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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-466

Filed: 7 November 2017

Brunswick County, No. 14 JT 1

IN THE MATTER OF: A.C.-H.

Appeal by respondent-mother from orders entered 22 February 2017 by Judge Fred Gore in Brunswick County District Court. Heard in the Court of Appeals 19 October 2017.

Morgan & Carter PLLC, by Michelle F. Lynch, for petitioner-appellee guardian.

Richard Croutharmel, for respondent-appellant mother.

ZACHARY, Judge.

Respondent-mother appeals from the trial court's adjudication and disposition orders terminating her parental rights to her son, A.C.-H. ("Andy").¹ After careful review, we reverse the orders of the trial court.

On 2 January 2014, the Brunswick County Department of Social Services ("DSS") filed a juvenile petition alleging that Andy was a neglected and dependent juvenile. The petition was based on, *inter alia*, the following allegations: on 2 January

¹ A pseudonym is used to protect the identity of the juvenile and for ease of reading.

2014, respondent-mother was arrested and charged with driving while intoxicated (“DWT”), careless and reckless driving, speeding, and child endangerment; at the time of her arrest, respondent-mother had a blood alcohol concentration of 0.22. Andy was in the car at the time of the incident. On 9 January 2014, DSS obtained nonsecure custody of Andy.

On 3 March 2014, the trial court entered an adjudication order concluding that Andy was a neglected juvenile based on the respondent-mother’s stipulation to the allegations contained in the petition pertaining to her DWI. In a separate disposition order, the trial court concluded that it was in Andy’s best interest to remain in DSS custody. The trial court found that respondent-mother had already executed a case plan with DSS, had begun substance abuse treatment, and was compliant with her visitation schedule with Andy.

On 9 July 2014, Andy was placed with Susan H. Susan had been in a relationship with respondent-mother at the time of Andy’s birth and helped care for him as an infant. During this time, however, respondent-mother began abusing alcohol and prescription drugs, and she eventually entered a rehabilitation program. Susan ended her relationship with respondent-mother in July 2013, after respondent-mother returned from the rehabilitation program and relapsed three days later. Susan nonetheless continued to be a part of Andy’s life.

In an order entered 12 December 2014, the trial court ceased reunification efforts with respondent-mother. On 5 June 2015, the trial court granted guardianship of Andy to Susan. The court subsequently waived further review hearings in the juvenile case.

On 1 December 2015, Susan filed a petition to terminate respondent-mother's parental rights to Andy, alleging the following grounds for termination: neglect; willful failure to make reasonable progress towards correcting the conditions that led to removal of the juvenile from the home; willful failure to provide financial support; dependency; and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (3), (4), (6), (7) (2015). Susan later served the unknown father of Andy by publication and filed an amended termination petition on 25 July 2016. Following a hearing, the trial court entered an order on 22 February 2017 concluding that grounds for termination of respondent-mother's parental rights existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), (5), and (6). In a separate disposition order, the court concluded that termination of respondent-mother's parental rights was in Andy's best interest. The trial court did not terminate the parental rights of Andy's unknown father. Respondent-mother appeals.

On appeal, respondent-mother challenges the trial court's conclusion that grounds existed for termination of her parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of

eleven enumerated grounds. We review the trial court's order to 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 Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). In the instant case, the trial court terminated respondent-mother's parental rights to her child pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (3) (willful failure to provide a reasonable portion of the cost of care for the juvenile), (5) (failure to legitimate), and (6) (dependency). We address respondent-mother's arguments as to each ground in turn.

FAILURE TO SUPPORT

We first address the trial court's conclusion that respondent-mother's parental rights could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). This subsection provides that a parent's rights may be terminated where

[t]he juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3)(2015). Respondent-mother argues that this subsection does not apply to her because Susan was awarded guardianship of Andy and, therefore, Andy was not in the custody of DSS. We agree. The plain language

of subsection (a)(3) only applies to juveniles who are in the custody of DSS or a similar entity. Here, it is undisputed that Susan had guardianship of Andy at the time the petition was filed. Therefore, he was no longer in DSS custody.

We also reject Susan’s argument that the award of guardianship transferred only physical custody of Andy, and that, therefore, DSS retained legal custody of Andy at the time the petition was filed. As an initial matter, we note that Susan fails to cite any pertinent statutory authority or case law in support of this assertion.

