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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1375

Filed: 17 July 2018

Duplin County, No. 16 JT 44

IN THE MATTER OF: J.P.

Appeal by respondent from orders entered 29 July 2016 and 12 September 2017 by Judge Sarah C. Seaton in Duplin County District Court. Heard in the Court of Appeals 28 June 2018.

Elizabeth Myrick Boone for petitioner-appellee Duplin County Department of Social Services.

K&L Gates LLP, by Hillary Dawe, for guardian ad litem.

Jeffrey L. Miller for respondent-appellant.

DAVIS, Judge.

M.R. (“Respondent”) appeals from the trial court’s order terminating her parental rights to her son, J.P. (“Julio”).¹ On appeal, Respondent argues that (1) the trial court erred by terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), and (a)(3); and (2) she was deprived of effective assistance of

¹ Pseudonyms and initials are used throughout this opinion for the protection of the minor child and for ease of reading.

counsel. After a thorough review of the record and applicable law, we vacate and remand for further proceedings.

Factual and Procedural Background

Respondent is the mother of Julio, who was born on 9 December 2014.² Respondent has an extensive history with Child Protective Services in Duplin, Wayne, and Lenoir Counties due to her long-term use of methamphetamines. Prior to the filing of the juvenile petition by Duplin County Department of Social Services (“DSS”) in the present case, Respondent had lost custody of her six other children as a result of her lengthy history of substance abuse.

On 14 April 2016, DSS received a report that Respondent was once again using methamphetamines. On 19 April 2016, DSS filed a petition alleging that Julio was a neglected juvenile due to Respondent’s substance abuse. The petition stated that: (1) Respondent had tested positive for methamphetamines on 5 April 2016 in Lenoir County; (2) Respondent appeared at DSS while under the influence of drugs on 18 April 2016; and (3) Respondent had admitted to DSS that her drug use was a disease, that she had been using drugs for approximately 22 years, and that she had relapsed about three or four months earlier.

DSS also alleged in the petition that a safety plan had been put in place to allow Julio to remain in Respondent’s home under the condition that she not use

² Julio’s father is not a party to this appeal.

drugs in his presence and that she be supervised by individuals approved by DSS. However, Respondent subsequently admitted to being under the influence of methamphetamines around Julio. DSS expressed concern that the safety resources put in place to protect Julio allowed Respondent to provide care for Julio while under the influence of methamphetamines. Furthermore, DSS stated that Respondent threatened to both abscond with Julio and commit suicide if Julio was removed from her care. On 20 April 2016, DSS obtained non-secure custody of Julio and placed him in foster care.

A hearing was held before the Honorable Sarah C. Seaton in Duplin County District Court on 30 June 2016. On 29 July 2016, the trial court entered an order (the “Adjudication Order”), adjudicating Julio to be a neglected juvenile and adopting a permanent plan of reunification.

On 23 September 2016, the trial court entered a review order in which it found that Respondent had (1) failed to fully comply with her case plan; and (2) admitted to using illegal substances. Consequently, the trial court relieved DSS of further reunification efforts. On 30 September 2016, the trial court entered a permanency planning review order in which it changed the permanent plan for Julio to a concurrent plan of custody with a court-approved caretaker and adoption. The court also directed DSS to file a petition to terminate Respondent’s parental rights within sixty days.

On 29 November 2016, DSS filed a petition to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (a)(3) (failure to pay support), and (a)(6) (dependency). A hearing (the "TPR hearing") was held on 23 August 2017. A DSS social worker testified at the TPR hearing. Respondent did not attend the TPR hearing although her attorney was present.

On 12 September 2017, the trial court entered an order (the "TPR Order") in which it determined that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2) (failure to make reasonable progress) and (a)(3). The trial court further concluded that it was in Julio's best interests that Respondent's parental rights be terminated. Respondent filed a notice of appeal from the Adjudication Order and the TPR Order.

Analysis

N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citation omitted). We review the trial court's conclusions of

law *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).

I. N.C. Gen. Stat. § 7B-1111(a)(1) (Neglect)

Respondent first argues that the trial court erred by terminating her rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). A “[n]eglected juvenile” is

[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; . . . or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2017).

Generally, “[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child at the time of the termination proceeding.” *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citation and quotation marks omitted). When, however, as here, “a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.” *Id.* (citation and quotation marks omitted). “In those circumstances, a trial court may find that grounds for termination

exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect.” *Id.* (citation and quotation marks omitted).

