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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-633

Filed: 18 December 2018

Alleghany County, No. 14 JT 7

IN THE MATTER OF: E.B.J.

Appeal by respondent from order entered 27 March 2018 by Judge David Von Byrd in Alleghany County District Court. Heard in the Court of Appeals 29 November 2018.

*Anné C. Wright and John Benjamin Reeves for petitioner-appellee Alleghany County Department of Social Services.*

*Richard Croutharmel for Respondent-appellant mother.*

*Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.*

TYSON, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to her son "Eddie." The name "Eddie" is a pseudonym used to protect the identity of the juvenile. See N.C. R. App. P. 3.1(b) (2016). We vacate the order and remand for further findings.

I. Factual Background

Respondent-mother gave birth to Eddie in June 2006. Alleghany County Department of Social Services (“DSS”) filed a petition alleging Eddie is an abused, neglected, and dependent juvenile on 13 May 2014. DSS alleged it had received a report alleging Eddie’s father disciplined Eddie with a belt, leaving bruises and marks to Eddie’s shoulder, and a methamphetamine laboratory had been present in the family home where Eddie was residing.

The trial court held a hearing on 29 July 2014 and entered an adjudication and disposition order on 25 August 2014. The trial court adjudicated Eddie to be an abused, neglected, and dependent juvenile, and placed him in DSS custody. The trial court found Eddie suffered from significant psychological and emotional issues. At the time of the hearing, Eddie had been expelled from summer camp and was residing in a Level III facility. Subsequent to the August order, Eddie’s behaviors deteriorated rapidly. He was moved to a group cottage foster placement, a Level IV facility, in December 2014.

Following a permanency planning review hearing held in July 2015, the trial court found the parents had been “very compliant with their service agreements” and it would be possible for Eddie to return to his parents’ home within six months, upon completion of their service agreements and “subject to the recommendations of psychological professionals.” In February 2016, the trial court ordered Eddie’s

tentative home placement to be with his father, while Respondent-mother was only allowed to have telephone contact with him.

In a permanency planning order entered 17 May 2016, the trial court found Eddie had been involuntarily committed in April 2016. The trial court ordered, upon Eddie's release from involuntary commitment, Eddie should be released to his father, with DSS retaining legal custody of Eddie. In October 2016, Eddie began living with Respondent-mother. On 15 November 2016, Eddie was again involuntarily committed to a hospital. Eddie remained in mental health facilities, until he was transferred to a group home in February 2017.

On 15 November 2016, DSS obtained nonsecure custody of Eddie and filed another petition alleging Eddie was a neglected and dependent juvenile. DSS made the following allegations: (1) Eddie is not provided necessary medical or remedial care for his pre-existing mental health issues; (2) Eddie attempted to jump from a moving vehicle, (3) Respondent-mother is unable to control him; (4) Respondent-mother states Eddie has attempted to hurt her; (5) Eddie retaliates physically and verbally when he is told "no"; (6) Respondent-mother tested positive for multiple illegal substances on 15 November 2016; (7) as a result of the positive drug tests, Respondent-mother's probation was revoked and she was taken into custody; (8) Respondent-father is also incarcerated; and, (9) no other known family members were available to care for Eddie.

The trial court held a hearing on 20 December 2016 regarding DSS's petition and entered an adjudication and disposition order on 10 January 2017. The trial court found both parents were incarcerated and neither was able to formulate a case plan. The trial court concluded Eddie was a neglected and dependent juvenile and it is in his best interest to be removed from Respondent-mother's home. Eddie was placed in to the custody of DSS. Respondent-mother and Eddie's father were both granted visitation beginning upon their release from incarceration.

Respondent-mother was released from incarceration on 13 March 2017. On 22 May 2017, Respondent-mother entered into an Out-of-Home Family Services Agreement ("OHFSA") wherein she agreed to: (1) communicate with DSS two times per month; (2) obtain proper housing suitable for Eddie; (3) maintain employment; (4) attend child and family team meetings; (5) submit to urine drug screens; (6) obtain substance abuse treatment; and (7) visit Eddie.

After an amended permanency planning hearing, the trial court entered an order on 21 November 2017 finding Respondent-mother had failed to follow her OHFSA. During the hearing, Respondent-mother admitted she would test positive for marijuana if she were drug tested. The trial court relieved DSS of further efforts to reunify Eddie with Respondent-mother. The court established a primary permanent plan of termination of parental rights with a concurrent plan of custody with an approved caregiver.

