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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-86

Filed: 21 January 2020

Robeson County, Nos. 12 JT 427-29

IN THE MATTER OF: J.I., Jr., J.I., T.I.

Appeal by Respondents from Order entered 5 November 2018 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 19 December 2019.

*Tiffany Peguise-Powers for petitioner-appellee Robeson County Department of Social Services.*

*Jacky L. Brammer for respondent-appellant mother.*

*Mary McCullers Reece for respondent-appellant father.*

*Winston & Strawn LLP, by Amanda L. Groves and Elizabeth J. Ireland, for guardian ad litem.*

HAMPSON, Judge.

**Factual and Procedural Background**

Respondents, the mother and father of minor children J.I., Jr. (Jeremy),<sup>1</sup> J.I. (Jason), and T.I. (Thomas) (collectively, the children), appeal from the trial court's

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<sup>1</sup> Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

Termination of Parental Rights Order (Termination Order) terminating both of their parental rights. The Record reflects the following:

Respondents' involvement with the Robeson County Department of Social Services (DSS) began in May 2011 when DSS first received a Child Protective Services (CPS) report alleging neglect due to domestic violence. On 16 May 2012, DSS received a second CPS report alleging neglect. The case was transferred to case management in July 2012 to assist Respondents in addressing mental health, substance abuse, and domestic violence issues. On 21 December 2012, DSS obtained nonsecure custody of the children, and, in April 2013, the children were adjudicated neglected. Respondent-Mother regained custody of the children in November 2014. Respondent-Father did not regain custody, but he was allowed visitation supervised by Respondent-Mother.

In March 2016, DSS received a third CPS report alleging the children were neglected in that they received improper discipline and lived in an injurious environment due to substance abuse and domestic violence. DSS determined that services were needed but closed the case because Respondent-Mother moved with the three minor children to South Carolina.

In early 2017, the family moved back to North Carolina, and DSS received referrals alleging the family did not have stable housing and was fluctuating in between living in their vehicle and motels, Respondents were using drugs and

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engaging in domestic violence, and the children were not enrolled in school and were not appropriately fed and clothed. Based on CPS reports and DSS's ensuing investigation, on 17 February 2017, DSS obtained nonsecure custody of then-eleven-year-old Jeremy, eight-year-old Jason, and seven-year-old Thomas and filed Juvenile Petitions alleging the three children were neglected on the basis that they did not receive proper care, supervision, or discipline and that they lived in an environment injurious to their welfare. The children were placed in foster care.

On 21 February 2017, Respondents signed an Out-of-Home Family Services Agreement (Case Plan) with DSS requiring them to obtain and maintain stable housing, complete substance abuse and mental health assessments and follow all recommendations, submit to random drug screens, obtain employment in order to financially provide for the basic needs of the children, and attend parenting classes. Respondent-Mother also agreed to follow up with her treatment for diabetes. At that time, the primary permanency plan was for reunification, with a secondary/concurrent plan of adoption.

The Petitions came on for hearing before the trial court on 1 June 2017, and on 6 June 2017, the trial court adjudicated the three children neglected. The trial court determined it was in the children's best interests for DSS to maintain legal and physical custody and continued their placement in foster care. The trial court established a primary permanent plan for the children of reunification and a

concurrent plan of adoption. Following a review hearing on 11 January 2018, based on findings that Respondents were homeless and not working on the case plan, and the children had been in foster care for 327 days, the trial court changed the primary permanent plan to adoption and the concurrent plan to reunification.

On 2 April 2018, DSS filed a Petition to Terminate Parental Rights (Termination Petition) of both Respondents on grounds of neglect, failure to make reasonable progress, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2), (6) (2017). The Termination Petition came on for hearing on 6 September 2018 (Termination Hearing). Respondents were not present at the Termination Hearing but were represented by their respective counsel.

On 5 November 2018, the trial court entered the Termination Order. The trial court concluded grounds existed to terminate Respondents' parental rights for failure to make reasonable progress, failure to pay a reasonable portion of the cost of care, and dependency.<sup>2</sup> *See* N.C. Gen. Stat. § 7B-1111(a)(2)-(3), (6). The trial court further determined it was in the children's best interests to terminate Respondents' parental rights. Respondents each filed Notice of Appeal from the Termination Order on 14 November 2018.

