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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-347

Filed 5 March 2024

Robeson County, No. 20 JT 152

IN THE MATTER OF: D.J.W.

Appeal by respondent from order entered 4 January 2023 by Judge Angelica C. McIntyre in District Court, Robeson County. Heard in the Court of Appeals 31 October 2023.

*No brief filed for petitioners-appellees.*

*BJK Legal, by Benjamin J. Kull, for respondent-appellant.*

STROUD, Judge.

Respondent-father appeals a trial court order terminating his parental rights to his minor child. Because there was not sufficient evidence presented to support any alleged ground for termination of Father's parental rights, we reverse.

**I. Background**

Petitioners are the maternal great aunt (“Aunt”) of the minor child Dante<sup>1</sup> and her husband (“Uncle”). Dante was born in Wake County in August 2016 and he was placed with Aunt by the Wake County Department of Social Services (“DSS”) shortly thereafter, when Dante was about three weeks old.<sup>2</sup> Father was initially granted visitation with Dante once a month and he consistently visited with Dante since 2016. On 16 May 2018, over four years before the termination hearing at issue in this appeal, the Wake County District Court entered a Juvenile Order granting guardianship to Aunt, making Aunt “a party to this action[,]” and granting Father “supervised monthly visits at such times and places as the father and the guardian can agree,” but if they could not agree, the “third Saturday of each month from noon until 2:00 p.m.” at a specified McDonald’s in Robeson County. This order also found that “[a] proceeding to terminate the parental rights of the child’s parents is not necessary in order to perfect the primary permanent plan for the child because the primary permanent plan for the child is guardianship.” The Wake County District Court found guardianship to be in the child’s best interests. Our record does not include any other orders entered in the Wake County proceeding since 2018 but based

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<sup>1</sup> A pseudonym is used to protect the minor child’s identity.

<sup>2</sup> A juvenile petition regarding Dante was filed by the Wake County DSS in 2016. The allegations of neglect were based upon Mother’s drug use, as Dante tested positive for cocaine at his birth. Father was identified as the potential father of Dante and the petition alleged he was “making arrangements to comply with genetic marker testing and does not believe that he is the child’s father.” All court orders referred to in this opinion, other than the termination order on appeal, were entered by the Wake County District Court in the juvenile proceeding filed in 2016.

on argument of counsel and the parties' testimony at the termination hearing, there have been proceedings in Wake County juvenile case much more recently than 2018.<sup>3</sup>

On or about 14 July 2021, Petitioners filed a petition in Robeson County to terminate the parental rights of the Mother, Father, and "any unknown father" to Dante. Petitioners alleged they were Dante's guardians.<sup>4</sup> At the hearing, both testified Father had consistently exercised his visitation with Dante as granted in the Wake County court orders and maintained communication with them prior to the filing of the petition. Their stated reason for seeking termination was *not* based on the actions or inaction of Father, but they wanted to adopt Dante so he could "receive [their] benefits" in the future. During the termination hearing, Father moved to dismiss the petition. Father argued Petitioners failed to present adequate evidence

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<sup>3</sup> For example, at the start of the hearing, Father's counsel made a motion to continue, stating, "there is a court date scheduled for Thursday, Your Honor, in Wake County juvenile court to review whether or not his visits, which he's been exercising that are supervised visits, should be amended to become unsupervised visits. He was in court in September in that county, Judge. There was a court order that indicated – that made reference to this pending action here in Robeson County. There were some services offered to [Father] at that court date and they scheduled it to be reviewed this following Thursday, Judge, to see if he is compliant with those in order to extend his visits to unsupervised visits." The motion was denied.

<sup>4</sup> The trial court found that both Aunt and Uncle "are the guardians of the minor child." This finding is consistent with the allegation in the Petition but it is not supported by the Wake County Juvenile order of 15 May 2018; this order placed Dante in the guardianship of Aunt alone. The Petition for termination does not allege when this occurred or which court granted guardianship. The Affidavit of Status of Minor Child, which is required by North Carolina General Statute Section 50A-209, *see* N.C. Gen. Stat. § 50A-209 (2021), attached to the Petition does not have any indication of a prior custody proceeding of any sort, despite the fact that Aunt was made a party to the Wake County proceeding in 2018.

of grounds for termination. The trial court denied the motion but stated no reason for the denial.

