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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-851

Filed 16 April 2024

Lincoln County, Nos. 20 JT 100-101

IN THE MATTERS OF:

N.F.P-C. and

E.S.P-C.

Juveniles.

Appeal by respondent-mother from order entered 23 May 2023 by Judge Micah Sanderson in Lincoln County District Court. Heard in the Court of Appeals 5 March 2024.

*Lauren Vaughan for petitioner-appellee Lincoln County Department of Social Services.*

*K&L Gates LLP, by Maggie D. Blair, for guardian ad litem.*

*Hooks Law, P.C., by Laura G. Hooks, for respondent-appellant mother.*

THOMPSON, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children. On appeal she argues that the trial court failed to announce the standard of proof in open court or in the order terminating her

parental rights. She also argues that the trial court erred in concluding that the grounds of neglect and willfully leaving the children in foster care without making reasonable progress were supported by clear, cogent, and convincing evidence. After careful review, we reverse.

### **I. Factual Background and Procedural History**

Respondent-mother is the biological mother of Nya and Ezrick,<sup>1</sup> born in 2016 and 2019, respectively. On 19 November 2020, Lincoln County Department of Social Services (DSS) filed juvenile petitions in Lincoln County District Court, alleging that Nya and Ezrick were neglected juveniles in that they did not receive proper care, supervision, or discipline and lived in an environment injurious to their welfare. The juvenile petitions also alleged that Nya and Ezrick were dependent juveniles in that respondent-mother was unable to provide for their care or supervision and lacks an appropriate alternative child care arrangement.

An adjudication hearing on the juvenile petitions was held on 25 February 2021, and by order entered 13 April 2021, Nya and Ezrick were adjudicated neglected “based upon exposure to an injurious environment[,]” and placed in the non-secure custody of DSS. The adjudication order required respondent-mother to: follow recommendations regarding mental health treatment, complete parenting classes

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<sup>1</sup> Pseudonyms are used to protect the identities of the minor children.

and/or a parental fitness evaluation, obtain and maintain employment, maintain a home with suitable sanitation, and submit to random drug screens with DSS.

In a permanency planning order entered 23 March 2022, the court found that, “[DSS] [wa]s concerned that [r]espondent[-m]other ha[d] not demonstrated what she ha[d] learned from [parenting] classes and may need to complete an additional parental fitness examination to determine if she is able to comprehend and demonstrate [what she has learned].” However, the permanency planning order also found that respondent-mother was, “making reasonable progress on her dispositional case plan;” had “actively participated in or cooperat[ed] with the plan, [DSS], and the guardian ad litem for the juvenile[s];” had also “made herself available to the court, [DSS], and the guardian ad litem;” but that she was “still in need of another parental fitness assessment in order to determine if she [wa]s acting in a manner inconsistent with the health or safety of the juveniles.”

On 22 September 2022, DSS filed a petition alleging that grounds existed to terminate respondent-mother’s parental rights in that Nya and Ezrick were neglected within the meaning of N.C. Gen. Stat. § 7B-101(15). The petition also alleged that respondent-mother had “willfully left [Nya and Ezrick] in foster care for more than twelve months without showing . . . reasonable progress under the circumstances . . . in correcting the conditions that led to the child[ren]’s removal.”

The matter came on for hearing on 24 January and 14 February 2023 in Lincoln County District Court. At the hearing, the court heard testimony from the

psychologist who conducted “[p]arental [c]ompetency [e]valuation[s]” of respondent-mother on 28 May 2021 and 18 March 2022. When asked if she could make a prediction “as to whether or not respondent-mother w[ould] ever be able to parent her child[ren][.]” the psychologist testified that, “based on the time that’s elapsed and the amount of progress that I’ve seen . . . I would have concern with [respondent-mother’s] ability to make progress toward being reunified.” However, on cross-examination, when asked whether respondent-mother had “exhibit[ed] that she had learned new techniques for her parenting with reference to the children after having gone through [parenting] classes” between the first and second parental competency evaluations, the psychologist acknowledged that respondent-mother was “able to verbalize some things that she’s gained in class.”

