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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-289

Filed 06 June 2023

Mitchell County, No. 19 JT 42

IN THE MATTER OF: H.K.S.

Appeal by Respondent-father from order entered 14 December 2021 by Judge Rebecca Eggers-Gryder in Mitchell County District Court. Heard in the Court of Appeals 15 May 2023.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for Petitioner-Appellee Mitchell County Department of Social Services.

Michelle FormyDuval Lynch for Guardian ad Litem.

Garron T. Michael for Respondent-Appellant father.

PER CURIAM.

Respondent-father appeals the trial court's order terminating his parental rights to his minor child "Hunter".¹ Because the trial court's findings of fact are not sufficient to support an adjudication of grounds to terminate Respondent's parental

¹ A pseudonym is used to protect the juvenile's identity. See N.C. R. App. P. 42.

rights, we vacate the termination order in part, reverse in part, and remand this matter for further proceedings.

I. Background

In July 2019, Mitchell County Department of Social Services (“DSS”) received a report alleging Hunter had been exposed to substance use and an injurious environment and had received improper supervision. Hunter’s mother admitted to staying overnight with Hunter in Respondent’s home, which was reportedly unsafe, and using methamphetamine with Respondent while in his home. She agreed to stay with Hunter in a temporary safety placement with the paternal grandparents.

On 14 August 2019, the paternal grandfather alerted DSS that Respondent had broken into the grandparents’ home, assaulted the paternal grandmother, and left with Hunter and Hunter’s mother. The grandfather believed they were staying in Respondent’s trailer, which grandfather reported had no running water or electricity. Nearly two hours after their arrival at Respondent’s trailer, Hunter’s mother provided the responding social workers with several potential safety placements, but she refused to accompany Hunter and the social workers to the office. She later refused to consent to a temporary safety placement with her sister, telling DSS “the agency would need to get the court involved.” DSS then filed a juvenile petition alleging Hunter was abused, neglected, and dependent, and obtained nonsecure custody of him.

Following a hearing on 23 September 2019, the trial court adjudicated Hunter neglected and dependent. The court held a disposition hearing on 24 October 2019 and ordered that Hunter remain in DSS custody. The court also ordered Respondent to enter into a case plan with DSS and denied Respondent visitation with Hunter until Respondent had produced two consecutive negative drug screens.

At the first permanency planning hearing, held on 3 January 2020, the trial court found that Respondent had yet to sign a case plan, had failed to make any contact with DSS, and had shown no progress towards reunification. The court ordered adoption as the permanent plan, with a concurrent plan of reunification.

Respondent was arrested in February 2020 and incarcerated in the McDowell County jail, where he remained until his plea to the underlying charges and subsequent transfer to prison in April 2021. At the second permanency planning hearing, held on 23 June 2020, the trial court found that Respondent still had made no progress towards reunification.

Respondent signed a case plan on 22 October 2020, the same day as the second review hearing. The case plan required him to take parenting classes, obtain employment and suitable housing, and address his substance abuse and legal issues.

At the 8 March 2021 permanency planning hearing, the trial court modified the permanent plan to reunification between Hunter and his mother, based on her significant positive progress, with a concurrent plan of adoption. The court relieved DSS from providing further reunification efforts for Respondent during his

incarceration, finding any such efforts “would be clearly futile or inconsistent with the juvenile’s need for a safe, permanent home within a reasonable period of time and are no longer required.”

At the 7 May 2021 review hearing, the trial court directed DSS to “follow up” on the services available to Respondent in prison. Respondent’s case manager informed DSS that the only classes available at that time were a behavioral program and a “father’s class.” On 30 June 2021, Respondent entered into a “correctional case plan,” which provided him with five available programs: character education, Alcoholics Anonymous, HRD (vocational training), Thinking for a Change, and Narcotics Anonymous. This case plan required Respondent to complete at least one program per year. At the 15 July 2021 review hearing, Respondent reported he was still unable to participate in programs, and the trial court ordered DSS to contact the prison and offer additional assistance to enable Respondent’s participation.

