

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-896

Filed: 21 March 2017

Pender County, No. 13 JT 31

IN THE MATTER OF: N.G.H.

Appeal by respondent from order entered 15 June 2016 by Judge R. Russell Davis in Pender County District Court. Heard in the Court of Appeals 20 February 2017.

Corbett & Fisler, by Robert H. Corbett, for petitioners-appellees.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for respondent-appellant.

ZACHARY, Judge.

Respondent-mother appeals from an order terminating her parental rights to her daughter, “Natalie,”¹ on the sole ground that respondent-mother willfully left the child in petitioners’ custody and failed to make reasonable progress toward correcting the conditions that led to the removal of Natalie from her custody. For reasons explained below, we reverse the order.

¹ This stipulated pseudonym is used to protect the child’s identity.

Petitioners are husband (“Jason”)—respondent-mother’s cousin—and wife (“Shannon”), and they were granted legal custody of Natalie pursuant to a permanent civil custody order filed 11 October 2012, *nunc pro tunc* 1 October 2012 (the 1 October 2012 order), by the Pender County District Court. On 5 August 2013, petitioners filed a petition to adopt Natalie. On 30 July 2015, petitioners filed a second petition to terminate respondent-mother’s parental rights.² Petitioners attached to the termination petition the order of the Pender County District Court awarding legal custody of Natalie to them. They sought termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), alleging respondent-mother had left the child “in the home and custody” of petitioners for more than twelve months “without making reasonable progress under the circumstances to correct the various issues which caused the Court to grant the Petitioners permanent custody over said child.” They also sought termination of the parental rights of respondent-mother pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), alleging that respondent-mother had willfully abandoned the juvenile for six months next preceding the filing of the petition. Respondent-mother was personally served with the summons and petition on 16 January 2016.

² The parental rights of the child’s biological father were terminated on 28 February 2013 by order of the Pender County District Court. Respondent-mother’s parental rights were also terminated but she appealed and the court’s order terminating her rights was vacated by this Court because petitioners failed to show standing to file the petition. *In re N.G.H.*, 237 N.C. App. 236, 239, 765 S.E.2d 550, 552 (2014).

The court conducted a hearing on 22 April 2016. Respondent-mother failed to appear but she was represented by court-appointed counsel at the hearing. At the call of the case for hearing, counsel stated to the court that he had not seen respondent-mother or heard from her since she was last in court for the earlier termination proceeding, despite having mailed letters to her and attempting to call her, in that her telephone numbers had been disconnected.

The court subsequently filed an order in which it concluded that grounds existed to terminate respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) in that (1) respondent-mother had willfully left the child with petitioners for more than twelve months without showing "any satisfaction, at all, that reasonable progress can be made under the circumstances to correct any of the conditions which previously led" the court to enter the permanent custody order on 1 October 2012 awarding legal custody to petitioners, and (2) respondent-mother's failure to make progress was not based on poverty. The court also concluded that termination of respondent-mother's parental rights was in the Natalie's best interest. The court filed and served the order on 15 June 2016. Respondent-mother filed notice of appeal on 23 June 2016.

At the adjudication phase of a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re*

T.D.P., 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). If it finds the existence of one or more grounds, the court then proceeds to make a discretionary determination as to whether terminating the parent's rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2015). The appellate court reviews an order terminating parental rights to determine whether the findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the adjudicatory conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). The conclusions of law are reviewed *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).

Respondent-mother contends that the court's findings of fact are insufficient to establish that she willfully left Natalie in an out-of-home placement without making reasonable progress in correcting the conditions that resulted in the removal of Natalie from respondent-mother's care. She argues that the findings of fact fail to identify the conditions to be corrected, to demonstrate her knowledge of these conditions, or to show that she has the ability to correct or address them.

Termination of parental rights is permitted under N.C. Gen. Stat. § 7B-1111(a)(2) if the court finds that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 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 the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2) (2015). To terminate parental rights on this basis, a court must conclude, based upon clear and convincing evidence, that the parent (1) willfully left the child in foster care or placement outside the home³ for more than twelve months, and (2) as of the time of the termination hearing, failed to make reasonable progress under the circumstances to correct the conditions that led to the child’s removal. *In re O.C.*, 171 N.C. App. 457, 464-65, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). The trial court’s order must contain

³ This Court has explained that

the legislature did not intend for *any* separation between a parent and a child to trigger the termination ground set forth in [N.C. Gen. Stat.] § 7B-1111(a)(2) (failure to make reasonable progress). Instead, we conclude the statute refers only to circumstances where a court has entered a *court order* requiring that a child be in foster care or other placement outside the home.