Shortly thereafter, the court inquired of the psychologist why “you don’t believe [respondent-mother] [wi]ll be able to learn the ability to parent . . . she has an average IQ, bipolar [disorder] and ADHD[,] [s]o where is the disconnect?” The psychologist responded, “some people just generally have poor judgment[,] [a]nd I think that is one of the defining features with regards to - - [respondent-mother]. You haven’t seen a great deal of motivation from [respondent-mother] to be reunified . . . she doesn’t follow through with what she’s being told.” The guardian ad litem testified that Nya, “is a handful, to say the least.” Finally, when the DSS worker assigned to the case was asked whether respondent-mother had “undertaken and completed every requirement that [DSS] ha[d] asked,” the DSS worker responded, “[y]es.”

By order entered 23 May 2023, the court terminated respondent-mother's parental rights to Nya and Ezrick, concluding that grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)-(2). From this order, respondent-mother filed timely written notice of appeal.

## **II. Discussion**

### **A. Standard of review**

“We review a trial court’s adjudication to determine whether the findings are supported by clear, cogent[,] and convincing evidence and the findings support the conclusions of law.” *In re M.R.F.*, 378 N.C. 638, 641, 862 S.E.2d 758, 761 (2021) (citation, internal quotation marks, and brackets omitted). “[W]hether a trial court’s adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to [N.C. Gen. Stat.] § 7B-1111(a) is reviewed de novo by the appellate court.” *Id.* at 641, 862 S.E.2d at 761–62 (citation and internal quotation marks omitted). “Under a de novo review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court.” *Id.* at 641, 862 S.E.2d at 762 (citation, brackets, and emphasis omitted).

### **B. Standard of proof in termination of parental rights proceedings**

On appeal, respondent-mother contends that the trial court, “erred because it failed to state the standard of proof at the termination of parental rights hearing, and it failed to recite the standard of proof in the written order.” We agree.

*Opinion of the Court*

“Section 7B-1109 establishes the requirements of an adjudicatory hearing in a termination of parental rights proceeding . . . .” *Id.* N.C. Gen. Stat. § 7B-1109 provides that, “[t]he burden in [termination of parental rights] proceedings shall be upon the petitioner or movant and all findings of fact *shall be based on clear, cogent, and convincing evidence.*” N.C. Gen. Stat. § 7B-1109(f) (2023) (emphasis added). Our Supreme Court has held that the statute “implicitly requires a trial court to announce the standard of proof [that] they are applying on the record in a termination-of-parental-rights hearing.” *Id.* (citation omitted). “[T]he trial court satisfies the announcement requirement of [N.C. Gen. Stat.] § 7B-1109(f) so long as it announces the ‘clear, cogent, and convincing’ standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court.” *Id.* at 642, 862 S.E.2d at 762 (citation omitted) (emphasis in original).

Moreover, our Supreme Court has recently held that in a termination of parental rights proceeding where, “the trial court failed to announce the standard of proof for its adjudicatory findings either in open court *or* in its written order[,]” but

the record reflects that there was competent evidence before the trial court to support a finding that any of the adjudicated statutory grounds existed for termination of parental rights, the appropriate remedy for the trial court’s noncompliance with [N.C. Gen. Stat.] § 7B-1109(f) is to vacate the trial court’s order and to remand the case for the entry of new findings of fact and conclusions of law based on the clear, cogent, and convincing evidence standard.

*Id.* (citation, internal quotation marks, and brackets omitted) (emphasis in original). However, in cases where “the trial court [failed] to announce the standard of proof which it was applying to its findings of fact” and a “review of the record . . . shows that petitioner failed to adduce sufficient evidence to sustain any of the alleged grounds for terminating [respondent]’s parental rights . . . we are compelled to simply, *without remand*, reverse the trial court’s order.” *Id.* at 642–43, 862 S.E.2d at 762–63 (emphasis in original).

Here, the petitioner concedes that, “the trial court erred by failing to state the appropriate standard of pro[o]f at the hearing or in its written order” and contends that, “the appropriate remedy is remand.” In light of our Supreme Court’s recent holding in *M.R.F.*, we now consider whether “sufficient evidence to sustain any of the alleged grounds” was presented, in order to determine whether remand or reversal is the appropriate remedy in this case.

**C. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(1)**

Respondent-mother argues that the trial court erred in “concluding that [respondent-mother] neglected Nya and Ezrick because the findings of fact are not supported by clear, cogent, and convincing evidence.” She further contends that “[t]he conclusion of law that [respondent-mother] neglected Nya and Ezrick” by “hav[ing] taken no action that will prevent said neglect from being repeated in the future” is “not supported by findings of fact based on clear, cogent, and convincing evidence.” As will be discussed at length in the analysis to follow, we agree.

