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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-540

Filed 6 February 2024

Rowan County, No. 22 JT 167

IN RE: J.M.M.M.

Appeal by respondent from order entered 27 February 2023 by Judge James F. Randolph in District Court, Rowan County. Heard in the Court of Appeals 18 December 2023.

No brief filed for petitioner-appellee.

Mercedes O. Chut for respondent-appellant.

STROUD, Judge.

Respondent-appellant appeals the trial court's order terminating her parental rights to J.M.M.M. ("John").¹ The trial court concluded two grounds for termination of parental rights existed, but one of the grounds was not alleged in the petition and the other ground was not supported by the findings of fact. For the reasons explained below, we reverse in part and vacate and remand in part.

I. Background

¹ A pseudonym is used.

Petitioner-appellee-father and Respondent-appellant-mother were married for three years. During the marriage, in April 2012, Mother gave birth to John. Prior to the separation of Father and Mother in May 2014, they were living in Morehead City. On 20 June 2014, Father filed a complaint for child custody under North Carolina General Statute Chapter 50 in Carteret County, and the trial court issued an *ex parte* temporary custody order placing John in Father's custody and set a return hearing for temporary custody on 7 July 2014. On 7 July 2014, Mother's counsel requested a continuance due to a family emergency. The matter was continued until 16 July 2014. Mother's counsel again moved to continue the hearing, but the trial court denied the continuance and held the return hearing.

On or about 14 August 2014, the district court entered its order ("Temporary Custody Order"), granting temporary custody to Father.² In the Temporary Custody Order, the trial court made procedural findings regarding the entry of the *ex parte* order and the prior continuance of the hearing on 7 July 2014. The remaining findings noted that Father "had traveled from Kannapolis" and was present with his witnesses and ready to proceed but Mother was not present despite proper notice and her counsel was present and ready to proceed.

The Temporary Custody Order had no findings of fact regarding the parties or

² Although the Temporary Custody Order was entered upon return of an emergency *ex parte* custody order, in his testimony, Father referred to the order as a "permanent custody" order which provided he could allow Mother to see John "if I saw fit and I allowed it[.]"

John's circumstances or the fitness of either parent. The trial court concluded "[t]he circumstances of this case are appropriate for continuing temporary custody in and with [Father] pursuant to North Carolina General Statute [Section] 50-13.2 and North Carolina General Statute [Section] 50-13.4"³ and decreed as follows:

1. The plaintiff, [Father] shall be and is hereby awarded the temporary care, custody, and control of the minor child of these parties, [John].
2. [Mother] and her family, friends, associates, or agents or any other persons acting in active concert or participation with her are restrained and prohibited from removing this child from the care of [Father] or anyone that [Father] designates as a caretaker for this child.
3. This order shall continue in force and effect indefinitely and pending entry of any further order.

On 28 September 2022, Father filed a petition in Rowan County to terminate Mother's parental rights. The petition alleged as grounds for termination:

- a. [Mother] has not made any attempt to see or contact [John], either in person, in writing, or by telephone since 2016.
- b. That [Father] and [John] had previously lived in Kannapolis, North Carolina, with the Paternal

³ The meaning of the reference to North Carolina General Statute Section 50-13.4 is unclear; perhaps this was a typographical error. North Carolina General Statute Section 50-13.4 is entitled "Action for support of minor child" and addresses child support, not child custody. N.C. Gen. Stat. § 50-13.4 (2021). According to the Temporary Custody Order, Father's complaint sought "custody of the minor child of these parties and such other and further relief as more particularly set out therein." There is no indication of a claim for child support in our record.

Grandmother during this period of time and [Mother] was aware of said location. Paternal Grandmother still resides at the address.

c. That [Mother] . . . *willfully abandoned* [John] for at least six consecutive months prior to the filing of this action;

d. That [Mother] . . . has *willfully neglected* [John] as defined in NCGS 7B[-101](15) by not providing proper care, supervision, or discipline for [John], and by abandoning [John].

(Emphasis added.) Thus, the petition alleged grounds for termination under North Carolina General Statute Section 7B-1111(a)(7) for abandonment and North Carolina General Statute Section 7B-1111(a)(1) for neglect.

The matter was heard on 2 February 2023. On 27 February 2023, the trial court entered an order terminating Mother's parental rights based upon willful failure to pay child support and willful abandonment. Mother filed timely notice of appeal on 9 March 2023.

II. Adjudication of Grounds for Termination

On appeal, Mother first challenges several of the trial court's findings of fact and the existence of statutory grounds for termination of her parental rights.