Moreover, our juvenile code supports the opposite assertion—that an award of guardianship transfers legal custody to the guardian. “Legal custody refers ‘generally to the right and responsibility to make decisions with important and long-term implications for a child’s best interest and welfare.’ ” *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (quoting *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006)). Here, Susan was appointed as Andy’s guardian pursuant to N.C. Gen. Stat. § 7B-600, which provides, in pertinent part, that a trial court may appoint a guardian for the juvenile “[i]n any case . . . when the court finds it would be in the best interests of the juvenile[.]” N.C. Gen. Stat. § 7B-600(a) (2015). Section 7B-600(a) also provides that “[t]he guardian *shall have the care, custody, and control of the juvenile* or may arrange a suitable placement for the juvenile and may represent the juvenile in legal actions before any court.” *Id.* (emphasis added). The subsection then goes on to list a number of actions to which the guardian may consent on behalf

of the juvenile—all of which implicate important and long-term decisions for a child’s best interest and welfare. *Id.* Given that Susan has the care, custody, and control of the juvenile, as well as the right and responsibility to make important decisions for Andy, we conclude that she was given legal custody of Andy by virtue of the guardianship appointment. Accordingly, we reject Susan’s argument and conclude that the trial court erred in terminating respondent-mother’s parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(3).

FAILURE TO LEGITIMATE

Next, we turn to the trial court’s conclusion that respondent-mother’s parental rights to Andy could be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). Under this subsection, a trial court may terminate the parental rights to “[t]he father of a juvenile born out of wedlock” if he “has not, prior to the filing of a petition or motion to terminate parental rights,” taken one of the five statutorily-required steps to legitimate the juvenile. *Id.* Based on the plain language of Section 7B-1111(a)(5), it is undisputed that this subsection applies only to fathers. Indeed, Susan does not dispute the fact that it was improper for the trial court to terminate respondent-mother’s parental rights based upon this ground.² We therefore hold that the trial

² Susan, however, argues that the trial court “meant to terminate the parental rights of the unknown father pursuant to N.C. Gen. Stat. § 7B-1111(a)(5)” and mistakenly failed to include the unknown father in the order. Susan therefore asks this Court to remand the order to the trial court to make appropriate findings of fact. We are not persuaded. The order makes no mention of the unknown father, and we decline to infer the trial court’s intent to include him. Moreover, because

court erred in terminating respondent-mother's parental rights based upon N.C. Gen. Stat. § 7B-1111(a)(5).

DEPENDENCY

Next, we address the trial court's conclusion that termination of respondent-mother's parental rights to Andy was justified based upon dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). This subsection provides for termination of parental rights if

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) (2015) (emphasis added). In determining whether a juvenile is dependent, the trial court is required to "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).

Susan essentially argues for a reversal of the order in part, the proper method to raise this argument would have been a cross-appeal. *Williams v. N.C. Dep't of Econ. & Cmty. Dev.*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995). Susan has failed to cross-appeal from the order and therefore waived review of this issue.

Respondent-mother argues, and Susan concedes, that the dependency ground does not apply to respondent-mother's case. The trial court's order lacks any findings regarding the availability of an alternative child care arrangement, the second prong of a dependency determination. We therefore conclude that the trial court erred in terminating respondent-mother's parental rights based on dependency. *See In re N.B.*, 200 N.C. App. 773, 688 S.E.2d 713 (2009).

Susan argues, however, that the trial court's reference to N.C. Gen. Stat. § 7B-1111(a)(6) is a clerical error, and the trial court "meant to cite" the subsection regarding willful abandonment, N.C. Gen. Stat. § 7B-1111(a)(7). She maintains that the trial court's intent is evidenced in its findings of fact—one of which uses the statutory language pertaining to willful abandonment. Thus, Susan requests that this Court remand the order for correction of the purported clerical error.

We are not persuaded, as one of the trial court's findings of fact also uses the statutory language pertaining to dependency. Additionally, the trial court's oral rendering references both subsection (a)(6) and the statutory language of dependency. Nothing in the trial court's conclusions of law offers any indication that the trial court intended to terminate respondent-mother's parental rights based on willful abandonment. The trial court's ultimate conclusion of law regarding grounds for termination merely references statutory subsections, and given the lack of detail, we decline to infer that the court's reference to (a)(6) was a clerical error. Therefore, we

find that the trial court fully intended to find dependency as a ground for termination. Accordingly, we decline Susan's request for remand, and conclude that the trial court erred in finding dependency as a ground for termination.