“Pursuant to [N.C. Gen. Stat.] § 7B-1111(a)(1), a trial court may terminate parental rights upon a finding that the parent has neglected the juvenile.” *In re M.B.*, 382 N.C. 82, 85, 876 S.E.2d 260, 264 (2022). “Generally, termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing.” *Id.* at 86, 876 S.E.2d at 264 (citation, internal quotation marks, and brackets omitted). However, “in instances where 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.” *Id.* (citation, internal quotation marks omitted) (emphasis in original).

“[A] trial court may consider many past and present factors to make this forward-looking determination.” *Id.* For instance, a trial court “must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.” *Id.* at 86, 876 S.E.2d at 265 (citation omitted). A trial court may also consider, “whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children.” *Id.* (citation omitted). However, “these are only *factors* within the trial court’s ultimate determination of a likelihood of future neglect; noting the factors alone does not amount to making the determination [of a likelihood of future neglect] itself.” *Id.* (emphasis in original). “After noting these factors, the trial court *must then distinctly determine* a parent’s likelihood of neglecting a child in the future.” *Id.* (emphasis added).

“[I]f the trial court *finds by clear and convincing evidence a probability of repetition of neglect* if the juvenile were returned to his or her parents[,]” a trial court “may terminate parental rights based upon prior neglect.” *Id.* at 86, 876 S.E.2d at 264 (citation and brackets omitted) (emphasis in original). However, “[t]he clear and convincing standard requires evidence that should fully convince.” *In re J.C.-B.*, 276 N.C. App. 180, 184, 856 S.E.2d 883, 887 (2021). When “[t]he trial court’s finding of a likelihood of repetition of neglect in the future crosses the line separating a reasonable inference from mere speculation . . . the trial court err[s] in concluding that respondent-mother’s parental rights should be terminated on the basis of neglect under [N.C. Gen. Stat.] § 7B-1111(a)(1).” *In re K.L.T.*, 374 N.C. 826, 847, 845 S.E.2d 28, 43 (2020).

Here, the minor children had been outside of respondent-mother’s care for twenty-three months at the time of the termination of parental rights hearing. Therefore, the trial court was required to “*distinctly determine* [respondent-mother]’s likelihood of neglecting a child in the future.” *Id.* (emphasis added). In the present case, pursuant to her case plan, respondent-mother was required to

[1]. Follow recommendations regarding mental health treatment;

[2]. Complete parenting classes and/or a parental fitness evaluation;

[3]. Obtain and maintain employment;

[4]. Maintain a home with suitable sanitation that is

appropriate for [Nya and Ezrick];

[5]. Submit to random drug screens as requested and within the parameters set forth by [DSS].

At the hearing, the DSS social worker assigned to the case testified that respondent-mother had attended, and continued to attend, individual therapy, that she had “complet[ed] parenting classes,” that she was “paying child support,” that, “[t]here were no [il]licit substances of any nature[,]” in respondent-mother’s drug screenings, and although her prescription medication made her feel “not like herself[,]” respondent-mother had been “on [her prescription medication] throughout this case, on and off” as was required by her case plan. Indeed, as noted above, when asked whether respondent-mother had “undertaken and completed every requirement that [DSS] ha[d] asked,” the DSS social worker assigned to the case responded, “[y]es.”

Similarly, in the order terminating respondent-mother’s parental rights, the trial court made several findings of fact demonstrating that respondent-mother had “taken [ ] action[s] that will prevent said neglect from being repeated in the future,” including:

9. Pursuant to the Disposition, [r]espondent-[m]other was ordered to have a mental health assessment. Respondent[-mother] *complied* with this Order through her parental fitness *evaluations*.

10. Respondent[-mother] had *two* parental fitness

*Opinion of the Court*

evaluations, both performed by Dr. Lisa Long. Each evaluation takes approximately [twenty to twenty-five] hours and is extensive in nature and scope.

. . . .

19. Since Disposition, [r]espondent[-mother] has had over [*thirteen*] jobs, none of them lasting longer than a couple months. Most of those jobs lasting less than a month.

21. Respondent[-mother] has been in *four different parenting classes*. Respondent[-mother] is currently in her fourth class but it is incomplete.