Here, the trial court restated in its findings both the issues that led to Julio’s removal from Respondent’s home and the fact that Julio was adjudicated to be neglected. The trial court further found that Respondent: (1) failed to receive counseling since September 2016; (2) continued to use methamphetamines, including testing positive for methamphetamines on 2 June 2017 and admitting to using methamphetamines while pregnant with Julio’s sibling; and (3) had unstable housing.

However, the trial court’s order does not contain a finding that there was a probability of the repetition of neglect if Julio was returned to Respondent’s custody. This Court has consistently required such a finding in order to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). *See, e.g., In re L.L.O.*, __ N.C. App. __, __, 799 S.E.2d 59, 63 (2017) (holding that lack of finding regarding probability of repetition of neglect was not harmless despite fact that “record contains evidence, which could support, although not compel, a finding of neglect”); *In re E.L.E.*, 243 N.C. App. 301, 308, 778 S.E.2d 445, 450-51 (2015) (holding that although “competent evidence in the record exists to support such a finding” of the probability of repetition of neglect, “the absence of this necessary finding requires reversal”).

Consequently, because the trial court failed to make any ultimate findings linking Respondent's past conduct to the likelihood of a repetition of neglect, the trial court's findings of fact are insufficient to uphold its conclusion that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

II. N.C. Gen. Stat. § 7B-1111(a)(2) (Reasonable Progress)

Respondent next contends that the trial court erred by terminating her parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). As an initial matter, we note that this ground was not alleged in the petition to terminate Respondent's parental rights and thus could not be used as a ground for termination. *See In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (concluding that N.C. Gen. Stat. § 7B-1111(a)(2) was improper basis for terminating respondent's parental rights where that ground was not contained in termination petition), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010).

In addition, termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) was improper for another reason. In order to terminate rights based on this subsection, the trial court must determine by clear, cogent and convincing evidence that: (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months; and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the removal of the child. *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).

Here, Julio was removed from Respondent's custody on 20 April 2016, and the petition to terminate Respondent's parental rights was filed on 29 November 2016, a period of less than eight months. Thus, because Julio had been in foster care or placement outside of Respondent's home for less than twelve months prior to the filing of the petition to terminate Respondent's parental rights, termination of Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) was improper. *See In re A.C.F.*, 176 N.C. App. 520, 527, 626 S.E.2d 729, 735 (2006) ("Where the more than twelve months threshold requirement in G.S. § 7B-1111(a)(2) did not expire before the motion or petition was filed, a termination on this basis cannot be sustained." (quotation marks omitted)).

III. N.C. Gen. Stat. § 7B-1111(a)(3) (Failure to Pay)

Finally, Respondent challenges the trial court's conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(3) to terminate Respondent's parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), the trial court may terminate parental rights upon a finding that

[t]he juvenile has been placed in the custody of a county department of social services . . . 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) (2017). “[N]onpayment constitutes a failure to pay a reasonable portion if and only if respondent [is] able to pay some amount greater than zero.” *In re Clark*, 151 N.C. App. 286, 289, 565 S.E.2d 245, 247 (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 302, 570 S.E.2d 501 (2002).

Here, the relevant six-month period was 29 May 2016 through 29 November 2016. Regarding this statutory ground, the trial court made only one finding of fact, which stated as follows:

29. The respondent mother is currently under an order to pay child support in the amount of \$75.00 per month in current support and \$10.00 per month toward arrears. *She has not paid child support since March of 2017* and currently is in arrears in the amount of \$432.55.

(Emphasis added.)

This finding establishes Respondent’s failure to pay child support since March 2017. However, the trial court made no findings concerning whether Respondent made any payments during the relevant statutory period. Thus, we conclude that the trial court’s findings lack the required 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). We are therefore unable to uphold the trial court’s determination pursuant to N.C. Gen. Stat. § 7B-1111(a)(3).

* * *

Accordingly, we must vacate the trial court's TPR Order and remand the case for further proceedings. On remand, the court shall conduct a new hearing upon the request of either party. Absent such a request, the trial court shall have the discretion to determine whether a new hearing is appropriate. Thus, it is unnecessary for us to address Respondent's ineffective assistance of counsel claim.³

Conclusion

For the reasons stated above, we vacate the trial court's 12 September 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).

³ Although Respondent's notice of appeal stated that she was also appealing the trial court's Adjudication Order, her appellate brief does not challenge any specific portion of that order. Therefore, she has waived any challenge to the Adjudication Order. See N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").