An appellate court reviews 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. A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding of fact. Where no objection is made to a finding of fact by the trial court, the finding is presumed to be supported by

competent evidence and is binding on appeal.

Appellate courts review a trial court's conclusion of law concerning adjudication de novo. In this context, de novo review requires the appellate court to determine whether or not, from its review, the findings of fact supported a conclusion of neglect.

In re G.C., 384 N.C. 62, 65-66, 884 S.E.2d 658, 661 (2023) (citations, quotation marks, and brackets omitted).

A. Willful Failure to Provide Support

Mother contends trial court erred in its conclusion that “[Mother] has willfully failed to provide support for [John].” Although the trial court did not identify which subsection of North Carolina General Statute Section 7B-1111 its conclusion was based upon, termination of parental rights based on willful failure to provide support is governed by North Carolina General Statute Section 7B-1111(a)(4):

One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a)(4) (2021).

This Court has previously noted that although failure to pay child support may be a factor in termination of parental rights under several grounds listed in North Carolina General Statute Section 7B-1111(a), “willful failure to pay child support” by

a parent when the other parent has been awarded custody of the child is addressed specifically by North Carolina General Statute Section 7B-1111(a)(4):

Notably, of all eleven statutory grounds to terminate parental rights, only § 7B-1111(a)(4) addresses the failure to pay the other parent in order to support the child pursuant to a court order or custody agreement, *i.e.* child support. N.C. Gen. Stat. § 7B-1111(a).

....

While other grounds in § 7B-1111(a) can be based on the *failure* to pay support, *see, e.g.* N.C. Gen. Stat. § 7B-1111(a)(5)(d) (permitting termination of a father’s parental rights when the child was born out of wedlock and the father did not “provide substantial financial support”), and even the *failure* to pay child support, *see In re I.R.L.*, 263 N.C. App. at 486, 823 S.E.2d at 906 (indicating the failure to pay child support could support an allegation of abandonment by citing to this Court’s case in *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015)), no other ground involves the *willful failure* to pay child support.

In re A.H.D., 287 N.C. App. 548, 555, 555-56, 883 S.E.2d 492, 498, 498-99 (2023) (brackets omitted) (emphasis in original).

Mother contends the petition did not put her on notice that her rights were subject to termination based on willful failure to pay child support under North Carolina General Statute Section 7B-1111(a)(4). *See In re B.C.B.*, 374 N.C. 32, 34, 839 S.E.2d 748, 751 (2020) (“[W]hile there is no requirement that the factual allegations [in the petition] be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.” (brackets altered)). And even if the petition was somehow construed as giving notice of a claim for termination

based upon North Carolina General Statute Section 7B-1111(a)(4), Mother contends her rights cannot be terminated on this ground because there was no child support order.

Although the petition need not make extensive allegations or identify the precise statutory provision upon which it is based,

[p]etitions in termination of parental rights cases must state “facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.” N.C. Gen. Stat. § 7B-1104(6) (2019). . . . The allegations in a petition do not need to include the “precise statutory provision ultimately found by the trial court” as long as the petition includes sufficient factual allegations. *In re A.H.*, 183 N.C. App. 609, 614-15, 644 S.E.2d 635, 638-39 (2007) (indicating a citation to the precise statutory provision is not required before finding adequate notice based on the facts alleged); *see In re B.L.H.*, 190 N.C. App. 142, 147, 660 S.E.2d 255, 257 (2008) (“Where the factual allegations in a petition to terminate parental rights do not refer to a specific statutory ground for termination, the trial court may find any ground for termination under N.C.G.S. § 7B–1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground.”).

In re A.H.D., 287 N.C. App. at 553-54, 883 S.E.2d at 497-98 (2023) (brackets omitted).

Mother is correct on both points. Here, the petition did not make any allegations regarding her failure to pay child support and did not allege willful failure to pay child support. In *In re A.H.D.*, this Court considered the sufficiency of a petition for termination of parental rights which alleged “for more than one (1) year, Father has failed and refused to pay child support. He has not paid child support

since May 6, 2018.” *Id.* at 549, 883 S.E.2d at 495 (brackets omitted). Although the petition did not cite the specific statutory basis for the claim and did not use the word “willful,” we noted the allegation that Father “refused” to pay child support put Father on sufficient notice of a claim based on “willful” failure to pay child support:

The Petitions allege Father willfully failed to pay through their use of the word “refused.” The word “refused” indicates an active decision not to pay. *See Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971) (“In Black’s Law Dictionary (4th Ed., 1951) *refusal* is defined as ‘the declination of a request or demand, or the omission to comply with some requirement of law, *as the result of a positive intention to disobey.*” (second emphasis added)). Put another way, an active decision not to pay is a willful decision not to pay.

