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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-311

No. COA21-667

Filed 3 May 2022

Perquimans County, No. 19 JT 12

IN THE MATTER OF: J.H., Minor Child.

Appeal by respondent-father by writ of certiorari from order entered 3 August 2021 by Judge Amber Davis in Perquimans County District Court. Heard in the Court of Appeals 5 April 2022.

William Crowe for petitioner-appellee Perquimans County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson W. Moore, Jr., for guardian ad litem.

Stam Law Firm, PLLC, by R. Daniel Gibson, for respondent-appellant father.

ZACHARY, Judge.

¶ 1 Respondent-Father appeals from the trial court’s order terminating his parental rights. After careful review, we vacate and remand to the trial court.

Background

¶ 2 Respondent-Father and Respondent-Mother are the parents of “Julia,”¹ who

¹ For ease of reading and to protect the minor child’s identity, we adopt the pseudonym to which the parties stipulated.

was born in October 2016. Respondent-Father was not present for her birth, and although he lived with Julia and Respondent-Mother “for almost five months in 2017, he has not seen or talked with [Julia] since June of 2018.” Respondent-Father was incarcerated in Virginia when Petitioner Perquimans County Department of Social Services (“DSS”) filed its juvenile petition in this matter; he remained incarcerated in Virginia for the duration of these proceedings, in which he was represented by counsel.

¶ 3

On 16 August 2019, DSS filed a juvenile petition in Perquimans County District Court alleging that Julia was neglected and dependent. That same day, the trial court entered an order granting DSS immediate nonsecure custody of Julia. On 28 August 2019, the parties consented to the entry of a continued nonsecure custody order. On 25 September 2019, the juvenile petition came on for hearing in Perquimans County District Court, and by order entered on 15 November 2019, the trial court adjudicated Julia as neglected. On 9 March 2020, the trial court entered a disposition order providing, *inter alia*, that Julia “shall remain in the legal custody of [DSS], with placement in [DSS]’s discretion to provide or arrange for foster care or other placement,” and designating reunification with Respondent-Parents as the permanent plan for Julia.

¶ 4

Respondent-Mother made little progress with her case plan, and she stated in open court at permanency planning hearings in July and August of 2020 that she was

willing to relinquish her parental rights. On 7 December 2020, Respondent-Mother executed a document voluntarily relinquishing her parental rights to Julia, surrendering Julia to DSS, and consenting to the permanent transfer of legal and physical custody of Julia to prospective adoptive parents.²

¶ 5 On 5 February 2021, DSS filed a petition to terminate Respondent-Father's parental rights, and this matter came on for hearing on 28 June 2021. Respondent-Father's counsel appeared on his behalf, with Respondent-Father participating by telephone from Coffeewood Correctional Facility in Virginia, where he was incarcerated. On 3 August 2021, the trial court entered an order terminating Respondent-Father's parental rights.

¶ 6 Respondent-Father filed his written notice of appeal on 3 September 2021. However, although properly filed with this Court, Respondent-Father's notice of appeal erroneously designated our Supreme Court as the court to which he addressed his appeal. *See* N.C. Gen. Stat. § 7B-1001(a)(7) (2021) (designating this Court as the proper court to address appeals of orders terminating parental rights, as of 1 July 2021). Respondent-Father also did not file his notice of appeal within the timeframe prescribed by N.C. Gen. Stat. § 7B-1001(b), and did not sign his notice of appeal on the signature line but rather wrote his name next to the signature line with a notation

² Consequently, Respondent-Mother is not a party to this appeal.

that he “did not [receive] this notice until 8-22-21[.]”

¶ 7

In light of the evident deficiencies of Respondent-Father’s notice of appeal, Respondent-Father petitioned this Court to issue its writ of certiorari, and thereby invoke its appellate jurisdiction. *See* N.C.R. App. P. 21(a)(1) (“The writ of certiorari may be issued in appropriate circumstances . . . to permit review of . . . orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action”). Our courts have interpreted the term “appropriate circumstances” in Rule 21(a) to mean that “the right of appeal has been lost through no fault of the petitioner[.]” *Johnson v. Taylor*, 257 N.C. 740, 743, 127 S.E.2d 533, 535 (1962), and “that error was probably committed below[.]” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

¶ 8

“Ultimately, however, our decision to issue the writ is discretionary.” *In re K.P.*, 249 N.C. App. 620, 623, 790 S.E.2d 744, 747 (2016). In our discretion, and “[i]n light of the serious consequences of the termination of parental rights,” *In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005), we allow Respondent-Father’s petition and proceed to the merits of his appeal.

