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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-455

Filed 5 March 2024

Person County, No. 20 JT 26

IN THE MATTER OF: A.W.

Appeal by respondent-mother from order entered 3 February 2023 by Judge Adam S. Keith in Person County District Court. Heard in the Court of Appeals 15 February 2024.

Thomas L. Fitzgerald for petitioner-appellee Person County Department of Social Services.

Poyner Spruill LLP, by John M. Durnovich, for the guardian ad litem.

Edward Eldred for respondent-appellant mother.

PER CURIAM.

Respondent-mother, the mother of A.W. (“Andy”)¹, appeals from the trial court’s order terminating her parental rights to Andy.² We vacate and remand.

¹ A pseudonym is used to protect the identity of the juvenile and for ease of reading.

² The order also terminated the parental rights of Andy’s father, but he is not a party to this appeal.

I. Background

On 12 March 2020, Person County Department of Social Services (“DSS”) obtained nonsecure custody of two-year-old Andy upon filing a petition alleging Andy to be a neglected juvenile. The petition asserted that DSS had received a report for improper supervision, improper medical care, injurious environment, and substance abuse after Andy ingested medication and became sick but did not receive medical treatment. The petition further provided that Andy’s parents denied the allegations but refused drug screens for themselves and Andy and that Andy’s older half-sibling³ had disclosed she observed a physical altercation between the parents stemming from an argument over the father’s refusal to purchase Mother “more benzos”. The sibling also reported similar altercations between the parents in the past.

On 13 January 2021, after a hearing on the matter, the trial court entered an adjudication and disposition order. In the order, the court adjudicated Andy to be a neglected juvenile based on the parents’ admission to DSS’s allegations and based on the evidence presented by DSS and the guardian ad litem (“GAL”). The court also found that DSS had located appropriate relatives for Andy’s placement and ordered DSS to retain custody of Andy while allowing Mother regular supervised visitation. The parents were ordered to clean up the home and lock medication out of the reach of the children. Mother was also ordered to complete a mental health and substance

³ Mother is not the mother of the sibling.

abuse assessment and follow recommendations, promptly submit to random drug screens, complete an anger management assessment and follow recommendations, and comply with her family services agreement with DSS.⁴

The matter came on for a permanency planning hearing on 12 February 2021. By that time, Andy had been removed from the placement with his maternal grandparents and placed in foster care. The court found in its permanency planning order that DSS received a report on 8 January 2021, a month before the hearing, that the grandparents allowed Andy to return to the parents' home in September 2020; that the parents' home was unkept; that the parents were often under the influence in Andy's presence and yelled at Andy; and that Andy had been able to run to the neighbor's home several times while unsupervised. In following up on the report, DSS confirmed that Andy was back at his parents' home. DSS was not allowed to inspect the inside of the home, but the outside of the home was in disarray with overflowing trash, broken glass, animal feces, and building materials. Mother denied any substance abuse but did not comply with DSS's request for a drug screen. The court found that mental health, substance abuse, and the condition of the home remained barriers to reunification; and that guardianship or custody with relatives

⁴ The trial court later entered an order allowing a motion to amend the adjudication and disposition order to correct errors related to Andy's half-sibling. An amended adjudication and disposition order was entered on 12 May 2021. The amended order made no substantive changes related to Andy's case.

was unlikely to be successful given the recent events. The court established the primary plan for Andy as reunification with a concurrent plan of adoption.

In an order from the next permanency planning hearing in April 2021, the court found Mother had tested positive for methamphetamine in February 2021 and been charged for driving without a license and with unrestrained children in the vehicle. DSS had scheduled return visits to the parents' home to evaluate the prior deficiencies, but the parents had rescheduled each visit. DSS recommended adoption as the primary plan and reunification as the secondary plan, but the trial court declined to change the permanent plan for Andy at the time.

