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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1063

Filed: 1 October 2019

Gaston County, No. 18 JT 15

IN THE MATTER OF: M.J.S.

Appeal by respondent-father from order entered 3 July 2018 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 5 September 2019.

Wyrick Robbins Yates & Ponton, LLP, by Michelle D. Connell, for petitioner-appellee mother.

J. Thomas Diepenbrock for respondent-appellant father.

McGEE, Chief Judge.

This appeal arises from a private termination of parental rights action between two parents. Respondent, the biological father of the minor child M.J.S., appeals from the trial court's order terminating his parental rights on the grounds of neglect, abandonment, and willful failure to pay for the cost of the child's care. For the following reasons, we affirm.

I. Background

Petitioner, the biological mother of M.J.S., and Respondent never married. The parties' relationship began in 2012 and ended in early 2013, one month after M.J.S. was born. On 19 February 2014, the parties entered into a consent custody order, in which Petitioner was awarded legal and physical custody of M.J.S., and Respondent was granted visitation every other weekend.

Following a 23 August 2016 hearing, the trial court entered an order on 12 September 2016 modifying Respondent's visitation to supervised visits. The court found that Respondent tested positive for cocaine and marijuana on 1 August 2016 and ordered Respondent to submit to all drug screens requested by Petitioner.

Petitioner subsequently filed a motion for contempt alleging Respondent was not compliant in providing the drug screens. A hearing on the motion was held 21 December 2016. In an order entered 22 December 2016, the trial court found that Respondent agreed to suspend his visitation until he submitted a clean hair follicle test and agreed to submit to a drug screen on or before 27 December 2016. The trial court continued the contempt hearing to allow Respondent to obtain counsel.

On 16 January 2018, Petitioner filed a petition to terminate Respondent's parental rights alleging the grounds of neglect, willful abandonment, and willful failure to pay for the cost of the care of M.J.S. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (4), (7) (2017). On 15 February 2018, Respondent filed an answer and a motion to

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dismiss the petition under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 7B-1104(6) (2017), arguing that the petition failed to state a claim upon which relief can be granted because the petition failed to set forth sufficient facts to show each alleged ground.

A hearing on the petition was held on 16 May 2018. Respondent was not present at the hearing. On 3 July 2018, the trial court entered an order terminating Respondent's parental rights. The trial court found that all three alleged grounds existed and that termination of Respondent's parental rights was in the child's best interests. Respondent appeals.

II. Appellate Jurisdiction

As an initial matter, Respondent has filed a petition for writ of certiorari as an alternative basis for review of his case in recognition of the fact that his notice of appeal was untimely. *See* N.C. Gen. Stat. § 7B-1001(b) (2017) (requiring notice of appeal to be filed "within 30 days after entry and service of the order"). In response, Petitioner has filed a motion to dismiss Respondent's appeal. Because Respondent's notice of appeal was untimely, as it was filed thirty-five days after entry of the termination order, we allow Petitioner's motion to dismiss. However, in our discretion, we also allow Respondent's petition for writ of certiorari to review the merits of his assignments of error to the trial court's order terminating his parental rights.

III. Motion to Dismiss Termination Petition

Respondent's sole contention on appeal is that the trial court erred by denying his motion to dismiss the petition to terminate his parental rights because the petition failed to allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C.G.S. § 7B-1104(6). Before we address this argument, we must determine whether it has been preserved for appellate review as to each of the three grounds for termination.

A. Preservation by Challenging Subject Matter Jurisdiction

Respondent first argues that, because the petition to terminate his parental rights does not comply with N.C.G.S. § 7B-1104(6), it failed to confer subject matter jurisdiction on the trial court to hear the petition to terminate his parental rights. He further contends that, as a question of subject matter jurisdiction, he may raise his argument for the first time on appeal, regardless of whether or not it was preserved below.

