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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-149

Filed: 5 September 2017

Edgecombe County, No. 15 JT 72

IN THE MATTER OF: A.M.S.

Appeal by respondent-mother from order entered 2 November 2016 by Judge John M. Britt in Edgecombe County District Court. Heard in the Court of Appeals 8 August 2017.

*Lawrence, Best & Associate, P.A., by Natarlin R. Best and Trevor L. Jackson, for petitioner-appellee Edgecombe County Department of Social Services.*

*Miller & Audino, LLP, by Jay Anthony Audino, for respondent-appellant mother.*

*Law Office of Matthew C. Phillips, PLLC, by Matthew C. Phillips, for guardian ad litem.*

CALABRIA, Judge.

Respondent-mother (“mother”) appeals from the trial court’s order terminating her parental rights to A.M.S. (“Amy”).<sup>1</sup> After careful review, we reverse the order of the trial court.

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

I. Factual and Procedural Background

Shortly after Amy's birth in May 2015, the Edgecombe County Department of Social Services ("DSS") obtained nonsecure custody of Amy and filed a juvenile petition alleging that she was a neglected and dependent juvenile. The petition alleged the following: Amy tested positive for opiates at birth and was showing signs of withdrawal; mother admitted to taking one Percocet prior to Amy's birth because she believed she was in false labor; Amy's parents had ongoing issues with substance abuse, domestic violence, and improper care of six older siblings; the family moved frequently; three older siblings were removed from the parents' care and placed with relatives; the other three older siblings were in the custody of DSS; and the parents relinquished their parental rights to the six older siblings. The petition further alleged that the parents were unable to provide proper care for Amy and failed to make alternative child care arrangements for her.

Following a hearing, the trial court entered an order on 9 October 2015 adjudicating Amy neglected and dependent. The trial court found that there was sufficient evidence to support the allegations of the petition. In the dispositional portion of the order, the trial court ordered Amy to remain in DSS custody.

On 8 March 2016, DSS filed a petition to terminate mother's parental rights to Amy, alleging the following grounds for termination: (1) neglect; (2) dependency; and (3) willful failure to pay a reasonable portion of the cost of care for the juvenile. *See*

N.C. Gen. Stat. §§ 7B-1111(a)(1), (3), (6) (2015). Following a hearing, the trial court entered an order on 2 November 2016 terminating mother's parental rights to Amy based upon neglect and dependency. The trial court also concluded that termination was in Amy's best interest. Mother appeals. The trial court also terminated the father's parental rights to Amy, but he does not appeal.

## II. Termination of Parental Rights

Mother challenges the trial court's grounds for termination of her parental rights. Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]" *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996) (citation omitted). In the instant case, the trial court terminated mother's parental rights to her child based upon two grounds: neglect and dependency. *See* N.C. Gen. Stat. §§ 7B-1111(a)(1), (6). Because the findings of fact are insufficient to support either ground, we reverse the trial court's order terminating mother's parental rights.

### A. Neglect

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Mother argues that the trial court's termination based on neglect is in error because the trial court failed to make any findings regarding repetition of neglect. We agree.

Our juvenile code provides for termination based upon a finding that "[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) (2015). Neglect, in turn, is defined as follows:

Neglected juvenile. – A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare. . . .

N.C. Gen. Stat. § 7B-101(15) (2015). Generally, "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). However, "[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citation omitted). Because the determinative factor is the parent's ability to care for the child at the time of the hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination

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of parental rights impossible.” *Id.* (citation omitted). Under such circumstances, “a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect.” *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984). However, the prior adjudication of neglect, standing alone, does not support termination based on neglect. “The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.” *Id.* at 715, 319 S.E.2d at 232. Thus, a trial court may terminate parental rights based upon prior neglect of the juvenile only if “the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

The trial court’s order lacks any finding that Amy was likely to be neglected if she was returned to mother’s custody. It also lacks any indication that the trial court considered any changed circumstances of mother. This Court has previously found reversible error where the trial court terminated a parent’s parental rights based on neglect but failed to make a finding that repetition of neglect was likely if the juvenile was returned to the parent. *In re E.L.E.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 778 S.E.2d 445, 450-51 (2015).

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Here, the trial court made one finding of fact in support of its determination that termination of mother's parental rights was justified based on the ground of neglect:

Pursuant to G.S. 7B-1111(a)(1), the parents have neglected the juvenile within the meaning of G.S. 7B-101. The juvenile has been in foster care since her birth and neither parent[ ] has provided proper care or supervision for the juvenile. The parents have not addressed the case plan that was developed to address issues of drug use and instability.

While the trial court may have implicitly acknowledged the likelihood of repetition of neglect by stating that “[t]he parents have not addressed the case plan that was developed to address issues of drug use and instability,” the finding does not draw the ultimate conclusion necessary to find neglect. Also missing are any details regarding the substance of the alleged case plan, any services offered to mother, and any actions or inactions on the part of mother. Furthermore, it is undisputed that mother was incarcerated at the time of the hearing. She was arrested in January 2016 and had a pending release date of 17 December 2016. However, there is no indication in the order as to whether the case plan was altered to account for mother's incarceration, whether mother availed herself of services in jail, or whether any substance abuse continued during this time period. We have repeatedly held that “[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005)

(citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). However, we have also held that “[a] parent’s incarceration may be relevant to whether his child is neglected[.]” *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007). In the instant case, the trial court’s order is notably absent on the impact of mother’s incarceration.

