permanent plan remained relative placement, with a concurrent plan of adoption.

On 5 January 2011, the trial court held another permanency planning hearing. A.E.C.'s GAL reported that, according to the results of the paternity test, mother's husband was not A.E.C.'s father. DSS reported that A.E.C. and her siblings had been moved from the home of Mr. and Mrs. S. into foster care on 10 November 2010. No findings were made that mother's husband was not A.E.C.'s father, and no inquiries were made into her paternity. The trial court changed the permanent plan to adoption.

On 26 April 2011, the trial court held another permanency planning hearing. DSS reported that A.E.C. had been moved to a new foster home on 7 January 2011, and that the foster parents were interested in adoption. The trial court found and concluded that adoption and termination of parental rights should be pursued. This determination was upheld at a subsequent hearing on 1 September 2011.

Sometime in September of 2011, mother was able to acquire father's contact information. At the end of September or beginning of October in 2011, mother contacted father and informed him that he was the father of A.E.C., who was in foster care. Mother gave father the phone number for DSS. Father spoke with A.E.C.'s social worker about paternity testing, and she told father he would need to attend a hearing scheduled for 2 February 2012. Father also contacted the judge's chambers and was given the same information.

On 2 February 2012, father appeared in court for the permanency planning hearing. DSS requested that its petition be amended to include father as A.E.C.'s father. Father requested paternity testing and custody of A.E.C. The court amended the petition and appointed counsel for father. It ordered paternity testing and continued the permanency planning review.

On 26 March 2012, at a permanency planning hearing, the trial court directed that DNA testing be expedited. The court maintained a permanent plan of adoption and ordered DSS to proceed with a termination of parental rights. The trial court further ordered that, should the DNA test confirm that father was A.E.C.'s father, the matter would return to court to address possible visitation rights.

On 26 April 2012, father received notice that he was A.E.C.'s father. On 29 June 2012, an order of paternity was entered in child support enforcement court.

On 2 and 3 July 2012, at another permanency planning hearing, father requested visitation, which was denied. The trial court ordered DSS to perform a complete home study and background check on father. The permanent plan remained adoption and termination of parental rights.

On 18 July 2012, father had back surgery. His hearing scheduled for 26 July 2012 was continued to 30 August 2012 due to his recovery. A permanency planning hearing was held on 1 August 2012, at which father's attorney requested a continuance for his recovery. This request was denied. Father's attorney informed the court that father was living with his ex-wife during his recovery, but the trial court found that this

information had "not been verified." The trial court found that father's whereabouts were unknown, and that he was not cooperating with DSS because he had not provided an address for his home study. The plan remained adoption, with a concurrent plan of custody with relatives, and termination of parental rights.

On 3 October 2012, Harnett County Department of Social Services completed a study of father's home, and recommended placement of A.E.C. with father.

On 23 October 2012, child support court entered a permanent order for child support. Father was ordered to pay \$50.00 per month effective 1 September 2012, to be deducted from his worker's compensation.

On 13 December 2012, DSS filed a petition to terminate parental rights against mother, her husband, and father, in regard to A.E.C. and her siblings. The grounds alleged against father were neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a reasonable portion of the cost of care, failure to establish paternity, and willful abandonment.

On 19 December 2012, the trial court held a permanency planning hearing, at which father was present, but mother was

not. The hearing was continued to allow mother to be present. The trial court denied father's motion to have a Christmas visit with A.E.C.

On 7 March 2013, at another permanency planning hearing, DSS reported the results of Harnett County's positive home study. The trial court made no findings regarding the home study, instead finding that father did not cooperate with the home study process. The court found that visitation with father would not be in A.E.C.'s best interest. The trial court reaffirmed these findings at a later hearing on 21 November 2013.

On 24 February 2014, the trial court began the termination of parental rights proceeding. DSS voluntarily dismissed the petition in regard to A.E.C.'s siblings. The trial court determined that grounds existed to terminate father's parental rights in regard to A.E.C. on the basis of neglect, failure to make reasonable progress toward correcting the conditions leading to A.E.C.'s removal from the home, willful failure to pay a reasonable portion of the cost of care, and willful abandonment. The dispositional phase began on 25 February 2014 and concluded on 26 February 2014. The trial court found that



it was in the best interests of A.E.C. to terminate father's parental rights.

