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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1251

Filed: 5 September 2017

Catawba County, No. 15 JT 36

IN THE MATTER OF: A.L.H.

Appeal by respondent from order entered 21 September 2016 by Judge Wesley W. Barkley in Catawba County District Court. Heard in the Court of Appeals 18 July 2017.

Wesley E. Starnes for petitioner-appellee.

N. Elise Putnam for respondent-appellant.

DIETZ, Judge.

Respondent appeals the trial court's order terminating her parental rights to her minor child, Amber.¹ Respondent argues that the trial court lacked subject matter jurisdiction to terminate her rights due to a defect in the verification attached to the petition. She also contends that the record does not support the trial court's determination of neglect by abandonment.

¹ We use a pseudonym to protect the child's identity.

As explained below, we reject Respondent’s jurisdictional argument. Petitioner met his burden to show that the verification attached to the petition attested to the truth of the petition’s allegations, despite a clerical error that caused the verification to reference a nonexistent “motion and affidavit for contempt” rather than “petition to terminate parental rights.”

We also reject Respondent’s argument concerning the sufficiency of the evidence supporting adjudication based on neglect by abandonment. At the time of the hearing, Respondent had not seen or spoken to her child for well over a year, despite knowing where she was and how to contact her. This, combined with other relevant evidence in the record, supports a finding of willful neglect by abandonment. But, as Petitioner concedes, the trial court’s order lacks the necessary findings and conclusions of willful neglect by abandonment (although the court’s statements in open court indicate the court intended to make those findings and conclusions). We therefore vacate the trial court’s order and remand for further proceedings. We leave it to the trial court, on remand, to determine whether a new hearing is necessary or whether the court can decide the matter based on the existing record.

Facts and Procedural History

Petitioner is Amber’s father. Amber was born in 2007 during the parties’ marriage, which ended in divorce in 2009. The parties entered into a parenting agreement that provided Petitioner with primary custody of Amber and provided

Respondent with custody on alternating weekends and for the final three weeks of each July. The trial court approved the agreement and entered a corresponding order.

On 23 January 2014, the trial court ordered Respondent to pay monthly child support of \$50.00 effective 1 September 2013, and to provide health insurance for Amber. On 4 February 2015, Petitioner filed a motion for modification of custody alleging that Respondent was not fully exercising her custodial rights under the parenting agreement.

On 5 February 2015, Petitioner filed a petition to terminate Respondent's parental rights to Amber on the grounds of (1) neglect by abandonment and (2) willful failure to pay for Amber's care, support, and education as required by the trial court's 23 January 2014 child support order. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (4).

Respondent took Amber to the beach one weekend in March 2015. After Amber returned from that beach trip, Petitioner moved for emergency custody, alleging that Respondent had inflicted multiple bruises on Amber while the child was in her care. After a hearing on 31 March 2015, the trial court entered a temporary custody order on 8 April 2015, limiting Respondent's visitation with Amber to Sundays from 12:00 p.m. to 6:00 p.m. and requiring supervision by a family friend.

The court later entered a custody order awarding Respondent Sunday visitation with Amber from 12:00 p.m. to 6:00 p.m. supervised by any licensed driver, as well as nightly phone calls with the child at 7:00 p.m. The court also ordered

Respondent to complete a parenting class through the Catawba County Department of Social Services and offered to restore her rights under the parenting agreement upon proof of completion.

The trial court held a hearing on the petition to terminate Respondent's parental rights on 22 August 2016. On 21 September 2016, the court entered a written order terminating Respondent's parental rights. Respondent timely appealed.

Analysis

I. Subject Matter Jurisdiction

Respondent first argues the trial court lacked subject matter jurisdiction to enter the termination order because the petition to terminate parental rights lacked a proper verification. Although Respondent did not raise this claim in the trial court, she contends—and we agree—that “[t]he issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.” *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895, 896–97 (2006).

Section 7B-1104 of the General Statutes states that a petition to terminate parental rights “shall be verified by the petitioner or movant.” N.C. Gen. Stat. § 7B-1104. This is a jurisdictional requirement: “verified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter.” *In re Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993).

Verification in this context means a sworn statement that the allegations in the petition “are true to the knowledge of the person making the verification.” N.C. Gen. Stat. § 1A-1, Rule 11(b). Thus, to confer jurisdiction on the trial court in a termination of parental rights case, the petition to terminate parental rights must include a verification that the allegations in the petition are true to the knowledge of the person who signs the verification.

The petition at issue here includes an attached verification page signed by Petitioner. But Respondent notes that the verification references “the foregoing Motion and Affidavit for Contempt,” not “the foregoing Petition to Terminate Parental Rights.” The relevant portion of the verification reads as follows:

[Petitioner], being first duly sworn, deposes and says that he is the Petitioner in the foregoing action; that he has read . . . the foregoing *Motion and Affidavit for Contempt* and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters, he believes them to be true.

(Emphasis added.)

Petitioner concedes that the reference to “the foregoing Motion and Affidavit of Contempt” is a mistake; apparently, Petitioner’s trial counsel used a verification page from an earlier proceeding as a template and failed to change the wording from “Motion and Affidavit for Contempt” to “Petition to Terminate Parental Rights.” Respondent argues that, whether it is an innocent mistake or not, the failure to

correctly identify the pleading that Petitioner sought to verify deprived the trial court of jurisdiction to adjudicate the termination issue.

We reject this argument. First, aside from the mistaken reference to a “Motion and Affidavit for Contempt,” the verification satisfied the requirements of Rule 11(b)—it was attached to the petition, identified Petitioner by name, included the necessary attestation, and carried the same signature and date as the petition.