Respondent relies on *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), for the broad proposition that a petition can "fail to confer subject matter jurisdiction" on a trial court by "fail[ing] to comply with the requirements of the statute." However, Respondent's reliance on *Z.T.B.* is misplaced. "Only a violation of the verification requirement of N.C.G.S. § 7B-1104 has been held to be a jurisdictional defect *per se.*" *In re T.M.H.*, 186 N.C. App. 451, 454, 652 S.E.2d 1, 2 (2007). Furthermore, in *In re*

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Humphrey, 156 N.C. App. 533, 577 S.E.2d 421 (2003), this Court held a defect in the termination petition that failed to conform with the statutory requirements did not mandate dismissal where the respondent “failed to demonstrate that she was prejudiced as a result of the omission.” *In re Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426. In *T.M.H.*, this Court noted that, “[a]lthough [the *Z.T.B.* Court] held that the failure of the petitioner to set forth the information required by N.C.G.S. § 7B-1104 was reversible error, even absent a showing of prejudice, the decision was grounded in the Court’s inability to follow the trial court’s reasoning for its conclusions.” *In re T.M.H.*, 186 N.C. App. at 454, 652 S.E.2d at 2 (citing *Z.T.B.*, 170 N.C. App. at 569-70, 613 S.E.2d at 301). The *T.M.H.* Court further noted that the *Z.T.B.* Court distinguished the case before it from *Humphrey* as follows:

In *Humphrey*, this Court had all the facts available to it for review *Humphrey* is further distinguishable in that the defect in the petition in that case could be overcome by information contained on the face of the petition itself.

In re T.M.H., 186 N.C. App. at 454, 652 S.E.2d at 2-3 (quoting *In re Z.T.B.*, 170 N.C. App. at 569-70, 613 S.E.2d at 301). The *T.M.H.* Court held *Z.T.B.* did not apply because “[t]he record as a whole discloses that [the respondent] had access to all of the information required by the statute, and the petition was substantially compliant on its face.” *Id.* at 455, 652 S.E.2d at 3. Alleged defects in failing to comply with the requirement under N.C.G.S. § 7B-1104(6) that the termination petition allege “[f]acts that are sufficient to warrant a determination that one or more of the grounds for

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terminating parental rights exist” does not mandate dismissal for lack of subject matter jurisdiction unless there is a showing of prejudice to the respondent, or the record as a whole shows the respondent did not have access to the information required by the statute. *See In re T.M.H.*, 186 N.C. App. at 455, 652 S.E.2d at 3; *In re Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426. A mere lack of specificity in the factual allegations contained in the petition is not, by itself, fatal.

In this case, Respondent failed to allege he was prejudiced by the alleged defects in the petition. Furthermore, as in *T.M.H.*, there is ample evidence in the record that Respondent was on notice about the factual bases for the petition. The petition referenced the previous custody orders in the original action, which were attached to the petition. These orders show Respondent’s failure to comply with the trial court’s drug screening requirements, which resulted in the suspension of visitation until he provided a negative screening test. The facts contained in these orders support the claims of neglect under N.C.G.S. § 7B-1111(a)(1) and willful abandonment for six consecutive months under N.C.G.S. § 7B-1111(a)(7). Furthermore, the petition itself specifically alleges Respondent “willfully failed, without justification, to pay for the care, support, and education of the juvenile” “[f]or a period of one year or more[.]” This suffices to put Respondent on notice as to the factual allegations underlying this ground. The record as a whole shows that Respondent was on notice about the factual basis of the petition’s grounds for

termination. Therefore, any alleged “defect” in the termination petition does not deprive the trial court of subject matter jurisdiction.

This Court has held that the question of whether a petition states facts sufficient to warrant a determination of the existence of grounds for termination is much like the question of whether the allegations in the petition state a claim upon which relief may be granted. *See In re Quevedo*, 106 N.C. App. 574, 578, 419 S.E.2d 158, 159 (1992). Thus, absent a showing of prejudice or lack of notice about the factual basis of the petition by the respondent, a challenge to a termination petition’s compliance with N.C.G.S. § 7B-1104(6) only tests the legal sufficiency of the allegations in the petition; it cannot call into question the trial court’s subject matter jurisdiction. *Id.* at 578, 419 S.E.2d at 159. Accordingly, the issue must be preserved for appellate review in the trial court. *See In re H.L.A.D.*, 184 N.C. App. 381, 392, 646 S.E.2d 425, 434 (2007) (holding that because the father did not make a motion to dismiss based on the legal insufficiency of the petition to terminate his parental rights, he failed to properly preserve the issue of whether the petition complied with N.C.G.S. § 7B-1104(6) for appeal), *aff’d*, 362 N.C. 170, 655 S.E.2d 712 (2008); *see also* N.C. R. App. P. 10(a)(1).