### **Issues**

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<sup>2</sup> The Termination Order does not state explicitly the subsections of Section 7B-1111 that it finds as grounds to terminate parental rights; however, from the plain language of the Termination Order, it is apparent that the trial court determined grounds existed under Section 7B-1111(a)(2)-(3), (6).

There are two primary issues before this Court. (I) Respondents each argue the trial court erred in adjudicating grounds on which to terminate their parental rights. (II) In addition, Respondent-Mother argues she received ineffective assistance of counsel in her Termination Hearing, entitling her to a new hearing.

### **Analysis**

#### **I. Grounds for Termination**

“At the adjudicatory stage of a termination of parental rights hearing, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that at least one ground for termination exists.” *In re O.J.R.*, 239 N.C. App. 329, 332, 769 S.E.2d 631, 634 (2015); *see also* N.C. Gen. Stat. § 7B-1109(f) (2017). Therefore, “[t]his 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). “If the trial court’s findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.” *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (citation and quotation marks omitted). “[T]he trial court’s findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court.” *Id.* at 532, 679 S.E.2d at 909. “Moreover, erroneous findings unnecessary to the determination do

not constitute reversible error where the adjudication is supported by sufficient additional findings grounded in competent evidence.” *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014) (citation and quotation marks omitted). We review the trial court’s conclusions of law de novo. *Id.*

Respondents challenge the trial court’s adjudication of willful failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). Section 7B-1111(a)(2) authorizes the termination of parental rights if “[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).

To terminate rights on this ground, the court must determine two things: (1) whether the parent willfully left the child in foster care for more than twelve months, and if so, (2) whether the parent has not made reasonable progress in correcting the conditions that led to the removal of the child from the home.

*In re C.M.S.*, 184 N.C. App. 488, 494, 646 S.E.2d 592, 596 (2007).

In the context of Section 7B-1111(a)(2), willfulness means something less than willful abandonment, which involves purpose and deliberation. *In re Nolen*, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995). “Voluntarily leaving a child in foster care for more than twelve months or a failure to be responsive to the efforts of DSS are sufficient grounds to find willfulness.” *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d

at 596. “A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children.” *In re Nolen*, 117 N.C. App. at 699, 453 S.E.2d at 224. “Similarly, a parent’s prolonged inability to improve his or her situation, despite some efforts and good intentions, will support a conclusion of lack of reasonable progress.” *In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596.

Respondents claim the trial court’s Findings of Fact are insufficient to support its adjudication under N.C. Gen. Stat. § 7B-1111(a)(2). Respondents contend the majority of the trial court’s Findings are restatements from the TPR Timeline DSS prepared and introduced into evidence and, therefore, are not actual Findings.

“The trial court may only terminate a parent’s parental rights if the petitioner proves at least one ground pursuant to N.C. Gen. Stat. § 7B-1111 by clear, cogent, and convincing evidence, *and* the trial court enters sufficient findings of fact to support a conclusion of law that at least one of the grounds alleged by the petitioner exists.” *In re O.J.R.*, 239 N.C. App. 329, 335, 769 S.E.2d 631, 636 (2015) (emphasis added). “When a trial court is required to make findings of fact, it must make the findings of fact specially.” *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). That is, “the trial court’s factual findings must be more than a recitation of allegations[.]” *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002), and “must be sufficiently specific to allow an appellate court to review the decision and

test the correctness of the judgment.” *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation and quotation marks omitted).

Here, the trial court’s Finding of Fact 56 states: “The parents have willfully left the children 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 corrections [sic] which led to the removal of the juveniles.” Finding 56—which operates as a conclusion of law and will be analyzed as such—concludes the elements of N.C. Gen. Stat. § 7B-1111(a)(2) exist, and it supports the trial court’s conclusion that “grounds exist . . . to terminate the parental rights of [Respondents.]” *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (“As a general rule, . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.” (citations omitted)). Thus, we address whether the trial court made adequate evidentiary findings of fact to support its Conclusion.

Respondents correctly observe that a majority of the trial court’s Findings of Fact repeat or closely track entries in the TPR Timeline that DSS entered into evidence. By way of example, the trial court found the following:

28. On June 13, 2017, Social Worker . . . made telephone contact with [Respondent-Father]. . . . [Respondent-Father] informed Social Worker that they no longer have housing and they are staying in motels.