Moreover, the verification referenced the “*foregoing* Motion and Affidavit for Contempt.” In this context, “foregoing” means the thing “just mentioned” or “preceding” the verification. *Foregoing*, *Oxford English Dictionary* (2nd ed. 1989). Thus, the verification indicates that it applies to the document to which it was attached—the Petition to Terminate Parental Rights. Moreover, Petitioner did not file a Motion and Affidavit for Contempt on the date indicated in the verification in this proceeding or any other, which rebuts any suggestion that this verification references a different, existing pleading.

Finally, Respondent’s counsel cross-examined Petitioner at the termination hearing in an effort to show that Petitioner had verified the accuracy of allegations that he knew to be untrue at the time. In the course of that cross-examination, Petitioner confirmed that the verification applied to the Petition to Terminate Parental Rights:

[RESPONDENT’S COUNSEL]: Isn’t this your verified signature?

[PETITIONER]: Yes, it is.

[RESPONDENT'S COUNSEL]: So you signed this without knowing what [the petition] meant?

[PETITIONER]: Well, to the best of my knowledge, I understood what it meant.

This testimony demonstrates that Petitioner completed the verification knowing that he was attesting to the truth of the allegations contained in the Petition to Terminate Parental Rights.

Under the circumstances, Petitioner has met his burden to show that the mistaken reference to a Motion and Affidavit for Contempt was merely a clerical error that resulted from his trial counsel's use of a verification template. *See T. C. May Co. v. Menzies Shoe Co.*, 186 N.C. 144, 151, 119 S.E. 227, 230 (1923). Because the verification satisfied the requirements of N.C. Gen. Stat. § 7B-1104, we hold that it was sufficient to confer jurisdiction on the trial court notwithstanding this clerical error.

II. Neglect by Abandonment

Respondent next claims the trial court erred in determining that grounds existed for termination of her parental rights based on neglect by abandonment under N.C. Gen. Stat. § 7B-1111(a)(1). Petitioner concedes in his appellate brief that the trial court's order fails to include the specific statutory ground on which the court based its decision to terminate parental rights. Moreover, at argument, the parties

acknowledged that the trial court's order does not contain any express findings concerning the willfulness of Respondent's conduct. Thus, at a minimum, we must vacate the order and remand for the trial court to make the necessary findings and conclusions. But Respondent argues that we should go further and hold that, on the record before us, there is insufficient evidence to support termination based on neglect by abandonment. As explained below, we reject this argument.

A trial court can terminate parental rights based on neglect by abandonment under N.C. Gen. Stat. § 7B-1111(a)(1) if the court finds that the parent's conduct manifested a willful neglect and failure to perform her natural and legal parental responsibilities. *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015). "If a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* Thus, to establish neglect by abandonment under section 7B-1111(a)(1), the court must find by clear, cogent, and convincing evidence that the parent's action or inaction leading to abandonment was willful. *Id.*

Here, Respondent did not maintain a parental relationship with Amber for nearly two years leading up to the termination hearing. In early 2015, the trial court revised Respondent's visitation to allow for Sunday visits from 12:00 p.m. to 6:00 p.m., and also permitted daily phone calls between Respondent and her daughter at 7:00

p.m. Nevertheless, from March 2015 until the termination hearing in August 2016, Respondent did not go to see her child—despite this court-ordered opportunity for visitation every weekend. As a result, Respondent did not visit her daughter *at all* for well over a year leading up to the termination hearing. Respondent’s failure to visit her daughter lasted so long that Amber’s court-appointed guardian ad litem reported Amber could no longer remember the last time she saw or spoke to Respondent. During this same time period, Respondent also did not send cards or gifts, or celebrate any special occasions with her child such as birthdays or holidays. Respondent also regularly failed to make her child support payments.

To be sure, Respondent testified that she tried calling her daughter on the phone at 7:00 p.m. on some nights, and Petitioner conceded that he had refused to answer some of Respondent’s calls. But this alone does not preclude a finding of willful abandonment by the trial court. The record demonstrates that Respondent had a court-ordered right to both visitation and regular phone conversations but, despite being represented by counsel in the termination proceeding, took no steps to enforce these rights or develop a meaningful relationship with her daughter in advance of the termination hearing. After being served with notice that Petitioner sought to terminate Respondent’s parental rights, Respondent’s continued failure to take steps to create or maintain a relationship with her daughter—a child who could not even remember the last time she saw her mother—suggests a willful decision to

relinquish all parental claims and abandon the child. *See C.J.H.*, 240 N.C. App. at 503–04, 772 S.E.2d at 92.

In short, we hold that there is evidence in the record from which the trial court *could have* found by clear, cogent, and convincing evidence that Respondent willfully abandoned her child, thus permitting the court to conclude that termination was appropriate under N.C. Gen. Stat. § 7B-1111(a)(1) based on neglect by abandonment. We also note that, from our review of the hearing transcript, the trial court likely *intended* to make the necessary findings and conclusions in its written order. Accordingly, we reject Respondent’s argument that we must reverse the termination order because the record does not support termination of Respondent’s parental rights.

But, as the parties concede, the trial court’s written order does not contain the necessary findings and conclusions required by law. We therefore remand this matter for further proceedings. The trial court, in its discretion, may determine whether to conduct a new hearing or whether the case may be decided on the existing record.

Conclusion

For the reasons discussed above, we vacate the trial court’s order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and INMAN concur.

IN RE: A.L.H.

Opinion of the Court

Report per Rule 30(e).