Id. at 556, 883 S.E.2d at 499 (brackets omitted).

In addition, here there is no evidence of the existence of a child support order, as required by North Carolina General Statute Section 7B-1111(a)(4). *See In re C.L.H.*, 376 N.C. 614, 621, 853 S.E.2d 434, 440 (2021) (“Here, the trial court made no findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent’s parental rights. Consequently, we conclude that the trial court’s findings of fact are insufficient to support the termination of respondent’s parental rights based on N.C.G.S. § 7B-1111(a)(4).”). To the contrary, the trial court made a finding of fact that “[Mother] has not paid any child support for the minor child, despite having the means and ability to work as evidenced by her testimony that she has been employed as a telemarketer. *[Mother] was not under a*

court order to do so.” (Emphasis added.) Thus, the trial court erred in adjudicating the existence of grounds for termination based on willful failure to pay child support and we reverse the order as to this ground. See *In re J.M.K.*, 261 N.C. App. 163, 166, 820 S.E.2d 106, 108 (2018) (reversing the termination of parental rights based on abandonment when abandonment was not alleged in the petition); see also *In re C.W. & J.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) (determining the trial court erred by terminating parental rights based on abandonment when there was no mention of abandonment in the petition).

B. Abandonment

The trial court also concluded that Mother “has abandoned the minor child.” Parental rights are subject to termination when “[t]he parent has willfully abandoned 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) (2021). “Willful abandonment” was further explained in *In re K.N.K.*:

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. If a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re K.N.K., 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (citations, quotation marks, and brackets omitted). “The willfulness of a parent’s actions is a question of fact for the trial court.” *Id.* (citations omitted).

Mother argues the trial court erred in terminating her parental rights based on abandonment under North Carolina General Statute Section 7B-1111(a)(7) because the findings of fact do not support a conclusion of willful abandonment. Mother first challenges several of the findings of fact as recitations of testimony or unsupported by the evidence.

We note that the trial court's findings of fact were minimal. There were only 11 findings total. The first two findings identify the parties and child; the last two are the findings apparently intended to address disposition, as they address Father's wife's intent to file to adopt John and find termination "will cause no disruption in the minor child's current family unit." *All* the remaining findings are:

3. [Mother] has no relationship with [John].

4. [John] is ten years old, resides with [Father] in the state of North Carolina, and has done so his entire life; [Father's] wife has lived in the household with [Father] and [John] for the past seven (7) years consistently and serves as a mother figure for [John].

5. [Father's] wife has a close and loving relationship with [John]; [John] refers to [Father's] wife as Mom; [John] only knows one mother and that is [Father's] wife[.]

6. [Mother] has had no contact with [John] since [John] was two (2) years old and has played no role in [John's] life since that time. A custody order was entered in July of 2014 in Carteret County, which did not give [Mother] any specific visitation. [Mother] testified that she did not appear in court the day the order was entered due to transportation issues. This order has never been modified; [Mother] testified that she was not aware as to the process regarding modification prior to the petition being filed, and [Mother]

testified she spoke with an attorney regarding modification after the petition was filed. [Mother] acknowledged that she had not consulted with an attorney at any other time since the entry of the order and that she did receive a copy of the printed order in 2014.

7. [Mother] has not communicated directly with [John] during that time, nor has she extended gifts, cards, or any indirect contact. [Mother] testified that she attempted numerous times to call [Father] and his mother regarding visitation with [John], but was unsuccessful in her attempts to reach either and was unaware of [Father's] address. [Mother] also testified that she was blocked on [Father's] social media, which he confirmed. [Mother's] mother also testified that she and other family members reached out to [Father] regarding visitation, but was never given any visitation with [John]. [Mother] acknowledged that she has not tried to reach back out in a long time.

8. [Mother] has not paid any child support for [John] despite having the means and ability to work as evidenced by her testimony that she has been employed as a telemarketer. [Mother] was not under a court order to do so.

9. [Mother] has lived in her grandfather's home with her grandfather for several years; [Mother] does not pay rent[.]

Mother contends several of these findings are not actually findings of fact but are instead recitations of evidence. She argues "the trial court never went beyond recitations of [Mother's] and her mother's and daughter's testimony to judge their credibility, except for noting in finding 7 that [Father] agreed he had blocked [Mother] on social media."