Even more troublesome is the portion of the finding that “neither parent[ ] has provided proper care or supervision for the juvenile.” It is undisputed that Amy was removed from her parents’ custody as a newborn and remained in DSS custody throughout the entirety of the case. We have repeatedly upheld a finding of neglect under such circumstances. *See, e.g., In re B.M.*, 183 N.C. App. 84, 88-89, 643 S.E.2d 644, 647 (2007) (affirming an adjudication of neglect where a nine-day-old was removed from the mother’s custody after testing positive for cocaine, the mother admitted to using cocaine prior to the juvenile’s birth, there was domestic violence between the parents, and the mother refused to sign a safety agreement); *see also In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008) (“When . . . the juvenile being adjudicated has never resided in the parent’s home, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case” (citation and quotation marks omitted)), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009). We nevertheless find this statement to be disingenuous

in light of the fact that mother never had an opportunity to attempt to provide proper care or supervision for Amy. As such, this finding does not support a conclusion that mother was likely to neglect Amy in the future.

Indeed, it appears that the trial court's neglect determination was based solely on the historical facts of the case and the prior adjudication of neglect, which itself is based on mother's neglect of her other children. The only other finding of fact that contains actual facts is a verbatim recitation of a finding from the 9 October 2015 adjudication order. This approach has been repeatedly disavowed by our appellate courts. *See e.g. Ballard*, 311 N.C. at 716, 319 S.E.2d at 233. Because the trial court's order lacked necessary findings of fact, we hold that the court erred in terminating mother's parental rights based on neglect.

#### B. Dependency

The trial court also terminated mother's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), which provides for termination based upon a finding that:

the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.



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N.C. Gen. Stat. § 7B-1111(a)(6) (2015). In determining whether a juvenile is dependent, the trial court is required to “address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.” *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). “Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court’s failure to make these findings will result in reversal of the court.” *B.M.*, 183 N.C. App. at 90, 643 S.E.2d at 648.

The trial court’s sole finding regarding dependency states as follows:

The parents are incapable of providing proper care and supervision for the juvenile such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future. The record is replete with the factual basis of the drug use of the mother as recent as December, 2013 as well as the inability of the parents to provide proper care and supervision for the minor child and to make appropriate child care arrangements. [Mother] voluntarily left the jurisdiction after the birth of the child and but for extradition would still be in Florida. . . .

This finding, like the trial court’s finding on neglect, is rooted in the historical facts of the case and finds no facts regarding mother’s current condition. We acknowledge that by the plain language of the statute, drug use may render a parent incapable of providing proper care and supervision for a child. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (“Incapability under this subdivision may be the result of substance abuse. . . .”). Here, however, the only factual finding regarding mother’s substance abuse is that

she had a history of substance abuse and used drugs “as recent” as December 2013—nearly three years prior to the trial court’s termination order. This lack of temporal proximity simply does not support a finding that mother was incapable of providing proper care and supervision for Amy for the foreseeable future.

We also have held that an “extended incarceration” may render a respondent unable to parent the juvenile. *In re L.R.S.*, 237 N.C. App. 16, 21, 764 S.E.2d 908, 911 (2014); *see also In re N.T.U.*, 234 N.C. App. 722, 734, 760 S.E.2d 49, 58 (holding that the trial court did not err in finding incapability based on incarceration, where the respondent was incarcerated on charges stemming from a homicide and a bank robbery and the record lacked any indication that the respondent would be released from incarceration in the foreseeable future), *disc. review denied*, \_\_\_ N.C. \_\_\_, 763 S.E.2d 517 (2014). Here, however, the trial court did not base its finding of incapability on mother’s incarceration. Furthermore, the record indicates that mother was set to be released from incarceration on 17 December 2016. Therefore, her incarceration was not “extended” and would not last for the foreseeable future.

We hold that this finding is insufficient to establish the first prong of the dependency ground—that mother was incapable of providing proper care and supervision for Amy and that the incapability was likely to continue for the foreseeable future. While this finding recites the statutory definition of dependency,

it contains no actual factual findings that support the definition's applicability to the instant case.

The only other factual finding that purports to support a conclusion of dependency is the trial court's statement that "[mother] voluntarily left the jurisdiction after the birth of the child and but for extradition would still be in Florida." While this finding suggests mother's lack of judgment, it is not relevant to the question of whether she was capable of providing for the proper care and supervision of Amy. Moving to a different state, standing alone, is not a condition or cause that renders one unable to parent. Mother would have been just as capable or incapable of parenting Amy regardless of whether she lived in North Carolina, Florida, or any other state. Because the findings of fact fail to support the ultimate finding that mother was incapable of providing proper care and supervision for Amy, we hold that the trial court erred in concluding that termination of mother's parental rights was justified based on dependency.

### III. Conclusion

We hold that both grounds for termination found by the trial court lack necessary findings of fact; therefore, the trial court's conclusions of law regarding both grounds are in error. Because the trial court erred in concluding that any ground existed to terminate mother's parental rights, we must reverse its order. Additionally, because we are reversing the trial court's order, we need not address

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mother's first argument challenging the trial court's denial of her motion for a continuance.

REVERSED.

Judges DILLON and DAVIS concur.

Report per Rule 30(e).