Father appeals from the permanency planning review orders entered on 10 April 2012, 24 August 2012, and 23 August 2012, and also the order terminating his parental rights entered on 11 April 2014.

## II. Certiorari

"At any hearing at which the court orders that reunification efforts shall cease, the affected parent, guardian, or custodian may give notice to preserve the right to appeal that order in accordance with [N.C. Gen.Stat. §] 7B-1001." N.C. Gen. Stat. § 7B-507(c) (2013). According to N.C. Gen. Stat. § 7B-1001 (a) (5) (a):

The Court of Appeals shall review the order to cease reunification together with an appeal of the termination of parental rights order if all of the following apply:

1. A motion or petition to terminate the parent's rights is heard and granted.
2. The order terminating parental rights is appealed in a proper and timely manner.
3. The order to cease reunification is identified as an issue in the record on appeal of the termination of parental rights.

N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2013). In an unpublished opinion, this Court held that, where the review of an order ceasing reunification efforts was not preserved, but the order was raised as an issue in the timely appeal from a termination order, N.C. Gen. Stat. § 7B-1001 permitted the adjudication to be reviewed directly on appeal. *In re J.R.*, \_\_\_ N.C. App. \_\_\_, 759 S.E.2d 712 (2014) (unpublished). Although that case is not binding precedent, we find its reasoning persuasive.

The record in the instant case shows that father did not preserve the right to appeal the permanency planning review orders by giving timely notice of appeal. However, he did appeal the termination order in a timely fashion. In his appeal from the termination order, father cited the review orders as issues he wished to address on appeal. These orders ceased reunification efforts. We hold therefore that father has properly preserved his right to challenge the review orders, and dismiss his petition for the issuance of a writ of *certiorari* as moot.

We examine his challenge to these orders directly on appeal.

### III. Ceasing Reunification

In his first argument, father contends that the trial court, in its permanency planning orders, erred in implicitly ceasing reunification by maintaining a permanent plan of adoption for A.E.C. We agree.

A. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

B. Analysis

Father first contends that, although the trial court did not issue explicit findings in its permanency planning orders ceasing reunification, it implicitly ceased reunification by changing the permanent plan to adoption and ordering the filing

of a petition to terminate parental rights. Father is correct; we have previously held that "where a trial court failed to make any findings regarding reasonable efforts at reunification, the trial court's directive to DSS to file a petition to terminate [a parent's] parental rights implicitly also directed DSS to cease reasonable efforts at reunification." *In re A.P.W.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 741 S.E.2d 388, 390-91, *disc. review denied*, \_\_\_ N.C. \_\_\_, 747 S.E.2d 251 (2013) (citations and quotations omitted). We hold that the trial court's order to file a petition to terminate parental rights implicitly ceased reunification with father.

Although the order need not explicitly cease reunification efforts, it "must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time. The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, \_\_\_ N.C. \_\_\_, \_\_\_, 752 S.E.2d 453, 455 (2013) (quotations omitted). Father contends that the trial court failed to address these statutory concerns in its findings.

#### 1. Reasonable Efforts

Father notes first that an order placing or keeping a child in DSS custody must contain findings regarding the provision of reasonable efforts by DSS "to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined or determines . . . that such efforts are not required or shall cease[.]" N.C. Gen. Stat. § 7B-507(a)(3) (2013). Father became a party to the case in February of 2012, at which time the trial court had already decided to pursue a plan of adoption and termination of parental rights. Despite the revelation of A.E.C.'s biological father, the trial court determined that the existing plan was consistent with A.E.C.'s best interest, and would not change. The trial court made no findings as to whether DSS made reasonable efforts to reunite father with A.E.C.

## 2. Futility

The trial court may order that reasonable efforts at reuniting the child with parents shall cease if it finds:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;

(2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;

(3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or

(4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; has committed sexual abuse against the child or another child of the parent; or has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-507(b). While subsections (2)-(4) do not apply to the facts before us, we acknowledge that the trial court had an obligation to determine that efforts to reunite A.E.C. with father would be futile before it could direct reunification efforts to cease. We have previously held that the trial court cannot merely recite findings of fact; it must "link . . . these findings to the two prongs set forth in N.C. Gen. Stat. § 7B-507(b)(1)." *In re I.R.C.*, 214 N.C. App. 358, 362, 714 S.E.2d 495, 498 (2011). "This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health, safety, and need for a safe, permanent home where the trial court was

required to make *ultimate* findings specially based on a process[] of logical reasoning." *Id.* at 363-64, 714 S.E.2d at 499 (citations and quotations omitted).