In re A.C.F., 176 N.C. App. at 525-26, 626 S.E.2d at 733-34. Here, petitioners were granted permanent custody of Natalie pursuant to the trial court’s 1 October 2012 civil custody order. Accordingly, because Natalie was removed from respondent-mother’s care and resided in an out-of-home placement—petitioners’ home—pursuant to a court order, petitioners were authorized to assert N.C. Gen. Stat. § 7B-1111(a)(2) as a ground for termination of respondent-mother’s parental rights. *C.f. In re L.C.R.*, 226 N.C. App. 249, 251-52, 739 S.E.2d 596, 598 (2013) (the respondent-mother’s parental rights were subject to termination under subdivision 7B-1111(a)(2) because the trial court’s order, which both awarded legal and physical custody of the children to their grandparents and converted the neglect case into a civil custody case, qualified as a “court order” under *In re A.C.F.* and it required the children to reside in an out-of-home placement; also rejecting the respondent-mother’s argument that subdivision 7B-1111(a)(2) “should not be available as a ground for termination in a private termination action” because “the fact that the neglect case had been converted to a child custody case [was] immaterial to a showing of reasonable progress” in correcting the conditions that led to the children’s removal).

adequate findings of fact as to whether the parent acted willfully, and whether the parent made reasonable progress under the circumstances. *In re C.C.*, 173 N.C. App. 375, 384, 618 S.E.2d 813, 819 (2005). “Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.” *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Reasonable progress in correcting the conditions that led to the removal from the home is not shown if the conditions have continued with little or no signs of progress. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995).

The preamble of the order states that the court made its findings of fact “after reviewing all of the pleadings filed in this action, and having carefully considered all of the sworn testimony and such other evidence as was presented by the Petitioners and counsel for the Respondent at the hearing of this matter[.]” The court made the following pertinent findings of fact:

9. That after being called to the witness stand and being placed under oath, the Petitioner, [Jason], first adopted all of the allegations he had previously alleged in the Petition as part of his testimony at this hearing, he then provided further testimony as to what has transpired since the last Court hearing and date the instant Petition was filed with this Court.

10. That based upon the uncontroverted sworn testimony of [Jason], this Court makes the following findings of fact:

a. That the Petitioner, [Jason] is a life-long citizen

and resident of Pender County, North Carolina;

b. That the Petitioner, [Shannon] . . . has been a citizen and resident of Pender County, North Carolina for approximately fifteen (15) years prior to the filing of this action;

c. That the Petitioners currently reside at . . . ;

d. That the Petitioner, [Jason], and the Respondent-mother . . . are cousins;

e. That the Respondent-mother maintained an on-again/off-again romantic relationship for a number of years with the biological father of the subject minor child and, as a result of this relationship, she has given birth to a total of four (4) children; the Respondent-mother's last child was born after the Petitioner's first action was initiated by the Petitioners;

f. That the Department of Social Services in Duplin County, North Carolina took custody of the Respondent-mother's first two (2) children before the subject minor child was conceived and said children have since been placed in the legal custody of the biological father's brother;

g. That the Department of Social Services in Duplin County, North Carolina also took custody of the Respondent-mother's fourth child and legal custody over said fourth child was placed with a third-party Duplin County resident before the Petitioners filed the instant action;

h. That [Natalie], who is the subject minor child of this action, was actually born in the Petitioners' residence . . . and both Petitioners were present for her birth; thereafter, the child was transported to New Hanover Regional Medical Center, located in

Opinion of the Court

New Hanover County, North Carolina; a copy of the child's "Certificate Of Live Birth" is attached to the Petitioners' Petition as Exhibit "A";

i. That from the time of her birth until February 17th, 2012 the subject minor child remained in the primary physical care, custody and control of the Petitioners;

j. That on February 17th, 2012 the Petitioners filed a Complaint seeking legal custody over the subject minor child and, contemporaneous therewith, the Court issued an "Ex-Parte Temporary Custody/Restraining Order" which granted the Petitioners sole and exclusive legal and physical care custody and control over the subject minor child (See Pender County Case No.: 12 CVD 157);

k. That the Petitioners filed the above-referenced Complaint after learning that the Respondent-mother was planning to leave the Petitioners' residence with the subject minor child and resume her relationship with the child's biological father;

l. That on October 1st, 2012 the Court entered a "Permanent Custody Order" in the above-referenced custody action in favor of the Petitioners against both the Respondent-mother and biological father of said child; finding that both biological parents had acted contrary to their Constitutionally protected rights as parents and provided directives for both biological parents to comply with before either party might file a subsequent Motion seeking a modification of said Order; a copy of said Permanent Custody Order is attached to the Petitioners' Petition in the instant action as Exhibit "B";

m. That since entry of the above-referenced Permanent Custody Order in Pender County Case No.: 12 CVD 157, the biological father's parental