Discussion

¶ 9

Termination of parental rights proceedings involve two distinct stages: (1) the adjudication stage, during which the petitioner must prove the existence of grounds for termination by clear, cogent, and convincing evidence; and (2) the disposition

stage, during which the trial court determines, in its discretion, whether the respondent's parental rights should be terminated. *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

¶ 10 In the instant case, Respondent-Father challenges the trial court's determination at the adjudication stage that grounds existed to terminate his parental rights, contending that the trial court "misunderstood and misapplied the law under N.C.G.S. § 7B-1111. It didn't address whether [he] made reasonable progress, it terminated his rights for a ground not alleged in the petition, and it relied on cases the North Carolina Supreme Court has overturned." Specifically, Respondent-Father argues that the trial court erred by concluding that grounds existed to warrant termination of his parental rights (1) under N.C. Gen. Stat. § 7B-1111(a)(2) (willfully leaving child in foster care for more than 12 months without making reasonable progress) because Respondent-Father's incarceration made his lack of contact involuntary, and the trial court did not address whether he made reasonable progress under the circumstances; (2) under N.C. Gen. Stat. § 7B-1111(a)(7) (willful abandonment) because this ground for termination was not alleged in DSS's termination petition, and the trial court did not resolve conflicts in the evidence with regard to this issue; and (3) under N.C. Gen. Stat. § 7B-1111(a)(6) (dependency) because the North Carolina Supreme Court has held that a parent does not bear the burden of locating and securing an appropriate alternative child care

arrangement.

¶ 11 Without expressing any opinion on the merits of Respondent-Father's arguments, we vacate and remand to the trial court for the entry of a new order that contains sufficient findings of fact to enable appellate review.

I. Standard of Review

¶ 12 Our appellate courts review a trial court's order terminating parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 4 (2020) (citation omitted). Our Supreme Court "has defined this standard as greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re W.K.*, 376 N.C. 269, 277, 852 S.E.2d 83, 90 (2020) (citation and internal quotation marks omitted). "The clear and convincing standard requires evidence that should fully convince . . . such that a factfinder applying that evidentiary standard could reasonably find the fact in question." *In re J.C.-B.*, 276 N.C. App. 180, 2021-NCCOA-65, ¶ 14 (citation omitted). "The trial court's conclusions of law are reviewed de novo." *A.L.L.*, 376 N.C. at 101, 852 S.E.2d at 4.

II. Analysis

¶ 13 A single principle undergirds each of Respondent-Father's three specific arguments on appeal: that the trial court "misunderstood and misapplied" N.C. Gen.

Stat. § 7B-1111(a).

¶ 14 “At the adjudicatory stage, the petitioner bears the burden of proving the existence of one or more grounds for termination under N.C. [Gen. Stat.] § 7B-1111(a) by clear, cogent, and convincing evidence.” *In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 12 (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 7B-1109(e)–(f). Among the grounds for termination of parental rights listed in § 7B-1111(a) are:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

(2) The 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. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

(3) 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 has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

. . . .

(6) That 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 the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, 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.

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (6)–(7). In its termination petition, DSS alleged facts that largely tracked the language of § 7B-1111(a)(1)–(3) and (6) as grounds to terminate Respondent-Father’s parental rights.

¶ 15 In its termination order, the trial court made the following findings of fact pertinent to the grounds alleged by DSS to terminate Respondent-Father’s parental rights:

10. Facts sufficient to warrant a determination that grounds exist for the termination of Respondent[-F]ather’s parental rights exist as follows:

i. That [Respondent-Father] is incapable of providing for the proper care and supervision of the juvenile within the meaning of G.S. 7B-101 and there is a reasonable possibility that such incapability will continue for the foreseeable future, in that after almost 2 years of working

with the parents in the DSS case file no. 19-JA-12, [Respondent-Father] has never been able to visit the child or come to court, and in fact [Respondent-Father] admitted that he was not present at the birth of the child, and never saw the child during the entire first year of her life. [Respondent-Father] further admitted that although he did live with the child and mother for almost five months in 2017, he has not seen or talked with the child since June of 2018., [sic] and [Respondent-Father] stated that he could not currently care for the child. [Respondent-Father] further admitted that although he knew [DSS]'s mailing address, he had not sent one card or letter or gift or any money to the child since before the filing of the underlying petition in [A]ugust of 2019, despite being told that he could forward such gifts to [DSS] and the gifts would be given to his daughter.

ii. [Respondent-Father] has willfully, and not due solely to poverty, left the child in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting the conditions that led to the child's removal, in that, after almost 2 years of working with the parents in the on-going DSS case, [Respondent-Father] never provided any possible alternative placement until the eve of this Termination Hearing, and the one name he was able to provide was not a relative of the minor child.