NEGLECT

Finally, we address the trial court's finding of neglect as a ground for termination. Our juvenile code provides for termination based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1). Neglect, in turn, is defined as follows:

Neglected juvenile. – A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare. . . .

N.C. Gen. Stat. § 7B-101(15) (2015). Generally, "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (internal citation omitted). Under such circumstances, "a prior

adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect.” *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). “The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.” *Id.* at 715, 319 S.E.2d at 232. Therefore, a trial court may terminate parental rights based upon prior neglect of the juvenile only if “the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

Respondent-mother argues that the trial court’s termination based on neglect is in error because the findings of fact are based on past conditions and the court failed to consider respondent-mother’s changed circumstances or the likelihood of repetition of neglect. We agree.

Here, the trial court’s pertinent conclusion of law states that “grounds exist for termination of parental rights of the Respondent pursuant to N.C.G.S. 7B-1111(a)(1)[.]” The only findings of fact in support of the trial court’s conclusion are the following:

8. The Respondent has previously been found to have neglected the minor child in court file no. 14JA01.
.....
11. The Respondent has a history of illegal substance

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abuse since the birth of the minor child.

12. The Respondent has spent time, on different occasions in rehab and jail since the birth of the minor child.
13. The Respondent was recently on probation for possession of heroin.
14. Since the filing of this action, the Respondent has pending felony identity theft charges and pending misdemeanor probation violation charges.
15. That the Respondent has an unstable housing situation in that she has lived in an efficiency apartment that is not suitable for a child and for months prior to this hearing, she was living in a motel.
16. That the Respondent has numerous ads on the website, "Backpage," wherein she is nude or has very little clothing on. When questioned by counsel, the Respondent stated the ads were for yard work or housework for pay. Upon further questioning, she stated she did not do much yard work.

Although the trial court made a finding of past neglect, the order is devoid of any findings of fact regarding the two-pronged analysis described in *Ballard* and subsequent cases. The order contains no findings that it assessed the likelihood that Andy would be neglected if returned to respondent-mother's custody. This Court has previously found reversible error where the trial court terminated a parent's parental rights based on neglect but failed to make a finding that repetition of neglect was

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likely if the juvenile was returned to the parent. *In re E.L.E.*, ___ N.C. App. ___, ___, 778 S.E.2d 445, 450-51 (2015).

Furthermore, the trial court's neglect determination was based mostly on the prior adjudication of neglect, respondent-mother's historical struggles with substance abuse, and a handful of findings of fact that may or may not reflect respondent-mother's actions at the time of the hearing. Reliance on historical neglect has been repeatedly disavowed by our appellate courts. *See, e.g., Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. And, regarding the specificity of findings of fact necessary to sustain a conclusion of law, our Supreme Court has stated:

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each . . . link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). The trial court's findings of fact must have the specificity necessary "to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

While the trial court may have hinted at the likelihood of repetition of neglect in its findings, it failed to draw the ultimate conclusion necessary to find neglect.

First, the findings regarding respondent-mother's substance abuse and treatment appear to be entirely historical—none of them detail her condition at the time of the hearing. Second, while the finding regarding the website “Backpage” appears to suggest inappropriate conduct on the part of respondent-mother, it fails to describe the manner in which the website or respondent-mother's conduct were inappropriate, or to draw the necessary inference that such conduct affected Andy's well-being. That leaves the findings that respondent-mother had a history of unstable housing, most recently lived in a motel, and has pending criminal charges. Given that the trial court failed to make any ultimate findings linking respondent-mother's conduct at the time of the hearing to the likelihood of repetition of neglect or changed circumstances, we find the remaining findings insufficient to uphold the trial court's neglect conclusion. Because the trial court's order lacks necessary findings of fact, we conclude that the court erred in terminating respondent-mother's parental rights based on neglect.

Consequently, we hold the trial court erred in adjudicating the existence of grounds for termination of respondent-mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (3), (5), and (6). Without the adjudication order concluding that grounds exist for termination, the trial court's disposition order likewise cannot stand. Accordingly, we reverse the trial court's adjudication and disposition orders terminating respondent-mother's parental rights.

REVERSED.

IN RE: A.C.-H.

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Judges BRYANT and STROUD concur.

Report per Rule 30(e).