In the order entered after the 19 August 2021 permanency planning hearing, the trial court found that DSS had complied with its July decree. The court also relieved DSS from providing reunification efforts for Hunter’s mother and modified the permanent plan to adoption with a concurrent plan of guardianship.

On 9 September 2021, DSS filed a petition to terminate parental rights, alleging neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and failure to legitimate pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) as grounds for the termination of Respondent’s parental rights. Respondent filed an answer denying both grounds for

adjudication and specifically arguing that he had “consistently claimed in open court that [Hunter] is his son[.]”

Following a hearing, the trial court entered an order on 14 December 2021 terminating Respondent’s parental rights based on the existence of both grounds alleged in the petition and its conclusion that termination of Respondent’s parental rights was in Hunter’s best interests.² Respondent appealed.

II. Analysis

Respondent challenges the adjudication of grounds to terminate his parental rights, arguing that the trial court’s conclusions are unsupported by the findings of fact and record evidence. We agree.

We review a trial court’s adjudication that grounds exist to terminate 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.S.D.*, 378 N.C. 425, 428, 861 S.E.2d 875, 879 (2021) (citations omitted). “Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal.” *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). “The trial court’s conclusions of law are reviewable de novo on appeal.” *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

A. Neglect

² The order also terminated the parental rights of Hunter’s mother and any “Unknown Fathers.”

Under N.C. Gen. Stat. § 7B-1111(a)(1), a trial court may terminate parental rights upon a finding that the parent has neglected their child such that the child has become a neglected juvenile. A neglected juvenile is one “whose parent . . . [d]oes not provide proper care, supervision, or discipline” or who lives in an “environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15) (2021).

Generally, termination of parental rights on this ground “requires a showing of neglect at the time of the termination hearing.” *In re M.B.*, 382 N.C. 82, 86, 876 S.E.2d 260, 264 (2022) (citations and quotation marks omitted). “When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.” *In re K.C.T.*, 375 N.C. 592, 597, 850 S.E.2d 330, 335 (2020) (quotation marks and citations omitted). “When determining whether future neglect is likely, the trial court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.” *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (citation omitted).

Here, the trial court’s conclusion that Respondent had neglected Hunter was based upon Findings of Fact 11 and 12. Finding of Fact 11 includes a recitation of the events that led to the filing of the initial juvenile petition and culminates by finding that Hunter was adjudicated neglected on 23 September 2019. Finding of Fact 12 provides, in relevant part:

Subsequent to DSS assuming custody of the juvenile . . . the respondent parents did not cooperate with the agency or communicate with the agency until January, 2020 when the respondent father was arrested; the respondent parents did not contact DSS from August, 2019 through January, 2020 except to exercise limited visitations with the juvenile. . . . The respondent father . . . signed a DSS case plan. The respondent father has remained incarcerated since the time of his arrest in January, 2020; the respondent father is now an inmate with the NC Department of Adult Corrections with an expected release date no earlier than August, 2022; the respondent father refused to work with . . . DSS for the five (5) months after the juvenile was placed in DSS custody prior to his arrest; that his progress has been limited while incarcerated; the respondent father has been in and out of jail for the last ten (1) [sic] years; has a criminal history dating back to 1995; did not raise his older child who is now 21 years of age since that child was five (5) years old; has had no contact with his younger child (not in DSS custody and residing with the paternal grandparents). That DSS has been relieved of providing further reasonable efforts to reunify the juvenile with the respondent father. The failure of the respondent parents to comply with the DSS case plans and/or their inability to eliminate the reasons the juvenile came into DSS custody, demonstrate the continued neglect of the juvenile and the probability of future neglect if the juvenile is returned to their care.