. . . .



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35. On September 13, 2017, Social Worker made telephone [contact] with [Respondent-Father]. [Respondent-Father] informed Social Worker that he is still working on finding a job and looking into [a] substance abuse program . . . .

. . . .

44. On March 1, 2018, [Respondent-Mother] informed Social Worker . . . that she and [Respondent-Father] had substance abuse assessments scheduled for March 12, 2018 at TT&T Services.

. . . .

48. On April 23, 2018, Social Worker . . . received [a] telephone call from [Respondent-Mother] inquiring the date of the next visit. Social Worker informed [Respondent-Mother] of the visits being terminated. [Respondent-Mother] informed Social Worker that she had been going to TT&T Services for treatment and that her therapist was attempting to secure inpatient treatment at Dove's Nest.

49. On June 6, 2018, Social Worker . . . contacted TT&T Services and spoke with [an employee] with TT&T Services. [The employee] reported that [Respondents] have not been consistent in attendance. [The employee] reported that [Respondent-Father] completed an assessment on May 15, 2018 but has not returned for weekly individual therapy. [The employee] reported that [Respondent-Mother] completed an assessment and attended appointments on April 11, 2018 and April 20, 2018; however she missed appointments on May 1, 2018 and May 18, 2018.

50. On August 24, 2018, Social Worker . . . contacted [the employee] at TT&T Services. [The employee] reported that [Respondent's] case was closed effective August 21, 2018, due to the amount of no shows.

However, while it is true these Findings repeat or closely track the TPR Timeline entered into evidence, this does not automatically transform these Findings into “mere recitations” of allegations or testimony. *See In re J.W.*, 241 N.C. App. 44, 48, 772 S.E.2d 249, 253 (2015) (“We do not agree that findings by the trial court are insufficient simply because they are similar, or even identical, to the wording of the juvenile petition.”). Here, the trial court found as fact that the TPR Timeline introduced by DSS without objection was, in fact, the timeline of events relevant to this matter. Indeed, these purported Findings tend to show Respondents did not avail themselves of opportunities to progress with their Case Plan on a number of occasions.

Moreover, and in any event, the trial court made additional Findings in support of its Conclusion that grounds to terminate Respondents’ parental rights exist under Section 7B-1111(a)(2).

47. On April 5, 2018, the parent’s visitation was terminated due to the parents being so inconsistent with visits and the affect it was having on the children by them not showing up.

. . . .

52. The children came into the custody of [DSS] a second time in February 16, 2017. The same issues that exist [sic] when the children came into custody still exist today.

53. The parents entered into a Family Services Case Plan back in February, [2017], but never followed through with

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services.

54. The parents as of this date still do not have stable housing, have not addressed their substance abuse issues or gained employment.

Neither Respondent challenges these Findings; accordingly, they are binding on appeal.<sup>3</sup> See *In re S.C.R.*, 198 N.C. App. at 532, 679 S.E.2d at 909.

Although the trial court's Findings 47, 52, 53, and 54 do not chronicle Respondents' noncompliance with their Case Plan to the degree of the TPR Timeline or the social workers' testimony, we conclude they are, nevertheless, also sufficient to support the trial court's Conclusion that grounds exist to terminate Respondents' parental rights on the basis that Respondents willfully left the children in a placement outside the home for over twelve months and failed to make reasonable progress in addressing the issues that led to their removal. First, these unchallenged Findings establish that the children have been in DSS custody since 16 February 2017, more than twelve months prior to the 6 September 2018 Termination Hearing. Second, the trial court's Findings that Respondents' visitation was terminated due to the effect their inconsistent participation was having on the children and that Respondents have not "followed through with services" establish that Respondents

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<sup>3</sup> We further note the Findings are supported by the social workers' testimony: DSS took custody of the children on 16 February 2017 and placed them in foster care where they remained at the time of the Termination Hearing on 6 September 2018; Respondents were not making sufficient progress on their Case Plan because they had not followed through with services and had not obtained stable housing or employment; Respondents were not incapacitated and were capable of making progress on their Case Plan; and the issues that brought the children into DSS custody still existed at the time of the Termination Hearing.

have not been responsive to DSS's efforts, which supports the trial court's Finding of Respondents' willfulness. *See In re C.M.S.*, 184 N.C. App. at 494, 646 S.E.2d at 596. Lastly, the fact that the issues existing at the time the children came into custody still exist, and that Respondents still do not have stable housing or employment and have not addressed their substance abuse issues, supports the Conclusion that Respondents have not made reasonable progress under the circumstances. *See id.*

Thus, we hold the trial court's Findings of Fact support its adjudication of grounds for terminating Respondents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, we need not address Respondents' challenges to the remaining grounds for termination.<sup>4</sup> *See In re B.S.O.*, 234 N.C. App. at 708, 760 S.E.2d at 62.