However, in the trial court's order from the next permanency planning hearing in October 2021, the court found that despite DSS guiding Mother towards her reunification plan and providing access to drug screens, Mother appeared disheveled at the hearing, had made no effort to complete her case plan, and had failed to complete drug screens to verify she was substance free. The court directly addressed Mother at the hearing and explained that it previously declined DSS's recommendation to change Andy's permanent plan because Mother indicated she was going to work on her plan. However, the court found the same barriers to reunification continued to exist and therefore accepted DSS's recommendation to change Andy's primary plan to adoption and the secondary plan to reunification.

In February 2022, DSS filed a motion to terminate parental rights. DSS alleged grounds existed to terminate Mother's parental rights for neglect and failure

to make reasonable progress, *see* N.C. Gen. Stat. § 7B-1111(a)(1)–(2) (2021), and alleged termination was in Andy’s best interests.

The case was back before the court for a permanency planning hearing on 28 April 2022. In the order from the hearing, the court found Mother was still not making efforts towards reunification—she was receiving medication management but had made no other progress. The court found the parents had recently broken up, but the barriers to achieving reunification remained the same: substance abuse, anger management, and lack of appropriate housing.

A termination hearing scheduled for 1 September 2022 was continued because the GAL was unavailable, but the permanency planning hearing scheduled for the same day proceeded. In the permanency planning order, the court found Mother was participating in an inpatient substance abuse treatment program at Freedom House that she began in July 2022, and Mother had been diagnosed with PTSD, ADHD, anxiety, amphetamine type substance abuse disorder, cannabis use disorder, and opioid dependence disorder. In the program, Mother was participating in substance abuse comprehensive outpatient treatment (“SACOT”), NA meetings, therapy, and medication management. The court found the program lasted six months, and Mother was doing well in the program. Nevertheless, the court further found the parents had substantial criminal records which supported the retention of the plan for adoption. The court found the living situation with the parents was still

inappropriate for Andy, and Andy required more care and supervision than the parents could provide.

On 3 February 2023, following a hearing on the matter, the trial court entered an order terminating parental rights. The court concluded the grounds alleged in the motion—neglect and failure to make reasonable progress—existed to terminate Mother’s parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(1)–(2). As additional grounds for termination, the court determined Mother failed to pay a reasonable portion of Andy’s cost of care, Andy was dependent in that Mother was incapable of providing for his care, and Mother had willfully abandoned Andy. *See* N.C. Gen. Stat. § 7B-1111(a)(3), (6)–(7). Lastly, the court concluded termination of parental rights was in Andy’s best interests. Mother timely appealed from the termination order.

II. Analysis

Mother challenges the trial court’s adjudication of the existence of grounds for termination of her parental rights. She argues the trial court erred by (1) adjudicating the existence of grounds not alleged in the termination motion and (2) failing to consider her circumstances at the time of the hearing in adjudicating the existence of grounds under N.C. Gen. Stat. § 7B-1111(a)(1) and (2). Since the adjudication of any single ground is sufficient to support termination, *see In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020), we begin with Mother’s challenge to the grounds specifically alleged in the termination motion.

A. N.C. Gen. Stat. § 7B-1111(a)(1) and (2)

Mother argues the trial court's adjudication of grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) and (2) was not supported by the evidence or sufficient findings because the trial court failed to account for her circumstances at the time of the termination hearing. Because Mother raises the same argument with respect to both grounds, we address the grounds together.

“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) (citations omitted); *see also* N.C. Gen. Stat. § 7B-1109(f) (2021). Accordingly, this Court reviews an adjudication of grounds for termination by examining “whether the court’s findings of fact are supported by clear, cogent[,] and convincing evidence and whether the findings support the conclusions of law. . . . The trial court’s conclusions of law are reviewed de novo.” *In re Z.G.J.*, 378 N.C. 500, 508–09, 862 S.E.2d 180, 187 (2021) (cleaned up).