Mother does not appeal the termination of her rights, so we address only Father in this opinion. As to grounds for termination of Father's parental rights, the petition alleged:

14. Facts sufficient to warrant a determination that one or more grounds exists for terminating the parental rights of the Alleged Respondent Father, Donell Howell, and any unknown father<sup>5</sup> under North Carolina Statu[t]e 7B-1111 are as follows:
  - (a) The Respondent alleged father and unknown father has willfully failed to provide substantial financial support or consistent care with respect to [Dante].
  - (b) The unknown father has willfully abandoned [Dante] for at least six consecutive months preceding the filing of this petition.
  - (c) The Respondent Alleged Father and Unknown Father have neglected [Dante] within the meaning of NC General Statute in that he has left [Dante] in placement outside the home for more than 12 months.
  - (d) The Respondent alleged father and unknown father of [Dante] has not, prior to the filing of

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<sup>5</sup> It is unclear why an "unknown father" was included in the petition. There are no allegations about the unknown parent as required by North Carolina General Statute Section 7B-1104, nor were there any court proceedings to identify an unknown parent as directed by North Carolina General Statute Section 7B-1105. *See* N.C. Gen. Stat §§ 7B-1104-05 (2021). According to the 16 May 2018 Juvenile Order from the Wake County proceeding, Father had previously been "confirmed as the child's father by genetic marker testing." The petition was filed in 2021, and Aunt was a party to the Wake County proceeding. But as noted below, we assume all the Petitions' allegations directed to the Respondent Father or the "unknown father" apply to Father.

a petition to terminate parental rights:

- i. Filed an Affidavit of paternity in a central registry maintained by the Department of Health and Human Services; and
- ii. Legitimated [Dante] pursuant to provisions of N.C.G.S. 49-10, N.C.G.S. 49-12.1, or filed a petition for the specific purpose; and
- iii. Legitimated [Dante] by married to the mother of [Dante].

Father filed a response denying most of the substantive allegations, and after a hearing on 31 October 2022, the trial court entered an order terminating both parties' parental rights on 4 January 2023. As to the grounds for termination of Father's parental rights, the trial court concluded:

4. Facts sufficient to warrant a determination that one or more grounds exists for terminating the parental rights of the Alleged Respondent Father, Donell Howell, and any unknown father under North Carolina Statute 7B-1111 are as follows:
  - (a) The Respondent alleged father and unknown father has willfully failed to provide substantial financial support or consistent care with respect to [Dante].
  - (b) The unknown father has willfully abandoned [Dante] for at least six consecutive months preceding the filing of this petition.
  - (c) The Respondent Alleged Father and Unknown Father have neglected [Dante] within the meaning of NC General Statute in that he has left [Dante] in placement outside the home for more than 12 months.

(d) The Respondent alleged father and unknown father of [Dante] has not, prior to the filing of a petition to terminate parental rights:

- i. Filed an Affidavit of paternity in a central registry maintained by the Department of Health and Human Services; and
- ii. Legitimated [Dante] pursuant to provisions of N.C.G.S. 49-10, N.C.G.S. 49-12.1, or filed a petition for the specific purpose; and
- iii. Legitimated [Dante] by married to the mother of [Dante].

5. That the Respondent Alleged Father and any Unknown Father, are subject to termination of his parental rights pursuant to North Carolina General Statu[t]e 7B-1111.

a. The Respondent has failed to maintain any contact with the minor child since September 2017.

b. The Respondent has not provided reasonable financial support or consistent care with respect to the minor child.

c. The Respondent failed to file an affidavit of parentage in a central registry maintained by the Department of Health and Human Services.

Father appeals.

## **II. Motion to Dismiss**

Father first contends that “[t]he trial court committed reversible error when it

denied the motion to dismiss at the close of Petitioners' evidence because Petitioners failed to present sufficient evidence to prove their allegations under both N.C. Gen. Stat. § 7B-1111(a)(1) and (5).” In the trial court, Father stated no specific rule for his motion to dismiss, but a motion to dismiss in a civil case made at the close of the petitioner's evidence is governed by North Carolina General Statute Section 1A-1, Rule of Civil Procedure 41. *See* N.C. Gen. Stat. § 1A-1, Rule 41 (2021).

A motion to dismiss pursuant to Rule 41(b) will be granted if the petitioner has shown no right to relief or if the petitioner has made out a colorable claim but the court nevertheless determines as the trier of fact that the respondent is entitled to judgment on the merits. The trial court is able to weigh all evidence before it and make a determination.