## II. Ineffective Assistance of Counsel

Respondent-Mother contends the trial court failed to ensure she received effective assistance of counsel at the Termination Hearing.<sup>5</sup> Specifically, Respondent-Mother faults the trial court for failing to question her counsel about Respondent-Mother's absence from the Termination Hearing or counsel's efforts to communicate with her. Respondent-Mother further notes her counsel "did not ask for a continuance

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<sup>4</sup> We are compelled to note that the Termination Petition did not allege grounds to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(3). "When the petition alleges the existence of a particular statutory ground and the court finds the existence of a ground not cited in the petition, termination of parental rights on that ground may not stand unless the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground." *In re T.J.F.*, 230 N.C. App. 531, 532, 750 S.E.2d 568, 569 (2013). However, because we affirm the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(2), we do not address it further.

<sup>5</sup> Respondent-Father does not challenge his counsel's performance.

or advise the court about any contact [counsel] may have had with [Respondent-Mother]. Instead, the hearing proceeded as if the [Respondent-Mother]’s absence and her right to effective representation was not an issue.” Accordingly, Respondent-Mother contends “this case should be remanded for the trial court to determine whether proper efforts were made to inform and prepare [her] for the termination hearing” based upon this Court’s decision in *In re S.N.W.* 204 N.C. App. 556, 698 S.E.2d 76 (2010).

“Parents have a ‘right to counsel in all proceedings dedicated to the termination of parental rights.’” *In re L.C., I.C., L.C.*, 181 N.C. App. 278, 282, 638 S.E.2d 638, 641 (2007) (citation omitted). “Implicit in this right to counsel is the right to effective assistance of counsel.” *In re Faircloth*, 153 N.C. App. 565, 571, 571 S.E.2d 65, 70 (2002). “A claim of ineffective assistance of counsel requires the respondent to show that counsel’s performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing.” *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

In *In re S.N.W.*, the respondent-father was absent from his termination hearing, and the trial court permitted his appointed counsel not to participate in the hearing based solely on his counsel’s assertion the respondent-father had not contacted him. 204 N.C. App. at 557-58, 698 S.E.2d at 77. The trial court heard testimony from a foster care supervisor, took judicial notice of the proffered

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termination petitions and the underlying adjudication order, and subsequently terminated the respondent-father's parental rights. *Id.* at 558, 698 S.E.2d at 77. On appeal, the respondent-father argued "he was denied effective assistance of counsel when the trial court allowed his trial counsel to refrain from participating in the termination hearing." *Id.* at 558-59, 698 S.E.2d at 77-78. Although this Court did not hold that the respondent-father received ineffective assistance of counsel, it remanded the matter for further findings because it was "unable to determine that the attorney assigned in the termination matter made adequate efforts to communicate and/or consult with Respondent." *Id.* at 559, 698 S.E.2d at 78. This Court explained:

Under these unique factual circumstances, the trial court should have inquired further about Respondent counsels' efforts: (1) to contact Respondent; (2) to protect Respondent's rights; and (3) to ably represent Respondent. After inquiry, if the trial court determined that counsel was indeed ineffective, the trial court should have appointed new counsel, despite the fact that no motion to withdraw was made.

*Id.*

In the case *sub judice*, unlike in *In re S.N.W.*, the trial court did not excuse Respondent-Mother's counsel from participating in the Termination Hearing. The Record reflects Respondent-Mother's counsel engaged in some limited cross-examination of DSS's witnesses but that Respondent-Mother's counsel offered no evidence or argument at either stage of the proceeding. Notwithstanding this

distinction, we are persuaded of the need to remand the matter to the trial court for a hearing on Respondent-Mother's ineffective-assistance-of-counsel claim.