Parental rights may be terminated under N.C. Gen. Stat. § 7B-1111(a)(1) if “[t]he parent has . . . neglected the juvenile” within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2021). A neglected juvenile is defined, in relevant part, as a juvenile “whose parent . . . [d]oes not provide proper care, supervision, or discipline[,] . . . has not provided or arranged for the provision of necessary medical . . . care[, or] . . . [c]reates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15)

(2021). Termination based on neglect “requires a showing of neglect at the time of the termination hearing or, if 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 D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016). “When determining whether such 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.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019). “The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*” *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

Independent of N.C. Gen. Stat. § 7B-1111(a)(1), N.C. Gen. Stat. § 7B-1111(a)(2) authorizes 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) (2021). “A [parent’s] prolonged inability to improve their situation, despite some efforts in that direction, will support a finding of willfulness regardless of [the parent’s] good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under [N.C. Gen. Stat. §] 7B-1111(a)(2).” *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (quotation marks and citations omitted). But similar to a court’s evaluation of

changed circumstances in determining the likelihood of repeat neglect, a “parent’s *reasonable progress* [for purposes of N.C. Gen. Stat. § 7B-1111(a)(2)] is evaluated for the duration leading up the hearing on the motion . . . to terminate parental rights.” *Id.* (quotation omitted).

In the instant case, Mother does not take issue with the trial court’s findings that Andy was previously adjudicated neglected for purposes of N.C. Gen. Stat. § 7B-1111(a)(1) or that Andy had been in foster care for more than twelve-months preceding the filing of the termination motion, as required by N.C. Gen. Stat. § 7B-1111(a)(2). Rather, Mother argues the trial court failed to make sufficient findings to account for changes in her circumstances at the time of the termination hearing such that the trial court erred in determining there was a likelihood of repetition of neglect for purposes of N.C. Gen. Stat. § 7B-1111(a)(1) and that she failed to make reasonable progress for purposes of N.C. Gen. Stat. § 7B-1111(a)(2). We agree.

A review of the termination hearing shows that, although Mother did not put on her own evidence, DSS’s witnesses presented evidence that Mother made positive changes between the filing of the termination motion in February 2022 and the termination hearing in January 2023. Testimony, exhibits, and the trial court’s order from the 1 September 2022 permanency planning hearing all show that Mother obtained sobriety while she was incarcerated between April and July 2022 on charges that were ultimately dismissed. The evidence further showed that, upon her release from incarceration in July 2022, Mother entered an inpatient rehabilitation program

at Freedom House in Chapel Hill, where she remained at the time of the termination hearing. The inpatient program was six months long and included substance abuse testing. DSS social workers testified that Mother was in compliance with the program, was currently sober, and doing well. Mother was expected to complete the program the week following the termination hearing and was to be discharged to a halfway house where there was a possibility that Andy would be able to join her.

DSS social workers also testified that Mother was employed and had been employed for several months. Additionally, evidence at the termination hearing established that Mother was no longer in a relationship with Andy's father, with whom there had been domestic violence. The evidence indicated the relationship ended around Christmas 2021 and Mother was working through her relationship issues in therapy.

One of the social workers testifying at the termination hearing specifically acknowledged Mother's progress, stating she was "really proud of [Mother's] progress." The social worker added, "I don't think the agency is arguing that she's not doing well at this point." However, the evidence indicated that DSS remained concerned about Mother's ability to maintain sobriety and healthy relationships outside the structured setting of the inpatient program given her history. Therefore, DSS was not comfortable reunifying Mother with Andy at the time of the hearing.

Despite the evidence from DSS, the termination order is devoid of any findings concerning Mother's recent progress. The trial court's findings instead reflect the

allegations in the termination motion—generally, that DSS entered into a case plan with Mother and offered services towards reunification, but that Mother had been unwilling to work with DSS and refused all services. Mother takes issue with the following six findings:

31. The mother has not utilized the services offered by DSS;

. . . .