*In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908-09 (2001) (citations, quotation marks, and brackets omitted).

North Carolina General Statute Section 7B-1111(a) sets out the grounds upon which parental rights may be terminated, and thus Petitioners must “ma[k]e out a colorable claim” for at least one of the enumerated grounds for termination of parental rights under North Carolina General Statute Section 7B-1111(a). *See id.* The petition did not refer to any specific subsection of North Carolina General Statute Section 7B-1111.

Furthermore, it is well-established that the trial court may only terminate parental rights based on at least one of the eleven statutory grounds alleged in the petition:

A petition for termination of parental rights must allege facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights listed in N.C.G.S. § 7B-1111(a) exist. The facts alleged need not be exhaustive or extensive but they must be sufficient to put a party on notice as to what acts, omission or conditions are at issue. 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) (citations, quotation marks, and brackets omitted). As already noted, because Petitioners did not explicitly state the alleged grounds for termination, we have identified each potential ground alleged based on the language used in the petition; all emphasis is our own in an attempt to match the petition's allegations with a potential statutory ground for termination.

All the grounds for termination were listed under number 14 in the petition. Subsection 14(a) in the petition states: "The Respondent alleged father and unknown father has *willfully failed to provide substantial financial support or consistent care* with respect to [Dante]." This allegation seems to stem from North Carolina General Statute Section 7B-1111(a)(5)(d) which states,

- (5) The 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:

. . . .



- d. Provided *substantial financial support or consistent care* with respect to the juvenile and mother.

N.C. Gen. Stat. § 7B-1111(a)(5) (2021).

Subsection 14(b) in the petition states: “The *unknown father* has *willfully abandoned [Dante]* for at least six consecutive months preceding the filing of this petition.” This allegation appears to refer to the potential unknown father – not Father – since Father was also included as a named party in the petition and he had been confirmed as the biological father by DNA testing in the Wake County proceeding. But we will assume this allegation could relate to Father as well. Subsection 14(b) tracks the language of North Carolina General Statute Section 7B-1111(a)(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)(7) (2021).

Subsection 14(c) in the petition states, “The Respondent Alleged Father and Unknown Father *have neglected [Dante]* within the meaning of NC General Statute *in that he has left [Dante] in placement outside the home for more than 12 months.*” This subsection seems to incorporate parts of two grounds stated in North Carolina General Statute Sections 7B-1111(a)(1) and (a)(2):

- (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.

N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2021).

Finally, subsection 14(d) in the petition states:

- (d) The Respondent alleged father and unknown father of [Dante] has not, prior to the filing of a petition to terminate parental rights:
  - i. *Filed an Affidavit of paternity in a central registry maintained by the Department of Health and Human Services; and*
  - ii. *Legitimated [Dante] pursuant to provisions of N.C.G.S. 49-10, N.C.G.S. 49-12.1, or filed a petition for the specific purpose; and*
  - iii. *Legitimated [Dante] by married to the mother of [Dante].*

Subsection 14(d) also seems to rely on North Carolina General Statute Section 7B-1111(a)(5):

- (5) The 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). Thus, under a generous reading of the petition, and assuming each ground alleged as to the “unknown father” also was intended to apply to Father, Petitioners alleged grounds for termination under North Carolina General Statute Section 7B-1111(a)(1), (2), (5), and (7).

We will address each potential ground for termination as alleged in the petition. Starting with North Carolina General Statute Sections 7B-1111(a)(1)-(2), the petition seems to commingle these two grounds, stating “[t]he Respondent Alleged Father and Unknown Father have neglected [Dante] within the meaning of NC General Statute in that he has left [Dante] in placement outside the home for more

than 12 months.” Essentially, Petitioners allege that since Dante was in their care, as guardians, for more than one year, Father neglected him. As to neglect under North Carolina General Statute Section 7B-1111(a)(1), “if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent.” *See In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (citations and ellipses omitted). Here, Petitioners not only failed to show current neglect or a likelihood of future neglect, their own evidence shows *Petitioners* did not believe there would be future neglect by Father since their testimony showed he was consistently involved with Dante and they only filed for termination in order to secure government benefits for Dante.

As to subsection (a)(2), Petitioners only allege this ground in reference to neglect under subsection (a)(1). Petitioners made no specific argument as to whether “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). While the Wake County DSS file is included in our record, the relevant Wake County court file is not, and we do not know what the Wake County court determined regarding the “conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2). Based upon the allegations of the initial Wake County petition and the orders in our record, the removal apparently arose out of the Mother’s drug abuse prior to and following Dante’s birth. Thus, Petitioners failed to show termination was proper as to Father under North Carolina General Statute Section 7B-1111(a)(1)

and (a)(2).