Our Supreme Court has noted that "recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge absent an indication concerning

whether the trial court deemed the relevant portion of the testimony credible.” *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (citations, quotation marks, and brackets omitted) (emphasis in original). However, findings describing testimony are not impermissible if the trial court “ultimately makes its own findings, resolving any material disputes.” *In re T.N.H.*, 372 N.C. 403, 408, 831 S.E.2d 54 (2019) (citation and quotation marks omitted).

Mother is correct that finding 6 and finding 7 are mostly recitations of testimony. These two findings relate to the primary issue raised by the evidence: whether Mother’s lack of contact with Father and John since entry of the Temporary Custody Order in 2014 was willful. The findings state that Mother “testified” about several things, using the phrase “[Mother] testified” five times in these findings, and the maternal grandmother had “testified” about her efforts to visit John. But most significantly, these findings fail to evaluate the credibility and weight of the evidence to resolve the primary factual dispute presented by the evidence, and there are no other findings of fact which resolve this uncertainty. *See In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495.

Here, the primary dispute relevant to abandonment was the reason for Mother’s lack of contact with John since the parties’ separation in 2014. As the Guardian ad Litem report noted, Mother blamed her lack of contact with John on Father. The report specifically noted that Mother’s “position is that [Father] made it impossible for her to have a relationship. But that debate really belongs to the

adjudication portion of the TPR hearing.” Mother claimed Father had taken John after their separation, moved to a new residence, changed his phone number, blocked her on social media, and ignored or rebuffed her and her family’s efforts to contact Father through his family members.

For the most part, Father’s evidence tended to support Mother’s contentions. Before the trial court, Father argued that Mother could have hired a “private investigator to track down where this man is.” One contested fact in this regard was whether Mother knew Father was living with his grandmother from 2014 to 2016, even assuming she knew the grandmother’s address. But the relevant time period for abandonment is the “six consecutive months immediately preceding the filing of the petition or motion.” N.C. Gen. Stat. § 7B-1111(a)(7). Based upon Father’s evidence, even if Mother knew where he and John lived from 2014 to 2016, the evidence was undisputed that she did not know where he had moved in 2016, years before the six months preceding filing of the petition. The trial court’s findings reciting Mother’s testimony could be read as confirming her claims that she attempted to contact Father but was unable to because he had changed all his contact information and actively sought to prevent her from reaching him. Notably, the trial court made no finding indicating Mother had any actual knowledge of Father’s address or contact information, nor could the trial court have made this finding based upon the evidence. Even Father admitted he had changed his phone number, moved, and blocked Mother on social media, and he acknowledged he did not provide his

contact information to Mother.

Father's evidence presented at the hearing for purposes of adjudication⁴ showed Mother and Father were living in Morehead City, Carteret County before they separated in 2014. Father testified he moved to Kannapolis in May of 2014 to live with his grandmother and Mother knew where his grandmother lived and that he had moved there. He filed a complaint seeking custody of John in Carteret County on 20 June 2014 and an *ex parte* temporary custody order was entered the same day. After the return hearing on 16 July 2014, Father was granted temporary custody. Father moved away from his grandmother's home in 2016. He testified his phone number had changed since 2014 but he did not give Mother or her family his current phone number or his address. He also blocked Mother and her family on social media. He testified he was not aware of Mother trying to contact him either directly or through family members, although he was aware that Mother's oldest daughter had "messed h[is] sister awhile back" but he did not know what the message said.

Mother testified she did not know where Father moved when they separated in 2014. She knew generally where his grandmother lived but did not know her address or phone number. After the Temporary Custody Order was entered, she attempted to call Father at the last number she had. She also called his mother's office phone number and asked for her but "they told me I had the wrong number."

⁴ Most of the evidence at the hearing was presented for purposes of disposition.

She “reached out to his sister” on social media because she had no other “contact information for anybody.” Mother confirmed Father’s testimony that he had blocked her on social media. She testified that “every couple months” she would “reach out.” Her oldest daughter, brother, sister, mother, and father had also tried at various times to get contact information for Father, but “[n]obody will contact my family back. They block ‘em immediately as soon as one of them reaches out.”

The maternal grandmother also testified about her attempts to contact Father. After entry of the Temporary Custody Order, she contacted Father through Facebook to ask if she could see John. He said she could see him “as long as [Mother’s] not around.” But soon after this, “we were ghosted. No more contact at all.” Mother’s oldest daughter also testified about her attempts to contact Father and various family members, but she was also blocked. Her most recent attempt was “just a few months back.”