33. The mother has not been willing to work with the DSS social workers to reunify herself with her child;

. . . .

41. The . . . mother declined additional DSS services to assist in reunification as late as September 1, 2022; she never took part in any programs or services offered by DSS to assist her in reunification with her child;

42. The mother has refused drug screens requested by [DSS];

43. The mother has not consistently taken steps to become and/or remain employed;

. . . .

66. There is a probability that the neglect will continue for the foreseeable future pursuant to the statute, because [Mother] has not addressed the issues that brought [Andy] into care including substance abuse and lack of parental care[.]

The trial court relied on these findings to support its adjudication of grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) and (2).

Mother argues findings of fact 31, 33, 42, and 43 are not supported by clear,

cogent, and convincing evidence of the circumstances at the time of the termination hearing and that the first portion of finding of fact 41—that she refused services as late as September 2022—is not supported by any evidence. While the findings may be supported by evidence of Mother’s lack of effort towards reunification for much of the case, we agree the findings do not account for the evidence of Mother’s substance abuse treatment that included drug screens, her employment, and her participation in therapy to address relationship issues. Furthermore, there is no evidence that Mother declined DSS services as recently as 1 September 2022, a date that corresponds to the last permanency planning hearing before the termination hearing. The trial court’s order from the 1 September 2022 hearing did not contain findings that Mother refused services on that date. The court found Mother was participating in the inpatient rehabilitation program at Freedom House, including SACOT, NA meetings, therapy, and medication management; and the court found Mother’s relationship with Andy’s father had ended. We agree with Mother that the trial court’s factual findings fail to account for the evidence of her recent progress and are not reflective of her circumstances at the time of the termination hearing.

In regard to finding 66, Mother argues “[i]t cannot be reasonably found from the evidence that at the time of the hearing that [she] ‘had not addressed the issues that brought [Andy] into care including substance abuse and lack of parental care’ ” given that she was completing a lengthy inpatient program that included substance abuse treatment and therapy. DSS and the GAL respond to Mother’s challenge to

finding 66, asserting the record fully supports a finding that Mother “had not adequately addressed the substance abuse concerns.” In support of their position, DSS and the GAL direct this Court to evidence, some of which was not presented at the termination hearing, that they claim paints a clear picture of Mother’s circumstances at the time of the termination hearing and supports the trial court’s determinations that there was a likelihood of repetition of neglect and a lack of reasonable progress by Mother. Notably, DSS and the GAL do not direct this Court to specific findings in the termination order that support such determinations, and they add “adequately” to their rendition of finding 66, suggesting the trial court considered Mother’s recent progress in its finding that she had not addressed the issues that brought Andy into DSS care.

Upon review, we disagree with Mother’s contention that a court could not reasonably find that she “has not addressed the issues that brought [Andy] into care” in finding 66. While there was evidence that she had recently engaged in services and was making progress in addressing the issues that brought Andy into DSS care, a trial court is will within its authority to determine there is a likelihood of repetition of neglect despite a parent’s progress and changed circumstances, *see In re J.J.H.*, 376 N.C. 161, 185, 851 S.E.2d 336, 352 (2020) (holding a parent’s compliance with a case plan does not preclude a determination that there is a likelihood of repeat neglect), or that a parent waited too long to begin efforts towards reunification such the parent had not made reasonable progress. *See In re I.G.C.*, 373 N.C. 201, 206,

835 S.E.2d 432, 435 (2019) (holding the trial court's findings showed the court considered the parent's efforts up to the termination hearing and supported its determination that the parent waited too long to begin work on a case plan such that the parent had not made reasonable progress). However, we agree with Mother that finding 66 is not such a determination in this case where the trial court failed to issue findings reflecting Mother's circumstances at the time of the termination hearing. Without findings as to Mother's changed circumstances leading up to the termination hearing, the trial court could not properly evaluate whether there was a likelihood of repetition of neglect or whether Mother had made reasonable progress. *See In re Z.V.A.*, 373 N.C. at 212, 835 S.E.2d at 430 (requiring consideration of changed circumstances occurring between the period of past neglect and the termination hearing); *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (requiring a parent's progress be evaluated up to the termination hearing for purposes of N.C. Gen. Stat. § 7B-1111(a)(2)).