As to North Carolina General Statute Section 7B-1111(a)(5), Petitioners must show, and the trial court must find by clear, cogent, and convincing evidence, that termination is appropriate if Father has done *none* of the five listed actions under North Carolina General Statute Section 7B-1111(a)(5), including filing an affidavit of paternity, legitimating the child, providing financial support or care, or establishing paternity. *See* N.C. Gen. Stat. § 7B-1111(a)(5); *see also In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) (“[T]he petitioner must show by clear, cogent, and convincing evidence that a statutory ground to terminate exists.”). Here, Father specifically contends that “petitioners did not even allege element (e.), let alone introduce any evidence to prove it.” While Petitioners did allege elements (a)-(d) of North Carolina General Statute Section 7B-1111(a)(5), we agree with Father that Petitioners did not allege element (e) and did not introduce sufficient evidence to support termination on that ground. *See* N.C. Gen. Stat. § 7B-1111(a)(5). Again, the Wake County DSS file is included in our record, but the Wake County *court* file is not. Petitioners did not present evidence to show that Father failed to “establish[] paternity through G.S. 49-14, 110-132, 130A-118, or other judicial proceedings.” N.C. Gen. Stat. § 7b-1111(a)(5)(e).

Finally, as to North Carolina General Statute Section 7B-1111(a)(7), abandonment, Petitioners’ own evidence shows Father did not “willfully abandon[] the juvenile for at least six consecutive months immediately preceding the filing of

the petition or motion[.]” N.C. Gen. Stat. § 7B-1111(a)(7). As discussed in detail below, Petitioners’ own evidence showed Father was consistently and actively involved in Dante’s life during the six months preceding the filing of the petition, and the reason they chose to file a petition to terminate Father’s parental rights was to help Dante secure their government benefits. Thus, Petitioners’ own evidence fails to support termination under North Carolina General Statute Section 7B-1111(a)(7).

We have thoroughly reviewed the record and transcript and based on the record before this Court, the evidence is woefully inadequate to support termination of Father’s parental rights on any alleged statutory ground. Petitioners’ own evidence is that they filed to terminate parental rights *not* because Father was absent from Dante’s life – even they acknowledge he was consistently involved with Dante – but simply to be able to find a way to make sure Dante would receive Petitioners’ “benefits” from the government. Aunt testified they had filed the petition to terminate parental rights and to adopt Dante to secure “benefits” from the “government” for him:

[W]e was just trying to -- since our children is grown and [Dante] is the youngest, we just wanted someone to be able to receive our benefits, and we want [Dante] to receive our benefits. That was the reason for us doing that, to adopt him, but we wasn’t trying to take no legal rights from him like not seeing him because it wouldn’t have changed -- everything would still have been the same with us. But we just wanted [Dante] to receive our benefits. My husband benefits and my benefits so it wouldn’t go back to the government, and since we have [Dante], we wanted him to receive it.

Aunt further testified that Father was “offended” by their reason for filing the petition for termination of parental rights.

Aunt also testified Father consistently exercised visitation with Dante once a month until guardianship was granted to Petitioners. Aunt also testified that after she and Uncle received legal guardianship in 2018,<sup>6</sup> she was “on a consistent talking basis” with Father and their communication was “all good” until Petitioners decided they “wanted to adopt” Dante. After Aunt was granted guardianship in 2018, until the petition to terminate parental rights was filed in 2021, Father continued to visit Dante consistently “every other weekend.” Father normally visited at Petitioners’ home and sometimes stayed overnight at the home. Aunt testified there was not any time period when Father was not visiting Dante, and he also frequently called.

Aunt also testified Father had “been good about gifts and presents, holidays, birthdays, and Christmas” in buying things Dante asked for, and Father had also bought diapers and formula when Dante was a baby, as well as clothing, shoes, and other necessities. Aunt stated that after the petition to terminate his parental rights was filed, Father’s “whole demeanor changed” because he didn’t “want us to adopt him.” Aunt testified that at some point after the filing of the petition the Wake County District Court changed Father’s visitation to “four hours every third

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<sup>6</sup> According to the May 2018 Wake County Juvenile order, only Aunt was appointed as Dante’s guardian.