. . . .

27. Pursuant to the Disposition, [r]espondent[-mother] was ordered to complete drug tests when requested. Respondent[-mother] *has complied* with this Order *and has always tested negative for controlled substances*.

28. Pursuant to the Disposition, [r]espondent[-mother] was ordered to complete non-offender domestic violence treatment . . . .

29. Respondent[-mother] *did enroll in and complete non-offender domestic violence treatment*.

(emphases added).

We also note that the trial court entered several findings of fact that are contradicted within the order's other findings of fact, including:

15. Pursuant to the Disposition, [r]espondent[-mother] was ordered to continue with her therapy and continue taking all prescribed medications. Respondent[-mother] did not comply with this Order.

. . . .

17. Respondent[-mother] refuses and has never taken her prescribed medications, as she has always tested negative for her drug tests. She recently started and is currently taking her prescribed [medication].

18. Pursuant to the Disposition, [r]espondent[-mother] was ordered to maintain employment. Respondent[-mother] did not comply with this Order.

. . . .

20. Pursuant to the Disposition, [r]espondent[-mother] was ordered to enroll in and complete parenting classes. Respondent[-mother] did not successfully comply with this Order.

Finding of Fact seventeen *contradicts itself*; in that finding, the court asserted that respondent-mother “has *never taken* her prescribed medications” yet, somehow, respondent-mother “[wa]s *currently taking* her prescribed [medication].” (emphases added). To be clear, respondent-mother *has* taken her prescribed medications, as established by testimony at trial and in Finding of Fact seventeen.

Finding of Fact seventeen is but one of a plethora of inconsistent findings of fact within the termination of parental rights order. For example, in the aforementioned Finding of Fact fifteen, the trial court stated that respondent-mother, “did not comply with th[e] Order” requiring her “to continue with her therapy . . . .” However, this finding is contradicted in the *very next* Finding of Fact, sixteen,

wherein the trial court acknowledges that respondent-mother, “started therapy in 2021 and then ended it in July 2021 . . . because [respondent-mother] believed the therapist was too self-centered[,]” and then “began therapy at a different location in July 2021 and then ended it in December 2021.” Finding of Fact fifteen simply ignores the reality of respondent-mother’s participation in therapy acknowledged in Finding of Fact sixteen, that respondent-mother had “started therapy in 2021”<sup>2</sup> and continued in therapy, albeit at a “different location” until “December 2021.” Moreover, as noted above, at trial, when asked whether respondent-mother had attended individual therapy, the social worker testified that she restarted therapy “in August of 2022” and her attendance had “been pretty consistent.”

In Finding of Fact eighteen, the trial court found that respondent-mother “was ordered to maintain employment[,] [but] [r]espondent[-mother] did not comply with this order.” Again, Finding of Fact eighteen is contradicted in the *very next* Finding of Fact, nineteen, wherein the trial court found that, “[s]ince Disposition, [r]espondent[-mother] has had over [thirteen] jobs, none of them lasting longer than a couple months. Most of those jobs lasting less than a month.” To assert as fact that respondent-mother “did not comply with th[e] Order” that she “maintain employment” is wholly disingenuous in the face of the record. Indeed, the sheer number of positions that respondent-mother held during the course of her case plan

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<sup>2</sup> Presumably at some point prior to July 2021.

demonstrates the great lengths that she went to in order to “maintain employment” pursuant to her case plan.

For one final example of the trial court’s internally inconsistent findings of fact, turn no further than to Finding of Fact twenty, wherein the court found that, “[r]espondent[-mother] was ordered to enroll in and complete parenting classes[,]” but “[r]espondent[-mother] did not successfully comply with this Order.” Yet again, this finding is contradicted in *the very next Finding of Fact*, twenty-one, wherein the court found that, “[r]espondent[-mother] has been in *four different parenting classes . . .* [and] [r]espondent[-mother] is in her fourth class but it is incomplete.” It is unclear what number of completed parenting classes would have sufficed for the trial court to find that respondent-mother had “successfully compl[ie]d[ with th[e] Order” on this element of her case plan.