Respondent does not challenge the trial court's finding of past neglect. He contends the evidence does not support the court's finding of a likelihood of future neglect, thus the court's findings are insufficient to support its ultimate conclusion. We agree.

Respondent first challenges the portion of Finding of Fact 12 related to his history of incarceration and his involvement with his older child. He contends that

the evidence to support such findings was presented during disposition, and thus it was improper for the trial court to consider it when making adjudicatory findings. *See In re Z.J.W.*, 376 N.C. 760, 772-73, 855 S.E.2d 142, 152 (2021) (concluding that a trial court’s reliance upon dispositional evidence to support an adjudicatory finding is error).

Those specific portions of the finding are direct summaries of Respondent’s testimony during the dispositional phase. The record contains no other evidence related to Respondent’s relationship with his other children, and the only evidence of his criminal history is that he was previously adjudicated a habitual felon and was sentenced as a habitual felon following his April 2021 plea. Thus, the trial court’s finding that Respondent had been “in and out of jail for the last ten” years and that he had “a criminal history dating back to 1995” are unsupported by the adjudicatory evidence and cannot be a “determination reached through logical reasoning from the evidentiary facts[.]” *Barnette v. Lowe’s Home Ctrs., Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016) (quotation marks and citation omitted). Accordingly, the trial court erred by relying on dispositional evidence in its adjudicatory findings and we disregard those portions of Finding of Fact 12. *In re Z.J.W.*, 376 N.C. at 772-73, 855 S.E.2d at 152.

Contrary to the remainder of Respondent’s argument, the record contains sufficient evidence—including testimony from Respondent—to support the remainder of the evidentiary facts in Finding of Fact 12, to wit: except for two visits

with Hunter, Respondent did not contact DSS in the five or six months between the time Hunter was removed from the home and Respondent's arrest and "refused" to cooperate with DSS during that same period;³ Respondent had been incarcerated for the majority of the case and would be released no earlier than August 2022; Respondent signed a case plan; Respondent's "progress has been limited while he was incarcerated;" and DSS had been relieved of efforts to reunify Respondent and Hunter. However, these scant findings neither establish a probability of future neglect nor support the trial court's ultimate decision to terminate Respondent's parental rights for neglect.

While "[a] parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect[.]" *In re M.A.*, 374 N.C. 865, 870, 844 S.E.2d 916, 921 (2020) (quotation marks and citation omitted), it is not necessarily determinative. *See In re K.D.C.*, 375 N.C. 784, 792-93, 850 S.E.2d 911, 918 (2020) (reversing the trial court's conclusion that the respondent's rights could be terminated based on neglect when the respondent's failure to comply with many of the components of her case plan were attributable to her incarceration). In this case,

³ We note that the record tends to support Respondent's initial arrest as occurring in February 2020, not January 2020 as reflected in the trial court's order. In its reports compiled for review and permanency planning hearings between Respondent's arrest and subsequent transfer, DSS identified his date of arrest as 14 February 2020. The trial court first includes this date in the order entered after the October 2020 review hearing, but the court does not include a date of arrest in any other order besides the termination order. At the hearing, the DSS social worker testified Respondent was arrested in January 2020, but Respondent testified that he was arrested on 12 February 2020. Respondent does not challenge the trial court finding his arrest occurred in January 2020.

the trial court's findings fail to establish the degree to which Respondent did not comply with his case plan and do not show consideration of how Respondent's incarceration impacted his ability to comply with the plan.

The trial court's findings identify that Respondent "also signed a DSS case plan[,]” but the findings fail to identify what the case plan required or how Respondent's compliance with the plan was needed to remediate the conditions that led to Hunter's removal. Similarly, the court found that Respondent "refused" to work with DSS in the first months of the case prior to his arrest, and that his "progress ha[d] been limited" since, but there is nothing to explain what efforts Respondent has, or has not, actually made in achieving this "limited" progress. There were no findings establishing which provisions in the case plan Respondent failed to comply with. Such evidentiary findings are necessary to establish that a parent's failure to comply with a case plan indicates a probability of future neglect. *See, e.g., In re M.S.E.*, 378 N.C. 40, 57-58, 859 S.E.2d 196, 210 (2021) (affirming termination of parental rights based upon a probability of future neglect where "the trial court made numerous findings concerning the lack of progress respondent made toward satisfying the requirements of her case plan[,]” including identifying "the steps . . . required to complete in order to achieve reunification" and the respondent's specific actions, or lack of action, that constituted "inadequate" progress).