Saturday” at McDonald’s. The change in visitation apparently came after Father filed a motion in Wake County to review his visitation.

Uncle’s testimony confirmed that of Aunt. Uncle testified Father had consistently visited Dante until the petition for termination was filed. Before the petition was filed, Petitioners had allowed Father to visit even more than allowed by the court order, but after they filed the petition, Father had an “attitude change[.]” Uncle stated, “I don’t have to put up with it” so they then limited Father’s visitation to the four hours specifically set in the court order. Uncle also confirmed the reason for filing the petition; Uncle testified,

I’m a retired veteran, disability. I’m not a young man and I love him and I want him to be taken care of even when I’m gone. And if anything happen[ed] to me, [Dante will] get a check until he’s 18 years old and his college will be paid for.

Uncle stated that he wanted Dante “to grow up knowing who his daddy is. I’m not trying to say get him out of the picture completely, I’m not trying to do that[.]” but he had adjusted how he dealt with Father due to his “attitude change[.]” Uncle testified:

Q: So before this TPR was filed, you and [Father] got along great?

A. Yeah. Got along good.

Q. [Father] and [Aunt] got along good?

A. Yeah.



Q. And [Father] visited in a way that was –

A. Respectable.

Q. Respectful and [Dante] loved him for it?

A: Yes.

We must emphasize the evidence noted above is solely *Petitioners'* evidence, and this evidence cannot support termination of parental rights on any alleged ground. According to the Petitioners, Father consistently visited more than the minimum set by the Wake County order and was involved with Dante up until the filing of the petition in 2021; Petitioners limited his contact with Dante only after they filed the petition. We have not addressed Father's evidence, although he did present evidence, and his evidence also confirms his consistent contact with Petitioners and Dante and his desire to retain his parental rights.

Our dissenting colleague attempts to rely upon the Wake County Juvenile Court file in which Aunt was granted guardianship. We agree the Wake County Juvenile Court file would likely answer many questions, but that file is not in our record and was not before the trial court. The most recent Wake County Juvenile Court order in our record is dated 16 May 2018. From that order, we know the Wake County court found that “a proceeding to terminate the parental rights of the child's parents is not necessary in order to perfect the primary permanent plan for the child because the primary permanent plan for the child is guardianship.” The Wake County court also found guardianship to be in the child's best interests.

Petitioners requested the trial court to take “judicial notice of the underlying JA file” including “the non-secure that was filed, the petition that was filed, the adjudication and disposition order, as well as all PPH orders including the guardianship order.” The trial court agreed, “[i]f that’s included in the JA file, so noted.” But the exhibit admitted before the trial court and included in our record is not the Wake County Juvenile Court file and it does not include many of the items noted by Petitioners’ request for judicial notice.

We have examined this exhibit carefully. The exhibit the trial court took judicial notice of was the file of the Wake County DSS, not the Juvenile Court file. The DSS exhibit begins with a page inexplicably numbered as “37,” which is an order entitled “Order for Wake County DSS Records” from the Robeson County District Court directing the Wake County Department of Social Services “to produce all files and records” regarding Dante and “Juvenile File” “16 JA 227” to the Robeson County court for in camera review. The Health and Human Services Records Supervisor for Wake County Health and Human Services produced the records. The first document in the DSS file is numbered as page 39 and appears to be the final four pages of an unsigned draft of a permanency planning order. These pages are followed by emails between counsel of Wake County DSS and other attorneys involved in the Wake County proceeding regarding revisions to the proposed order and another unsigned draft of a proposed Wake County order. The 1059 pages of the DSS file also include notes and reports from social workers, the petition for neglect, various evaluations of

the Mother and Father, drug testing reports and other records regarding both Mother and Father, court reports from the Wake County Guardian Ad Litem, notes of social workers regarding visitation and other interactions between DSS and the parents, and many other documents, but few relevant court orders. The initial petition was filed in Wake County on 4 October 2016. According to court reports in the file, Dante was adjudicated as neglected at an adjudication and disposition hearing held on 15 November 2016, but this order is not included in our record. According to GAL Court Reports, as of 8 February 2017, Father had already been “validated by a positive genetic marker test.” Although there is some useful information in the DSS Exhibit and some is certainly relevant to the termination petition, without the Wake County Juvenile Court orders, we do not know what the Wake County Court actually found as fact or ordered in most of its orders.