In the first order to which father was a party, entered 21 March 2012, the only finding concerning father was that he had not yet taken a DNA test. In the second order, entered 10 April 2012, the only findings concerning father were that he had requested paternity testing, which the court directed to be expedited. In the third order, entered 24 August 2012, the trial court found that father first became aware of A.E.C. in October of 2011 when he was contacted by mother; that he was A.E.C.'s biological father; that he had not provided any support for A.E.C.; and that he should have investigated the birth, as he had reason to believe that mother could be pregnant. The trial court also ordered a home study. In the fourth order, entered 23 August 2012, the court found that father had requested to become a part of A.E.C.'s life; that he and A.E.C. shared no bond; that he was unaware of A.E.C. until October 2011; that DSS was ordered to perform a home study; that father had failed to provide an address for the home study; that he was not present in court and his whereabouts were unknown; that he had not contacted DSS or the court since the last hearing date;

that counsel indicated that he was with his ex-wife while recovering from back surgery; and that he was not cooperating with DSS. None of these findings address the ultimate finding of fact required of the trial court, which is whether reunification with father would have been futile.

### 3. Best Interests

At the conclusion of any hearing in which a child is not returned home, a trial court is required to consider and make findings regarding:

(1) Whether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests.

(2) Where the juvenile's placement with a parent is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established and, if so, the rights and responsibilities that should remain with the parents.

(3) Where the juvenile's placement with a parent is unlikely within six months, whether adoption should be pursued and, if so, any barriers to the juvenile's adoption.

(4) Where the juvenile's placement with a parent is unlikely within six months, whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why.

(5) Whether the county department of social services has since the initial permanency



plan hearing made reasonable efforts to implement the permanent plan for the juvenile.

(6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906.1(e) (2013).<sup>2</sup> Father cites to *In re I.K.*, in which we held that the trial court's findings failed to explain why the child could not be returned home. *In re I.K.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 588, 595-96 (2013). We remanded that case for further findings of fact and conclusions of law. Father also cites to *In re Eckard*, in which the trial court found that the father made a "late appearance" and dismissed him as a candidate for custody because the child was "too bonded to her current placement[.]" *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002). We held that the trial court erred, in that the statute required it to consider custody with a relative, and reversed and remanded for reunification proceedings.

We find the instant case to be controlled by *Eckard*. As the father in *Eckard*, father in the instant case made a late appearance. Despite his appearance and subsequent confirmation as A.E.C.'s biological father, the trial court saw no need to

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<sup>2</sup> Father, in his brief, cites to N.C. Gen. Stat. § 7B-907(b), which has since been repealed. N.C. Gen. Stat. § 7B-906.1(e) contains substantially the same provisions.

change its permanent plan. It failed to determine whether DSS had made reasonable efforts to reunite A.E.C. with father, whether reunification would be futile, or why placement with father was not in A.E.C.'s best interest, in any manner other than the issuance of conclusory statements.

#### 4. Termination Order

Our Supreme Court has held that we are to construe orders to cease reunification together with termination orders. *In re L.M.T.*, \_\_\_ N.C. at \_\_\_, 752 S.E.2d at 457. Specifically, the Court in *L.M.T.* held that "[b]ecause we consider both orders 'together,' incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order." *Id.*

In its termination order, the trial court adopted its findings from its earlier permanent planning orders. Beyond these, the trial court made other findings, but none had any bearing on the issues outlined above. We hold that the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders. We further hold that the trial court erred in ceasing reunification efforts with respect to father.

#### IV. Conclusion

Because the trial court erred in ceasing reunification efforts with respect to father, it erred in entering its order terminating father's parental rights with respect to A.E.C. See *In re A.P.W.*, \_\_\_\_ N.C. App. at \_\_\_\_, 741 S.E.2d at 392. We vacate the order ceasing reunification with father and the order terminating father's parental rights, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges GEER and STEPHENS concur.