Prior to the amended permanency planning order, DSS filed a petition to terminate Respondent-mother's parental rights on 31 October 2017. The petition alleged, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2017), the following grounds: neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of Eddie's child care costs, dependency, and willful abandonment. The petition was heard on 1 March 2018. The trial court terminated Respondent-mother's parental rights based upon neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of Eddie's child care costs, and dependency. The trial court also concluded it is in Eddie's best interests to terminate Respondent-mother's parental rights. Respondent-mother timely appeals.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

## III. Issues

Respondent-mother argues the trial court erred by: (1) not considering changed circumstances at the termination hearing; (2) not adequately making findings on the probability of future neglect, willfulness in failing to make reasonable progress, willfulness in failing to pay financial support, and incapability in caring for Eddie; and (3) not making findings of fact required under N.C. Gen. Stat. § 7B-1110(a).

## IV. Standard of Review

“This Court reviews a trial court’s conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court’s findings of fact, and whether the findings of fact support the court’s conclusions of law.” *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015) (citation omitted), *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). “The trial court’s conclusions of law are reviewable *de novo* on appeal.” *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation and quotation marks omitted).

## V. Analysis

### A. Neglect

Respondent-mother argues the trial court erred in terminating her parental rights on the basis of neglect because the trial court failed to make findings concerning the probability of future neglect. We agree.

Under N.C. Gen. Stat. § 7B-1111(a)(1), the trial court may terminate parental rights based upon a finding “[t]he parent has . . . neglected the juvenile” within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-101(15) (2017) defines a “neglected juvenile” as

[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[.]

A conclusion that a juvenile is neglected “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).

Neglect exists at the time of a termination hearing when a child has not been in the custody of the parent for a significant period of time prior to the termination hearing when there is a showing of (1) “a past adjudication of neglect,” and (2) “a probability of repetition of neglect if the juvenile were to be returned to [the parent].” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

Here, Eddie was not in the custody of Respondent-mother at the time of the termination hearing. The trial court made the requisite finding that Eddie was previously adjudicated as neglected and dependent. However, the trial court entered no findings regarding a probability of repetition of neglect if Eddie were returned to Respondent-mother. The ground of neglect is not supported by the necessary findings of fact. *See In re E.L.E.*, 243 N.C. App. 301, 308, 778 S.E.2d 445, 450-51 (2015) (“absence of this necessary finding [of a probability of a repetition of neglect] requires reversal”).

Respondent-mother also argues the trial court failed to consider evidence of changed circumstances at the termination hearing. Addressing this argument is unnecessary in light of our holding on the trial court’s failure to adequately find a probability for repetition of neglect.

B. Reasonable Progress

Respondent-mother asserts the trial court erred in terminating her parental rights on the basis of willful failure to make reasonable progress because the trial court failed to make a finding concerning her willfulness. We agree.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the court may terminate parental rights if it determines “[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.” (emphasis supplied). “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).

In order for a trial court to terminate a parent’s rights under N.C. Gen. Stat. § 7B-1111(a)(2), it must make a finding regarding the parent’s willfulness in making progress. *See In re C.C.*, 173 N.C. App. 375, 384, 618 S.E.2d 813, 819 (2005) (holding the trial court erred in concluding grounds exist under N.C. Gen. Stat. § 7B-1111(a)(2) when the trial court’s order included insufficient findings that the respondent acted “willfully”). “Evidence showing a parents’ ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must



be apparent for willfulness to attach.” *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) (citation omitted).

Here, the trial court’s termination order includes a statement that Respondent-mother failed to make “reasonable progress under the circumstances.” However, the termination order lacks any findings regarding Respondent-mother’s willfulness in failing to show reasonable progress. The ground of willful failure to make reasonable progress is not supported by the necessary and required findings of fact.

C. Failure to Pay Reasonable Cost of Care

In her third argument, Respondent-mother argues the trial court erred by terminating her parental rights on the basis of willful failure to pay a reasonable portion of Eddie’s care because the trial court had failed to make a finding concerning her ability to pay financial support. We agree.

Under N.C. Gen. Stat. § 7B-1111(a)(3), parental rights may be terminated where:

The 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.

(emphasis supplied).