Termination of parental rights interferes with “a natural parent’s paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child.” *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citation omitted). In this case, adoption by the Petitioners may eventually provide a financial benefit for Dante, but termination of parental rights simply to obtain “government benefits” for a child is not supported by the law if there is not also a statutory ground for termination. The financial benefit to the child may be an appropriate consideration

for the disposition portion of the termination hearing but is not relevant to the adjudication.

Therefore, for the reasons stated above, Petitioners did not “ma[k]e out a colorable claim[,]” *In re Blackburn*, 142 N.C. App. at 610-11, 543 S.E.2d at 908-09, for termination of Father’s parental rights under North Carolina General Statute Section 7B-1111; Father’s motion to dismiss at the close of the evidence should have been allowed. As there was not sufficient evidence presented to terminate on any ground, reversal is appropriate. *See In re M.R.F.*, 378 N.C. 638, 642-43, 862 S.E.2d 758, 762-63 (2021) (noting that when sufficient evidence is not presented, reversal rather than remand is appropriate). In addition, remand of this matter to the trial court for entry of a new order is not in the child’s best interests and would likely delay permanency in this unusual situation. The petition fails to allege some grounds for termination that certainly may exist, but remand would not allow the trial court to find grounds for termination that were not alleged in the petition even if new evidence is presented. As to the grounds based upon a particular time period preceding the filing of the petition, including abandonment or failure to pay child support, *see* N.C. Gen. Stat. § 7B-1111(a)(7); N.C Gen. Stat. § 7B-1111(a)(3), whether six months or a year, the trial court already heard evidence as to those time periods, and according to Petitioners’ own evidence, Father was actively involved in Dante’s life during those time periods. That evidence would not change on remand, as no one can change the past. And the reversal of the trial court’s order does not preclude Petitioners from

filing a new petition if appropriate based upon current circumstances.

### **III. Conclusion**

Because Petitioners failed to present evidence to support any alleged ground for termination of parental rights, Father's motion to dismiss should have been allowed. We must therefore reverse the trial court's order.

REVERSED.

Judge HAMPSON concurs.

Judge GORE dissents by separate opinion.

Report per Rule 30(e).

No. COA23-347 – *In re: D.J.W.*

GORE, Judge, dissenting.

There is an old saying to measure ten times and cut once. Dante has been placed with the Aunt and Uncle for over six years, and the record establishes measurements that do not require reversal. Because there was sufficient evidence for at least one ground of termination in the record, I would vacate and remand the termination order for further findings and conclusions of law to adequately address the existing grounds for termination.

The majority opinion argues the petition failed to allege grounds for termination and that the record “is woefully inadequate to support termination of Father’s parental rights on any alleged statutory ground.” The majority opinion also argues that the trial court order did not identify the specific grounds for termination under N.C.G.S. section 7B-1111(a). While I agree with the majority that the trial court’s order was lacking, I disagree that the record was woefully inadequate, and for this reason I would vacate and remand for the trial court to prepare an order that properly addresses the evidence in the record supporting both sections 7B-1111(a)(3) and 7B-1111(a)(5) as grounds for termination.

The majority opinion quotes language from *In re T.J.F.* to demonstrate the requirement that a petition allege facts to put a parent on notice of the grounds sought to terminate the parental rights. 230 N.C. App. 531, 532 (2013). In *In re*

*T.J.F.*, the trial court considered whether the petition “alleged sufficient facts” for termination of parental rights due to abandonment. *Id.* The trial court articulated that abandonment falls within two different grounds for termination, section 7B-1111(a)(1) and section 7B-1111(a)(7). *Id.* at 533; *see* N.C.G.S. §§ 7B-1111(a)(1), (7) (2022). The trial court determined there were facts within the petition that could support grounds for abandonment and noted that “the better practice would have been to specifically plead termination pursuant to section 7B-1111(a)(7).” *In re T.J.F.* 230 N.C. App. at 533.

Similarly, I would note the better practice is to specifically state the grounds for termination in the petition. However, I depart from the majority’s opinion as I believe the petition does state facts sufficient to put respondent on notice. The majority opinion considered the language in the petition and determined the petition loosely alleged grounds for termination pursuant to 7B-1111(a)(1), (2), (5), and (7). The petition made the following allegations about respondent:

10. The alleged father of the minor child is Donell Howell . . .

11. That the biological father of the minor child is unknown and his last known address is unknown. There is no father listed on the child’s birth certificate.

. . .