iii. [Respondent-Father] has demonstrated that he cannot and will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the minor child pursuant to N.C. Gen. Stat. [§] 7B-1100(1) [sic] due to Respondent[-Father's] extended history of remaining incarcerated and unavailable for the child in any way, after having participated in only 5 months of the minor child's life back in 2017.

established three statutory grounds for terminating Respondent-Father's parental rights to Julia:

2. [DSS] established grounds for terminating Respondents' parental rights to the juvenile in that

i. pursuant to N.C.G.S. § 7B-1111(a)(2), the Respondents 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; and

ii. pursuant to N.C.G.S. § 7B-1111(a), [sic] one or both of the Respondents are 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 the incapability will continue for the foreseeable future; and

iii. pursuant to N.C.G.S. § 7B-1111(a)(7), the Respondents have willfully abandoned the aforesaid juvenile for at least six (6) consecutive months immediately preceding the filing of this action in that Respondents have withheld their presence, love, and care from the juvenile and willfully failed to display any filial affection toward the juvenile.

¶ 17 The trial court's findings of fact and conclusions of law seem to interweave relevant statutory phrases from different grounds for termination under § 7B-1111(a). For example, finding of fact 10.i begins by addressing the language of § 7B-1111(a)(6), dependency, by finding that Respondent-Father "is incapable of providing for the proper care and supervision of the juvenile within the meaning of [N.C. Gen.

Stat. § 7B-101 and there is a reasonable possibility that such incapability will continue for the foreseeable future[.]” See N.C. Gen. Stat. § 7B-1111(a)(6). But finding 10.i does not address that ground’s essential element that “the parent lacks an appropriate alternative child care arrangement.” *Id.*; see *In re K.D.C.*, 375 N.C. 784, 795, 850 S.E.2d 911, 920 (2020) (“In determining whether a juvenile is dependent, 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.” (emphases added) (citation and internal quotation marks omitted)).

¶ 18 Meanwhile, finding 10.ii begins with language that echoes § 7B-1111(a)(2), stating that Respondent-Father “willfully, and not due solely to poverty, left the child in foster care or placement outside the home for more than twelve (12) months” but that he had not demonstrated to the trial court’s satisfaction “that reasonable progress under the circumstances has been made within 12 months in correcting the conditions that led to the child’s removal[.]” See N.C. Gen. Stat. § 7B-1111(a)(2). But finding 10.ii then ascribes that lack of reasonable progress to § 7B-1111(a)(6)’s required lack of “an appropriate alternative child care arrangement.” *Id.* § 7B-1111(a)(6).

¶ 19 Finally, conclusion of law 2.iii cites § 7B-1111(a)(7), abandonment. This ground was neither alleged by DSS in its termination petition nor addressed by the court’s

findings of fact.³

¶ 20 The trial court’s termination order in this case is insufficient to enable appellate review. At a bare minimum, appellate review requires “sufficient findings of fact and conclusions of law *to reveal the reasoning which led to the court’s ultimate decision.*” *In re W.K.*, 379 N.C. 331, 2021-NCSC-146, ¶ 8 (emphasis added) (citation omitted); *see also In re B.C.T.*, 265 N.C. App. 176, 188, 828 S.E.2d 50, 58 (2019) (“We have previously noted that the trial court need not use ‘magic words’ in its findings of fact or conclusions of law, if the evidence and findings overall make the trial court’s basis for its order clear.”). Through its inconsistent application of the various statutory grounds for termination of Respondent-Father’s parental rights, the termination order in this case disguises, rather than reveals, the trial court’s reasoning.

¶ 21 Thus, under our well-established precedent, we must vacate and remand to the trial court for the entry of a new order. The trial court shall make appropriate findings of fact and conclusions of law regarding the grounds under N.C. Gen. Stat. § 7B-

³ This issue is not necessarily fatal to this ground for termination. Although it is well established that a termination of parental rights may not stand when a petition “alleges the existence of a particular statutory ground and the court finds the existence of a ground not cited in the petition,” a termination of parental rights may nevertheless stand if “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). In light of our disposition of this appeal, we express no opinion on the merits of this ground for termination.

1111(a) that form the basis for the trial court's ultimate decision concerning Respondent-Father's parental rights to Julia. *See, e.g., In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3, *supersedeas and disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

Conclusion

¶ 22

For the foregoing reasons, we vacate the trial court's termination order and remand to the trial court for the entry of a new order that contains appropriate findings of fact and conclusions of law sufficient to enable our appellate review. The trial court may, in its discretion, take additional evidence on remand. *See, e.g., In re I.R.L.*, 263 N.C. App. 481, 487, 823 S.E.2d 902, 906 (2019).

VACATED AND REMANDED.

Chief Judge STROUD and Judge TYSON concur.

Report per Rule 30(e).