As the trial court's termination order entirely fails to account for the evidence of Mother's circumstances at the time of the termination hearing, we hold the trial court's determinations that there was a likelihood of repetition of neglect and a lack of reasonable progress by Mother were not supported by the evidence and findings. Accordingly, the trial court erred in adjudicating the existence of grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2). Nevertheless, because evidence was presented from which the trial court could make additional

findings about Mother’s circumstances at the time of the termination hearing, remand of the case to the trial court for additional findings of fact and further consideration of grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) is appropriate. *See In re B.R.L.*, 379 N.C. 15, 22–23, 863 S.E.2d 763, 770 (2021); *In re K.N.*, 373 N.C. 274, 284–85, 837 S.E.2d 861, 869 (2020).

B. Grounds Not Specifically Alleged in the Motion

In addition to adjudicating grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(1) and (2), the trial court determined that grounds also existed for termination of Mother’s parental rights for failure to pay a reasonable portion of the costs of Andy’s care pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), for dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), and for willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Mother argues the trial court erred in adjudicating these additional grounds because the grounds were not alleged in the termination motion and because DSS and the trial court indicated they were not at issue.

“A [motion] seeking to terminate parental rights must state ‘[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.’ ” *In re B.C.B.*, 374 N.C. 32, 34, 839 S.E.2d 748, 751 (2020) (quoting N.C. Gen. Stat. § 7B-1104(6)). “[W]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.” *Id.* (quoting *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002)).

DSS and the GAL acknowledge that N.C. Gen. Stat. § 7B-1111(a)(3), (6), and (7) were not cited in the termination motion but contend the motion included sufficient allegations to place Mother on notice that these additional grounds were at issue. Contrary to DSS's and the GAL's assertions, the termination motion provides no indication that DSS sought to terminate parental rights on grounds other than N.C. Gen. Stat. § 7B-1111(a)(1) and (2). Not only does the termination motion not cite the additional grounds, the motion also does not contain statutory language or allege facts to implicate the additional grounds. Additionally, in contradiction to DSS's and the GAL's contention on appeal that N.C. Gen. Stat. § 7B-1111(a)(3), (6), and (7) were at issue in the termination proceeding, DSS explained to the trial court during a pre-termination conference that the only issues presented by the termination motion were neglect, failure to make reasonable progress, and best interests. The trial court then entered an "Order on Final Pre-Trial Conference" in which the court identified neglect, willful failure to make reasonable progress, and best interests as the only issues for trial. It appears that the parties relied on the pretrial order throughout the termination hearing as there was no mention of additional grounds for termination until the trial court rendered its adjudication decision. We agree with Mother that the termination motion did not provide sufficient notice that N.C. Gen. Stat. § 7B-1111(a)(3), (6), and (7) were at issue as grounds for termination.

Nonetheless, assuming *arguendo* the termination motion provided sufficient notice that the additional grounds were at issue, and assuming *arguendo* that DSS had not limited the grounds at issue in its representations to the trial court, the trial court's determinations that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(3), (6), and (7) are not supported by the evidence at the termination hearing or the trial court's findings of fact.

For the above reasons, we hold the trial court erred in adjudicating grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(3), (6) and (7).

III. Conclusion

For the above reasoning concerning the trial court's adjudication, we vacate the termination order and remand to the trial court for additional findings. The trial court, in its discretion, may take new evidence.

VACATED AND REMANDED.

Panel consisting of Chief Judge DILLON and Judges ARROWOOD and GRIFFIN.

Report per Rule 30(e).