The only remaining findings related to future neglect are those concerning Respondent's current incarceration. However,

respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration.

In re K.N., 373 N.C. 274, 282-83, 837 S.E.2d 861, 867-68 (2020). The trial court's findings do not show any "analysis of the relevant facts and circumstances" regarding Respondent's incarceration. The court found that he would remain incarcerated at least until August 2022, approximately eight months after the entry of the termination order, and that his progress had been "limited" while incarcerated, though again, the findings fail to consider to what extent Respondent's incarceration impacted his progress. Standing alone, these facts are insufficient to support the trial court's determination that Respondent was likely to neglect Hunter in the future. *Id.*

Accordingly, we conclude that the trial court's findings are insufficient to support an adjudication of neglect as a ground for termination of Respondent's parental rights. However, "the trial court *could* have made additional findings of fact, based on other evidence in the record, that might have been sufficient to support a finding of a future likelihood of neglect[.]" *Id.* at 284, 837 S.E.2d at 868. Thus, we vacate the portions of the order pertaining to neglect and remand the matter for further proceedings. *Id.* at 284-85, 837 S.E.2d at 868-69.

B. Failure to Legitimate

A trial court may terminate parental rights when

[t]he father of a juvenile born out of wedlock has not, prior to the filing of a petition or motion to terminate parental rights, done any of the following:

- a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services. The petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
- c. Legitimated the juvenile by marriage to the mother of the juvenile.
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
- e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5) (2021). Adjudication on this ground requires that the trial court “make specific findings of fact as to each subsection.” *In re J.M.K.*, 261 N.C. App. 163, 167, 820 S.E.2d 106, 109 (2018) (quotation marks, emphasis, brackets, and citation omitted).

Here, the trial court found Respondent was not married to Hunter's mother at the time of his birth and no father is listed on Hunter's birth certificate. The court further found that at no time prior to the filing of the petition to terminate his parental rights did Respondent establish his paternity pursuant to subsections (a) through (d); however, the court failed to address whether Respondent established paternity pursuant to subsection (e). Accordingly, we do not consider Respondent's

specific arguments related to subsection (e).

By failing to make all of the required statutory findings, the trial court erred in concluding that Respondent's parental rights were subject to termination on this ground, and we reverse the order in relevant part. *Id.*

III. Conclusion

The trial court's findings of fact are insufficient to support a conclusion that Respondent's parental rights are subject to termination for either neglect or failure to legitimate. However, the record contains evidence that potentially could support terminating Respondent's parental rights for neglect. Accordingly, we vacate the 14 December 2021 order in part and remand the matter for further proceedings not inconsistent with this opinion, including the entry of a new order containing appropriate findings of fact and conclusions of law on the issue of whether grounds exist to support the termination of Respondent's parental rights. On remand, the trial court shall have the discretion to determine whether the receipt of additional evidence is appropriate. *See In re K.N.*, 373 N.C. at 285, 837 S.E.2d at 869.

Because the trial court failed to make the required, specific findings of fact for each subsection of N.C. Gen. Stat. § 7B-1111(a)(5), we reverse the order as to that ground for termination. *See In re J.M.K.*, 261 N.C. App. at 167, 820 S.E.2d at 109.

VACATED AND REMANDED IN PART; REVERSED IN PART.

Before a panel consisting of Judges COLLINS, CARPENTER, and WOOD.

Report per Rule 30(e).