B. Preservation Under Appellate Rule 10(a)(1)

Petitioner argues Respondent has waived his argument as to two of the three termination grounds, because the record demonstrates that Respondent “only raised

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arguments concerning the sufficiency of the allegations to support the willful abandonment ground under [N.C.G.S. §] 7B-1111(a)(7)” during the hearing before the trial court. Petitioner also asserts that Respondent failed to obtain any ruling on his claims the petition failed to allege sufficient facts regarding the grounds of neglect and willful failure to pay, as required by North Carolina Rule of Appellate Procedure 10(a)(1). That rule provides:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.

N.C. R. App. P. Rule 10(a)(1).

In its termination order, the trial court made the following finding of fact regarding Respondent’s motion to dismiss:

THE COURT, having called the case for trial, then heard Respondent on his Motion to dismiss, filed as part of his responsive pleading. Respondent argued, in support of his Motion, that the Petition failed to state a claim in that although it alleged that Respondent-Father had willfully abandoned the juvenile under N.C.G.S. § 7B-1111(a)(7), it failed to allege any specific conduct of Respondent-Father. The Court noted that Exhibit A to the Petition was a true, filed copy of the a [sic] Custody Order entered in the Gaston County District Courts on September 12, 2016 . . . and that said Custody Order contained many specific findings of fact as to Respondent-Father’s specific conduct, which support the Petitioner’s allegation that Respondent-Father willfully abandoned the juvenile; and that the Petition,

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read together with such Order which was an exhibit thereto, sufficiently stated a claim. Respondent's Motion to Dismiss was therefore denied.

Respondent does not challenge this finding, and therefore it is binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

This unchallenged finding of fact establishes that Respondent argued to the trial court that the termination petition should be dismissed only for failure to state a claim on the ground of willful abandonment. The court denied the motion based on its conclusion that the custody order attached to the petition detailed specific conduct by Respondent to support the Petitioner's allegation that Respondent willfully abandoned the child. The finding does not reflect that Respondent argued that the allegations in the petition were deficient as to the other two grounds for termination he had challenged in his written motion to dismiss or that the trial court ruled on the sufficiency of the allegations of those grounds. Therefore, we hold Respondent failed to preserve for appellate review the issues of whether the trial court erred by denying his motion to dismiss on the grounds of neglect and willful failure to pay. *See* N.C. R. App. P. 10(a).

Even if Respondent had challenged the trial court's finding regarding his motion to dismiss, there is nothing in the record that would put the finding in doubt. The hearing on the motion to dismiss does not appear in the transcript provided to this Court. Respondent only acknowledges this omission in a footnote of his brief

stating, “For some reason, the transcript of the termination hearing does not include the proceedings on the motion to dismiss.” It is the appellant’s burden, however, “to ensure the record and complete transcript are properly prepared and transmitted to this Court.” *Hill v. Hill*, 173 N.C. App. 309, 322, 622 S.E.2d 503, 512 (2005), *writ denied, review denied, appeal dismissed*, 360 N.C. 363, 629 S.E.2d 851 (2006), and *writ denied*, 362 N.C. 235, 657 S.E.2d 892 (2008); *see also* N.C. R. App. P. 3.1(d). If the hearing cannot be transcribed, then it is the appellant’s duty to reconstruct the record to allow this Court to conduct a proper review. *See In re Shackelford*, 248 N.C. App. 357, 360, 789 S.E.2d 15, 18 (2016). The record on appeal in this case is devoid of any efforts by Respondent to reconstruct the hearing on his motion to dismiss. Therefore, this Court will rely on the trial court’s unchallenged finding as the definitive authority on what occurred at the hearing on Respondent’s motion to dismiss. Based on that finding, Respondent has waived his right to challenge the sufficiency of the allegations as to the grounds of neglect and willful failure to pay.