Here, the trial court did not make a finding of fact directly addressing willfulness and the findings overall are insufficient to establish Mother’s conduct was willful. *See In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738. While the termination order finds Mother had not made any contact with John since the entry of the 2014 Temporary Custody Order, Father’s own evidence shows that he moved away from Carteret County even before entry of the Temporary Custody Order; changed his phone number; did not provide Mother with a current address or phone number; and blocked Mother and John’s maternal relatives on social media. Mother testified she

attempted to call Father's previous number and his mother's work number but was unsuccessful. Mother, her mother, and her daughter also testified Father and his family blocked them when they attempted to make contact on social media.

The trial court had an obligation to resolve the question of fact regarding the extent to which Mother's lack of contact with John resulted from interference by Father and his family rather than from Mother's actions or inactions. *See In re D.T.H.*, 378 N.C. 576, 590, 862 S.E.2d 651, 661 (2021) (noting "the trial court had the obligation to resolve a substantial factual dispute over the extent to which [the father] had had contact with [the child] and the extent to which the limited relationship that [the father] had been able to sustain with [the child] stemmed from interference by the maternal grandparents rather than from [the father's] action or inaction" (citation omitted)). Such findings were necessary for the trial court to make the ultimate determination that Mother "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861-62 (2016) (citations, quotation marks, and brackets omitted). The trial court's findings reciting Mother's testimony note that she testified she had tried to contact Father but she "was never given any visitation with the minor child." The trial court also found Mother "testified" she was blocked on Father's social media and "he confirmed" this. Thus, the trial court's findings tend to support Mother's argument that Father prevented her from having contact with John more than they indicate willful abandonment. Thus, we conclude the trial

court's findings of fact are insufficient to "demonstrate that [Mother] had a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [John]" and, therefore, are also insufficient to show abandonment under North Carolina General Statute Section 7B-1111(a)(7). *See id.* (citations, quotation marks, and brackets omitted).

While Mother also argues it was not in John's best interests for her parental rights to be terminated, we need not address the disposition portion of the trial court's order as the trial court erred in concluding that grounds for termination for willful failure to pay child support and willful abandonment existed. *See In re S.Z.H.*, 247 N.C. App. 254, 265, 785 S.E.2d 341, 349 (2016) ("[B]ecause we have already determined that the trial court erred in concluding that there were grounds to adjudicate the termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)(7), we need not address respondent's argument regarding the lack of findings as to disposition.").

As we must disregard the trial court's findings of fact 6 and 7 to the extent they are mere recitations of testimony, we must vacate the order and remand for the trial court to enter a new order with proper findings of fact based on clear, cogent and convincing evidence. *See In re K.N.*, 373 N.C. 274, 284-85, 837 S.E.2d 861, 869 (2020) ("Accordingly, we vacate the trial court's termination order and remand this case to the District Court, Guilford County, for further proceedings not inconsistent with this opinion, including the entry of a new order containing appropriate findings of fact

and conclusions of law on the issue of whether grounds exist to support the termination of respondent's parental rights."). On remand, the trial court must resolve the factual dispute of the extent to which Mother's lack of contact with Father or John resulted from Father's admitted failure to provide his contact information after moving and changing his phone number and blocking Mother on social media. *See In re D.T.H.*, 378 N.C. at 590, 862 S.E.2d at 661. The trial court must consider the weight and credibility of all the evidence to make its findings. *See In re A.E.*, 379 N.C. at 185, 864 S.E.2d at 495. We also stress that the grounds for adjudication of termination of parental rights must be established *before* the trial court considers disposition and the trial court must make findings as required by North Carolina General Statute Section 7B-1110 to address disposition. N.C. Gen. Stat. § 7B-1110(a) (2021). As we did not address Mother's arguments as to the portions of the order addressing disposition but have vacated the order based on the adjudication, on remand the trial court should make appropriate findings as to disposition as well, if it concludes a ground for termination of parental rights exists. Upon the request of either party on remand, the trial court shall receive additional evidence regarding the grounds for termination of parental rights and disposition.

III. Conclusion

For the reasons stated above, we reverse the trial court's order based upon willful failure to pay child support; we vacate the order as to abandonment and disposition and remand for further proceedings.

IN RE: J.M.M.M.

Opinion of the Court

REVERSED IN PART AND VACATED AND REMANDED IN PART.

Judges GORE and STADING concur.

Report per Rule 30(e).