Here, the aforementioned contradictory findings of fact and the evidence supporting them do not “fully convince[.]” *J.C.-B.*, 276 N.C. App. at 184, 856 S.E.2d at 887, this Court that Conclusion of Law two, that respondent-mother had “taken no action that will prevent said neglect from being repeated in the future” is supported by clear, cogent, and convincing evidence; these inconsistent findings cannot support a termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

#### **D. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(2)**

Finally, respondent-mother contends that the trial court “erred [in] concluding that [respondent-mother] willfully left [N.F.P. and E.S.P.] in foster care without

making reasonable progress because the findings of fact are not supported by clear, cogent, and convincing evidence.” We agree.

A court may terminate parental rights upon a finding that a parent “has willfully left the juvenile in foster care or placement outside the home for more than [twelve] months without showing . . . 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). Therefore, an adjudication under N.C. Gen. Stat. § 7B-1111(a)(2) “requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether” (1) the child “has been willfully left by the parent in foster care or placement outside the home for over twelve months,” and (2) “the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.” *M.R.F.*, 378 N.C. at 643, 862 S.E.2d at 763 (citation omitted).

A “trial court [i]s required to *make a finding* of willfulness to support its termination of respondent’s parental rights under [N.C. Gen. Stat.] § 7B-1111(a)(2) . . . .” *M.B.*, 382 N.C. at 88–89, 876 S.E.2d at 266 (emphasis added). “The willfulness of a parent’s failure to make reasonable progress toward correcting the conditions that led to a child’s removal from the family home is established when the parent had the ability to show reasonable progress, but was unwilling to make the effort.” *Id.* (citation omitted). “A trial court has ample authority to determine that a parent’s ‘extremely limited progress’ in correcting the conditions leading to removal

adequately supports a determination that a parent's parental rights . . . are subject to termination" pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019) (citation omitted). However, "a trial judge should refrain from finding that a parent has failed to make reasonable progress in correcting those conditions which led to the removal of the juvenile simply because of his or her failure to fully satisfy all elements of the case plan goals." *Id.* (citation, ellipsis, and internal quotation marks omitted). Finally, and for added emphasis, we again note that, "[t]he clear and convincing standard requires evidence that should fully convince." *J.C.-B.*, 276 N.C. App. at 184, 856 S.E.2d at 887.

Upon our careful review of the record, transcripts, and order terminating respondent-mother's parental rights, we conclude that the trial court's conclusion of law that respondent-mother "willfully left [Nya and Ezrick] to remain in foster care . . . without showing . . . reasonable progress under the circumstances" is not supported by clear, cogent, and convincing evidence. Respondent-mother "complet[ed] parenting classes," and was "able to verbalize some things that she's gained in class[.]" she partook in two "twenty to twenty-five hour" parental fitness evaluations, she was "paying child support," "[t]here were no [il]licit substances of any nature[.]" in respondent-mother's drug screenings, she had "over [thirteen] jobs," as she was ordered to "maintain employment[.]" and despite her prescription medication making her feel "like a zombie . . . and not like herself[.]" respondent-mother had been "on [her prescription medication] throughout this case, on and off" as was required by her

case plan. Respondent-mother had “undertaken and completed every requirement that [DSS] ha[d] asked[,]” and the evidence supporting the findings of fact, and in turn, the conclusions of law does not demonstrate by clear, cogent, and convincing evidence that respondent-mother was “unwilling to make the effort[,]” *M.B.*, 382 N.C. at 88, 876 S.E.2d at 266 (citation omitted), as “[i]s required to . . . support [a trial court’s] termination of respondent[-mother]’s parental rights under [N.C. Gen. Stat.] § 7B-1111(a)(2) . . . .” *Id.* at 88–89, 876 S.E.2d at 266. For this reason, the order terminating respondent-mother’s parental rights to the minor children must be reversed.

### **III. Conclusion**

We conclude that the trial court failed to announce the appropriate standard of proof at the termination of parental rights hearing or in the order terminating respondent-mother’s parental rights to the minor children. Moreover, the trial court’s conclusion of law that neglect is likely to continue into the future, as is necessary to terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), is not supported by clear, cogent, and convincing evidence. Finally, the trial court’s conclusion of law that respondent-mother’s failure to correct the conditions that led to removal was willful, as is necessary to support a termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(2), was not supported by clear, cogent, and convincing evidence. For the aforementioned reasons, the order of the trial court is reversed.

IN RE: N.F.P-C. & E.S.P-C.

*Opinion of the Court*

REVERSED.

Judges ZACHARY and WOOD concur.

Report per rule 30(e).