C. Willful Abandonment

While Respondent has preserved the issue of the sufficiency of the allegations as to the ground of willful abandonment, we need not address Respondent’s argument. In addition to his failure to preserve his argument as to the sufficiency of the allegations for the other two grounds, Respondent has not challenged on appeal the trial court’s conclusions in its termination order that all three grounds existed to

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terminate his parental rights. Each of the two unchallenged grounds, standing alone, is sufficient to support the trial court's order terminating Respondent's parental rights. See *In re Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426 ("A finding of any one of the enumerated grounds for termination of parental rights under [N.C.G.S. §] 7B-1111 is sufficient to support a termination.").

Nevertheless, assuming, *arguendo*, Respondent properly challenged all three grounds for termination, his argument still fails because the petition stated sufficient facts to warrant a determination that Respondent willfully abandoned M.J.S. N.C.G.S. § 7b-1111(a)(7) provides that the court may terminate a parent's parental rights upon a finding that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." Under this Court's precedent,

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willfulness is more than an intention to do a thing; there must also be purpose and deliberation.

In re S.R.G., 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (internal citations and quotations omitted).

In this case, the Order Modifying Prior Custody Order, attached to the petition as Exhibit A, establishes that Respondent was ordered to "submit to all drug screens requested by the [Petitioner,]" and, furthermore, that he tested positive for marijuana

and cocaine in a 1 August 2016 drug screen. The Order Granting Defendant's Motion to Continue Contempt Hearing and Suspending Defendant's Visitation with Minor Child, also attached to the petition as Exhibit B, establishes that Respondent "consented in open court to suspending his physical visitation with the minor child until [a clean or negative hair follicle] drug screen is provided[,]" and the trial court so ordered on 22 December 2016. Furthermore, Exhibit B establishes Respondent "consented in open court that he agreed to submit to a ten panel hair follicle drug screen with additional benzodiazepine screening on or before [21 December] 2016 and thereafter provide the results of such screen to the [Petitioner] as soon as they are available." In the 22 December 2016 order, the trial court ordered Respondent to submit to this drug screen. The petition also alleges M.J.S. resided with Petitioner for "a continuous period of two years or more" prior to filing the petition. The allegations in the petition, together with these facts in the attached orders, support a finding that Respondent failed to submit to a drug screen after testing positive for illicit substances and consenting to a court order requiring him to do so as a condition of visitation, thus deliberately acting in a manner inconsistent with his parental rights for the six months prior to the filing of the petition. We therefore hold that, by incorporating these orders as exhibits, the petition stated sufficient facts to warrant a determination that Respondent willfully abandoned his child for the requisite six month period under N.C.G.S. § 7B-1111(a)(7). *See In re Quevedo*, 106 N.C. App. at

579, 419 S.E.2d at 160 (denying motion to dismiss termination petition for failure to state a claim where facts were shown in attached custody order and not petition alone). Even assuming Respondent properly challenged all three grounds of the petition, dismissal for failure to state a claim is, nevertheless, improper.

IV. Conclusion

Respondent cannot maintain a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), because Respondent has not shown prejudice or that the record as a whole shows he did not have access to the information required by the statute. Although Respondent filed a motion to dismiss all three grounds for termination pursuant to Rule 12(b)(6), the record shows that he failed to argue the legal insufficiency of the petition as to the grounds of neglect and willful failure to pay at the hearing before the trial court and that he failed to obtain a ruling on his motion to dismiss as to those two grounds. Therefore, we hold Respondent failed to properly preserve for appellate review the issue of whether the petition complied with N.C.G.S. § 7B-1104(6) as to the grounds of neglect and willful failure to pay. Since Respondent does not challenge the trial court's conclusions that those two grounds for termination existed, we affirm the trial court's order. Alternatively, even assuming Respondent properly preserved the issue of whether the petition complied with statutory requirements for all three grounds, we would nevertheless affirm, because the petition, together with the attached orders, adequately alleges facts

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sufficient to support a determination that Respondent willfully abandoned M.J.S. under N.C.G.S. § 1111(a)(7).

AFFIRMED.

Judge COLLINS concurs.

Judge MURPHY concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

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MURPHY, Judge, concurring in part and dissenting in part.

I concur in the Majority's order to dismiss the appeal. However, as we do not exercise our discretion under Rule 2 to excuse the preservation error under Rule 10, I would find that the appeal lacks merit, and I do not join the Majority in allowing Respondent's petition for writ of certiorari.