14. Facts sufficient to warrant a determination that one or more grounds exists for terminating the parental rights of the Alleged Respondent Father, Donell Howell, and any unknown father under North Carolina Statute 7B-1111 are as follows:

(a) The Respondent alleged father and unknown father ha[ve] willfully failed to provide substantial financial support or consistent care with respect to the juvenile.

...

(c) The Respondent Alleged Father and Unknown Father have neglected the minor child within the meaning of NC General Statute in that he has left the minor child in placement outside the home for more than 12 months.

(d) The Respondent alleged father and unknown father of the juvenile has not, prior to the filing of a petition to terminate parental rights:

- i. Filed an Affidavit of paternity in a central registry maintained by the Department of Health and Human Services; and
- ii. Legitimated the juvenile pursuant to provisions of N.C.G.S. 49-10, N.C.G.S. 49-12.1, or filed a petition for the specific purpose; and
- iii. Legitimated the juvenile by marri[age] to the mother of the juvenile.

My reading of the petition differs from the majority opinion because as I read the petition, there are facts sufficient to support notice of grounds for termination pursuant to sections 7B-1111(a)(3), and (5) in addition to the sections discussed by the majority. “A willful failure to provide substantial financial support or consistent care” could apply to either section 7B-1111(a)(3) or as the majority relies, section 7B-1111(a)(5). Accordingly, both sections should be considered just as abandonment was similarly contemplated in *In re T.J.F.* for both sections that discussed abandonment of a juvenile. 230 N.C. App. at 533. I will not expound any further on the petition as



I believe the majority sufficiently addresses the additional allegations of grounds for termination within the petition.

As the majority discussed, the trial court made the following findings that relate to respondent:

14. Mr. Howell, Respondent father, has not filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services.

15. Mr. Howell, Respondent father, has not legitimated the minor child by marriage to the mother or any filed [sic] a petition with the [c]ourts for that specific purpose.

16. Mr. Howell, Respondent father has not provided consistent care for the minor child.

17. Mr. Howell, Respondent father has not petitioned the Court to change the living arrangements of the minor child but has allowed the child to remain with the Petitioners since the child was three weeks old.

18. Mr. Howell, Respondent father currently is employed and rents a room in a home.

19. Mr. Howell, Respondent father's living situation has not changed since guardianship was granted and he does not have adequate living arrangements for the minor child.

...

23. The Respondents have failed to provide reasonable support for the benefit of the minor child.

24. The Respondents have had an opportunity preceding the filing of this action to provide for the care and support of the minor child, but ha[ve] not done so.

The trial court concluded the following as it relates to respondent:

4. Facts sufficient to warrant determination that one or more grounds exists for terminating the parental rights of the Alleged Respondent Father, Donell Howell, and any unknown father under North Carolina Statute 7B-1111 are as follows:

(a) The Respondent alleged father and unknown father has willfully failed to provide substantial financial support or consistent care with respect to the juvenile.

...

(c) The Respondent Alleged Father and Unknown Father have neglected the minor child within the meaning of NC General Statute in that he has left the minor child in placement outside the home for more than 12 months.

(d) The Respondent alleged father and unknown father of the juvenile has not, prior to the filing of a petition to terminate parental rights:

i. Filed an Affidavit of paternity in a central registry maintained by the Department of Health and Human Services; and

ii. Legitimated the juvenile pursuant to provisions of N.C.G.S. 49-10, N.C.G.S. 49-12.1, or filed a petition for the specific purpose; and

iii. Legitimated the juvenile by marriage to the mother of the juvenile.

5. That the Respondent Alleged Father and any Unknown Father, are subject to termination of his parental rights pursuant to North Carolina General Statute 7B-1111.

...

(b) The Respondent has not provided reasonable financial support or consistent care with respect to the minor child.

(c) The Respondent failed to file an affidavit of parentage in a central registry maintained by the Department of Health and Human Services.

6. That the Court takes judicial notice of the underlying JA file that involves the minor child.

I lay out the findings and conclusions specific to respondent to demonstrate why I believe there are findings—or at least evidence in the record—to support grounds for termination under either section 7B-1111(a)(3) and/or section 7B-1111(a)(5).