In the context of the word “willfully” in N.C. Gen. Stat. § 7B-1111(a)(3), this Court has stated the word “willful” “imports knowledge and a stubborn resistance[.]” *In re Matherly*, 149 N.C. App. at 455, 562 S.E.2d at 18 (internal quotes omitted). “Manifestly, one does not act willfully in failing to make support payments if it has not been within his power to do so.” *In re Adoption of Maynor*, 38 N.C. App. 724, 726, 248 S.E.2d 875, 877 (1978). As is the case regarding the ground of reasonable progress, a trial court must also make a specific finding of fact demonstrating the parent’s failure to pay is willful. *Matherly*, 149 N.C. App. at 455, 562 S.E.2d at 18. In *Matherly*, this Court held the trial court had not “adequately addressed” willfulness with respect to N.C. Gen. Stat. § 7B-1111(a)(2) and (3) where the court failed to make specific findings of fact demonstrating the respondent-parent’s willfulness. *Id.* (holding “there must be a proper application of the words ‘willfully’ in grounds (2) and (3)”).

Here, the trial court found the Respondent-mother had failed to pay a reasonable portion of Eddie’s child care “despite having the ability to do so.” “[S]uch ultimate findings must arise by processes of logical reasoning from the evidentiary facts found by the court.” *In re A.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 799 S.E.2d 445, 450 (2017) (internal quotation marks and citation omitted).

The termination order fails to include any supporting findings regarding Respondent-mother’s willfulness in failing to pay, including any specific findings

demonstrating her ability and capacity to pay. The trial court's findings before us are insufficient to demonstrate Respondent-mother's failure to pay was willful. The trial court's findings of fact do not support its conclusion to terminate Respondent-mother's parental rights under N.C. Gen. Stat § 7B-1111(a)(2) (failure to support).

D. Dependency

Respondent-mother asserts the trial court erred by terminating her parental rights on the basis of dependency because the findings of fact fail to address any incapability precluding her from caring for or supervising Eddie. We agree.

A trial court may terminate parental rights if it concludes:

[T]he 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). A dependent juvenile is defined as one who is "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9)

(2017). “Under this definition, the trial court must 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).

The trial court made an ultimate finding that Respondent-mother was incapable of providing for the proper care and supervision of Eddie. The trial court failed to include evidentiary facts addressing Respondent-mother’s ability to provide care or supervision of Eddie. The trial court erred in terminating Respondent-mother’s parental rights on the ground of dependency. *See In re A.B.*, \_\_\_ N.C. App. at \_\_\_, 799 S.E.2d at 450; N.C. Gen. Stat. § 7B-1111(a)(6).

#### VI. Remand

The record contains evidence from which the trial court could make findings addressing Respondent-mother’s probability for future neglect, willfulness in failing to make reasonable progress to correct the conditions leading to Eddie’s removal, willfulness in failing to make support payments, and incapability of providing care or supervision of Eddie.

We vacate the purported termination order and remand to the trial court with instructions to review the evidence and make additional findings of fact regarding Respondent-mother’s conduct and then, if appropriate, to make conclusions of law that the grounds under N.C. Gen. Stat. § 7B-1111(a) exist as basis for termination.

The trial court may receive additional evidence of current conditions upon remand. See *In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3, *disc. review denied*, 361 N.C. 694, 654 S.E.2d 245 (2007).

### VII. Best Interests Determination

Because the issue is likely to be raised upon remand, we also address Respondent-mother's argument that the trial court abused its discretion in failing to make findings of fact required under N.C. Gen. Stat. § 7B-1110(a) because evidence of Eddie's adoptability was controverted.

"After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2017). In deciding whether terminating the parent's rights is in the juvenile's best interests, the trial court must consider and make findings about the following criteria, insofar as they are relevant:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a).

N.C. Gen. Stat. § 7B-1110(a) “does not require written findings with respect to all six factors; rather, . . . a court must enter written findings in its order concerning only those factors that are relevant.” *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (internal quotation marks and citation omitted). “[A] factor is ‘relevant’ if there is ‘conflicting evidence concerning’ the factor, such that it is ‘placed in issue by virtue of the evidence presented before the trial court[.]’” *Id.* (citation omitted).

The trial court failed to make findings regarding the second statutory factor of the likelihood of adoption. Eddie’s guardian *ad litem* testified she believed Eddie would be adoptable if his mental health improved, while a DSS social worker testified Eddie’s mental health issues were a barrier for adoption. This conflicting evidence made Eddie’s likelihood of adoption a relevant issue requiring a finding by the trial court regarding the likelihood of his adoption. Upon remand, the trial court should make appropriate findings addressing this issue, only if it finds and concludes grounds exist to terminate Respondent-mother’s parental rights.

### VIII. Conclusion

The termination order is vacated and this cause is remanded for further proceedings as set forth above. *It is so ordered.*

IN RE: E.B.J.

*Opinion of the Court*

VACATED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).