Opinion of the Court

rights over the subject minor child were terminated by this Court on February 28th, 2013;

n. That since entry of the above-referenced Permanent Custody Order . . ., the Respondent-mother has not filed any subsequent Motion(s) in that case seeking a modification of said Order nor provided the Court with any evidence of her having complied with any of the Court's directives before doing so;

o. That since the birth of the subject minor child, the Respondent-mother has not offered nor provided any financial support, whatsoever, for the subject minor child;

p. That since entry of the above-referenced Permanent Custody Order, the Respondent-mother's visitation with the subject minor child was minimal, sporadic and lasted less than an hour; and most of these visits were initiated and transportation facilitated by the Petitioners;

q. That since the last hearing was held by this Court on the Petitioners' first Petition . . . the Petitioners have had little or no contact with the Respondent-mother; the Petitioner, [Jason], could only recall the Respondent-mother having contact with the subject minor child on one (1) occasion and his having one telephone conversation with the Respondent-mother wherein he was able to notify her of the death of their Uncle;

r. That as far as the Petitioners are aware, the Respondent-mother still does not have any permanent residence or employment.

The court then made findings of fact regarding the petitioners' home, employment and family, and the child's best interest.

“The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law.” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). We agree with respondent-mother that the findings of fact in the present case are inadequate because they do not identify the conditions that resulted in the involuntary removal of Natalie from respondent-mother. The termination order and record before us simply do not provide that information. At best, the findings show that Natalie was placed in petitioners’ custody because respondent-mother was going to take Natalie and move in with Natalie’s father and that the parents had acted inconsistently with their rights as parents, but the findings do not explain how. Allegation of a threat to take one’s child and reside with the child’s other parent, without any further showing of “conditions that pose a serious threat to a juvenile’s welfare,” is insufficient to invoke the protection of a juvenile court and potential termination of parental rights under Chapter 7B. *In re Stumbo*, 357 N.C. 279, 287, 582 S.E.2d 255, 261 (2003).

Moreover, it is unclear from the findings of fact that respondent-mother was aware of the conditions or that she had the ability to correct the conditions, whatever they may have been. The 1 October 2012 permanent custody order to which references are made does not contain a certificate of service to show that it was served

on respondent-mother and the court's findings of fact in the termination order do not show that she was served with it. The order makes reference to an order entered 5 April 2012 containing unspecified "directives" with which respondent-mother and Natalie's father were to comply. The 5 April 2012 order is not in the record on appeal. The 1 October 2012 order narrates that neither of Natalie's parents nor counsel for the parents were present at the hearing giving rise to the order.

Even if it is assumed that respondent-mother received the permanent custody order, nowhere in the order is language suggesting that the failure to comply with the court's "directives" could result in termination of parental rights. "To allow the termination ground set forth in G.S. § 7B-1111(a)(2) to be triggered no matter what the cause for a child's separation from his parent is inconsistent with affording parents notice that they are at risk of losing their parental rights." *In re A.C.F.*, 176 N.C. App. 520, 525, 626 S.E.2d 729, 733 (2006). Because an action was not pending in juvenile court at the time of the permanent custody order, respondent-mother did not have the benefit of her right to counsel afforded by N.C. Gen. Stat. § 7B-602(a). We further note that if lack of employment or permanent housing formed the basis for terminating the parental rights of respondent-mother, N.C. Gen. Stat. § 7B-1111(a)(2) expressly provides that parental rights may not be terminated on this ground based on a parent's poverty.

The order before us is similar to the order we found deficient in *In re Nesbitt*, 147 N.C. App. 349, 555 S.E.2d 659 (2001), in which we held that the court's findings were insufficient to support a conclusion that the mother's rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We noted that, similar to the case at bar, the record was unclear as to what conditions resulted in the removal of the child and needed to be corrected before the child could be returned. We find the following language from *Nesbitt* applicable to the present case:

While we recognize that the trial court is perhaps in the best position to evaluate the evidence in these very sensitive cases and are mindful of the need for permanency for young children, we believe that the law requires compelling evidence to terminate parental rights. The permanent removal of a child from its natural parent requires the highest level of scrutiny and should only occur where there is compelling evidence of potential risk of harm to the child or their well being. This Court would not hesitate to support the drastic judicial remedy of termination of parental rights if it was clear from the record that grounds exist to do so. This record fails to support such grounds.

Id. at 361, 555 S.E.2d at 667. In summary, an order that terminates parental rights on the ground that the parent willfully failed to correct the conditions that led to the removal of the child must adequately identify the conditions that were to be corrected; otherwise, the appellate court cannot determine whether the parent acted willfully or made reasonable progress. The present order fails to satisfy this requirement.

IN RE: N.G.H.

Opinion of the Court

Because we have determined that the order must be reversed, we need not consider respondent-mother's remaining arguments.

The order terminating respondent-mother's parental rights is reversed.

REVERSED.

Judges CALABRIA and INMAN concur.

Report per Rule 30(e).