I first consider section 7B-1111(a)(5) as I disagree with the majority's reading of the trial court order. Section 7B-1111(a)(5) is a ground for termination when:

(1) The 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.G.S. § 7B-1111(a)(5) (2022). Looking to the trial court's findings, the trial court provided findings to support subsection (a), (c), and (d). Additionally, the trial court judicially noticed the juvenile file from Wake County from the prior neglect adjudication, which led to the permanent guardianship order. Wake County's DSS file includes documents from the juvenile file that are in the record before us. Multiple orders and court reports within the DSS file include evidence that respondent took no actions to legally establish paternity despite court orders to do so. There is more than sufficient evidence in the record alongside the findings of fact to support the conclusions of law for section 7B-1111(a)(5).

Admittedly, the trial court failed to state all the requirements for section 7B-1111(a)(5) by not including the final subsection (e) that requires the father establish paternity through judicial proceedings. § 7B-1111(a)(5)(e). However, as stated, the record provides sufficient evidence to support a lack of any judicial proceeding initiated by respondent to establish paternity. Therefore, I respectfully disagree with the majority's opinion that the record is "woefully inadequate." Instead, I believe the trial court prepared an inadequate order of findings of facts and conclusions of law compared to what exists in the record.

Additionally, I believe the findings of fact and conclusions of law lead to a ground for termination pursuant to section 7B-1111(a)(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.

N.C.G.S. § 7B-1111(a)(3) (2022). The trial court concluded respondent had “willfully failed to provide substantial financial support or consistent care with respect to the juvenile” within conclusion of law 4a. This conclusion of law was separate from the conclusion of law within conclusion of law 5b that stated, “[t]he Respondent has not provided reasonable financial support or consistent care with respect to the minor child.” While the majority argues the references to financial support and care refers to section 7B-1111(a)(5), I would argue the statement regarding financial support with the term “willful failure” refers to section 7B-1111(a)(3). Further there are findings to support this conclusion, namely findings of fact 16, 18, 23, and 24 that refer to the father having a job, not paying for consistent care and support, and finding that the father had the ability to do so but did not. Further, the trial court judicially noticed the juvenile file that adjudicated the juvenile neglected and documents from this file are within the DSS file in the record. Within the DSS file there is evidence the juvenile was in the custody of Wake County’s DSS until the permanent guardianship order was entered. Accordingly, there is competent evidence within the record and findings of fact to support the conclusion of law for a ground for termination pursuant to section 7B-1111(a)(3).

Having stated what, I identify within the record, I also want to address the majority’s emphasis placed upon some of the guardians’ testimony. The majority

opinion claims petitioners' intent for filing the petition for termination was solely based upon the desire to give their retirement funds to Dante. I am unaware of any case law that overturns a petition for termination of parental rights based upon the intent of the petitioners. If the only evidence provided in the record was the provision of retirement benefits, this would not suffice under the statutory requirements listed within section 7B-1111(a). However, there is further testimony that does support the statutory requirements for grounds for termination. Further, the retirement benefits were addressed again during the disposition stage of the hearing and could properly be considered under the best interests of the child standard. *See* N.C.G.S. § 7B-1110(a)(6) (2022).

The majority focuses on petitioners' testimony that supports respondent's argument of an improper petition solely based upon retirement benefits and minimizes or completely overlooks other testimony that does support grounds for termination under sections 7B-1111(a)(3) and (5). The Aunt and Uncle also testified that the father did not financially provide for Dante's needs, because they provided for all of Dante's needs. Respondent testified he provided gifts and was willing to provide for Dante, but that he did not have a child support order. When asked if he realized he could provide financially without a child support order, respondent admitted he did not realize he was still expected to contribute for the support and care of the child without a support order. Respondent also admitted to an earning capacity of "1,500 bucks a week or more." Altogether, there was testimony of the

juvenile’s adjudication for neglect, inclusion of documents from the juvenile file in the DSS records that discuss the details of Dante’s non-secure custody with Wake County DSS, and the latter guardianship order.

The trial court found that respondent failed to provide reasonable support for the benefit of the minor child; that he had the opportunity to provide for the care and support of the child but failed to; and that both parents are employed but have not provided support for the minor child. Despite respondent’s argument that he did provide for the child through gifts, payment for some birthday parties, and some shoes and clothing, our Supreme Court has previously stated that these types of “sporadic” gifts do not supplant the responsibility to pay “a reasonable portion of the cost of care for the [child].” *In re M.C.*, 381 N.C. 832, 837 (2022). Because the record indicates sufficient evidence for grounds for termination pursuant to sections 7B-1111(a)(3) and (5), I would vacate and remand for further findings and conclusions of law to adequately address these grounds. Therefore, I dissent.