Respondent-Mother contends that the Record does not support the trial court's Finding that she was aware of the 6 September 2018 Termination Hearing date.<sup>6</sup> We agree. It is true that Respondent-Mother was served with the Termination Petition and summons and that counsel—who had represented Respondent-Mother since the beginning of these proceedings in 2017—appeared at the Termination Hearing on her behalf. However, the Record contains no written notice of the Termination Hearing date. *See* N.C. Gen. Stat. § 7B-1106.1(b)(5)-(6). A DSS social worker testified that she mailed Respondent-Mother notice of a scheduled hearing date of 5 September 2018—the day before the Termination Hearing was held—but that it was returned. The social worker also claimed to have left a voicemail on Respondent-Mother's phone on 5 September 2018, notifying her that the Termination Hearing would occur the next day. There is no further indication that Respondent-Mother received actual notice of the 6 September 2018 Termination Hearing or that counsel communicated or attempted to communicate with her about the Termination Hearing.

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<sup>6</sup> To the extent Respondent-Mother separately claims a denial of notice of the Termination Hearing under N.C. Gen. Stat. § 7B-1106.1(b)(5)-(6) (2017), the argument is waived by her counsel's appearance at the Termination Hearing without objection to notice. *See In re T.D.W.*, 203 N.C. App. 539, 546, 692 S.E.2d 177, 181 (2010). We read Respondent-Mother's argument as supporting her ineffective-assistance-of-counsel claim.

We emphasize that a parent’s absence from a termination hearing does not establish a lack of fairness *per se* and that “a finding of ineffective assistance of counsel will generally not be made where the purported shortcomings of counsel were caused by the party.” *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79. From the Record, it appears Respondent-Mother did not attend a single court proceeding in this case. It may well be that Respondent-Mother’s disinterest or lack of engagement left counsel with no alternative but to proceed without her; however, we cannot make that determination upon the limited evidence before us. *See In re A.R.C.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 830 S.E.2d 1, 4 (2019).

“[P]rocedural safeguards, including the right to counsel, must be followed to ensure the fundamental fairness of termination proceedings.” *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79 (citation and quotation marks omitted). Thus, we conclude from “[t]he lack of information in the record or transcript regarding counsel’s attempts to contact h[er] client[,]” we are precluded “from determining whether Respondent[-Mother] received effective assistance of counsel, and if [s]he was denied a fair hearing.” *Id.* at 560, 698 S.E.2d at 78-79. Therefore, we remand to the trial court for an evidentiary hearing to determine whether Respondent-Mother was denied effective assistance of counsel under *Oghenekevebe*. *Id.* at 561, 698 S.E.2d at 79. “On remand, the trial court should inquire into ‘efforts by [Respondent-Mother’s] counsel to contact and adequately represent [her] at the termination of parental



rights hearing’ and determine ‘whether [she] is entitled to appointment of counsel in a new termination of parental rights proceeding.’” *In re A.R.C.*, \_\_\_ N.C. App. at \_\_\_, 830 S.E.2d at 4 (quoting *In re S.N.W.*, 204 N.C. App. at 561, 698 S.E.2d at 79). In light of our ruling, we do not address Respondent-Mother’s particularized criticisms of counsel’s performance at the Termination Hearing. The trial court should consider these arguments on remand in assessing Respondent-Mother’s ineffective-assistance-of-counsel claim.<sup>7</sup>

### **Conclusion**

Accordingly, for the foregoing reasons, we hold the trial court did not err in terminating Respondents’ parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). We remand this matter to the trial court to determine whether Respondent-Mother was denied effective assistance of counsel at the Termination Hearing, entitling her to relief from the Termination Order and a new termination hearing.

AFFIRMED IN PART; REMANDED IN PART.

Judge STROUD and Judge DIETZ concur.

Report per Rule 30(e).

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<sup>7</sup> In light of the Termination Petition’s failure to allege grounds for termination under Section 7B-1111(a)(3), if the trial court determines that Respondent-Mother is entitled to a new Termination Hearing, the trial court should not consider grounds for termination under Section 7B-1111(a)(3) unless it finds the Petition sufficiently alleged facts to place Respondent-Mother on notice that her parental rights could be terminated on that ground. See *In re T.J.F.*, 230 N.C. App. at 532, 750 S.E.2d at 569.