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NO. COA10-277

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

IN THE MATTER OF:

Z.M.S.

Surry County
No. 07 J 83

Appeal by respondent-mother from order entered 22 October 2009 by Judge Charles M. Neaves in Surry County District Court. Heard in the Court of Appeals 20 July 2010.

H. Lee Merritt for petitioner-appellee, Surry County Department of Social Services.

Pamela Newell for respondent-appellee, Guardian Ad Litem.

Rebekah W. Davis for respondent-appellant, mother.

ERVIN, Judge.

Respondent-Mother Equilla S. appeals from an order entered by the trial court terminating her parental rights in her daughter, Z.M.S. (Zoe).¹ After careful consideration of the record in light of the applicable law, we conclude that the trial court's order² fails to contain sufficient factual findings to support termination

¹ "Zoe" is a pseudonym used to refer to the juvenile throughout the remainder of this opinion to protect her privacy and for ease of reading.

² The trial court's order also terminated the parental rights of Zoe's father, Robert M., who never appeared in the underlying juvenile proceeding, did not contest the termination of his parental rights in Zoe, and has not appealed the trial court's termination order.

of Respondent-Mother's parental rights in Zoe on the basis of the ground for termination set forth in N.C. Gen. Stat. § 7B-1111(a)(2) so that this case must be remanded to the trial court for further proceedings not inconsistent with this opinion.

I. Factual Background

On 11 September 2007, the Surry County Department of Social Services filed a petition alleging that Zoe was a neglected and dependent juvenile. More particularly, DSS alleged that Respondent-Mother had not consistently provided adequate food and care for Zoe, who had significant medical needs, and that Zoe had been diagnosed with failure to thrive. Contemporaneously with the filing of the petition, DSS obtained the issuance of a nonsecure custody order, took custody of Zoe, and placed her in a therapeutic foster home. In October 2007, DSS and Respondent-Mother entered into a case plan, pursuant to which Respondent-Mother was required to maintain safe and appropriate housing; obtain and maintain full-time employment; obtain a mental health assessment and follow any treatment recommendations; cooperate with DSS; attend scheduled visits with Zoe; and attend Zoe's medical appointments.

The trial court adjudicated Zoe a dependent juvenile on 25 October 2007. The trial court held review hearings on 13 December 2007 and 13 March 2008. In a permanency planning order entered on 13 June 2008, the trial court found that Respondent-Mother was not diligently working on her case plan and adopted a permanent plan of reunification and/or adoption. On 31 July 2008, DSS filed a motion to terminate Respondent-Mother's parental rights in Zoe. However,

DSS voluntarily dismissed its termination motion without prejudice on 13 November 2008.

The trial court held another permanency planning hearing on 13 November 2008. In a permanency planning order entered on 9 December 2008, the trial court found that Respondent-Mother had made some progress toward compliance with her case plan and adopted a permanent plan of reunifying Zoe with Respondent-Mother. The trial court held another permanency planning hearing on 16 April 2009. In a permanency planning order entered on 30 April 2009, the trial court found that Respondent-Mother "has yet to achieve the goals set forth in the [case] plan." For that reason, the trial court relieved DSS of its obligation to undertake further efforts at reunification and changed Zoe's permanent plan from reunification with Respondent-Mother to adoption.

On 1 July 2009, DSS filed a motion to terminate Respondent-Mother's parental rights in Zoe. In the termination motion, DSS alleged that Respondent-Mother's parental rights in Zoe were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(1) (neglect); N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress); and N.C. Gen. Stat. § 7B-1111(a)(3) (failure to pay reasonable costs of child care). After a hearing on 1 September 2009, the trial court announced the intention of entering an order terminating Respondent-Mother's parental rights in Zoe. On 22 October 2009, the court entered a written order in which it found as a fact, among other things, that:

8. Respondent-mother entered into a family services case plan with the SURRY COUNTY

DEPARTMENT OF SOCIAL SERVICES on October 9, 2007, prior to the hearing on the petition. The goal of the family services case plan was reunification with the mother. The objectives stated in the plan were for the mother to

(a) maintain safe and appropriate housing for herself and her child,

(b) obtain and maintain full-time employment,

(c) obtain a mental health assessment for herself and follow through with any recommendations[,]

(d) cooperate with the DEPARTMENT OF SOCIAL SERVICES, and

(e) attend scheduled visits with the child and attend medical appointments with the child.

. . . .

13. Respondent-mother has had five (5) different residences since September 2007. The mother resided at 325 Jefferies Street in Mount Airy, North Carolina, until early November 2007. In early November 2007, the mother left Mount Airy and went to Fayetteville, Tennessee, where she remained until March 2008. Respondent-mother did not provide the DEPARTMENT OF SOCIAL SERVICES with her address in Tennessee. The DEPARTMENT was able to obtain an address for the mother through Medicaid records and did contact her in January 2008. In late February 2008, respondent-mother did contact the DEPARTMENT and did meet with the case worker in early March 2008.

14. In early March 2008, respondent-mother began residing in Winston-Salem, North Carolina, with a friend. The mother remained at that residence with her friend until September 2008, when she moved again. Between September 2008 and December 2008, respondent-mother lived in Winston-Salem with a male friend; this individual had an extensive criminal history including convictions regarding drugs, assault on a female, and

assault with a deadly weapon. In December 2008, respondent-mother moved again to another residence in Winston-Salem[,] where she has remained to the present. Respondent-mother did not notify the caseworker of these changes of her residence. The caseworker became aware of these residences through other sources.

15. Respondent-mother has not been employed during the period the child has been in the custody of the DEPARTMENT OF SOCIAL SERVICES. The mother did receive Work First services while she resided in Forsyth County. The mother failed to comply with the terms of the Work First program during April and May 2008. As a result [of] this, she was sanctioned and her Work First benefits were suspended.

16. Respondent-mother re-applied for Work First services in Forsyth County in November 2008. In March 2009, the mother was notified by the Work First program that her benefits were to be terminated effective April 1, 2009, as a result of her not complying with the terms and provisions of the program. Respondent-mother's only income for the period of time since the child has been in the custody of the DEPARTMENT has been Work First program funds.

. . . .

18. Between August 2008 and May 2009, respondent-mother worked closely with Dianna Case, a case worker with Triumph Mental Health in Winston-Salem. The case worker worked with the mother 3 to 5 hours each week during this period of time to help her develop skills to enable her to live a productive life in her community. The case worker and the mother discussed what needed to be done in order for the child to be returned to her care. The respondent-mother did make some progress while she was working with the caseworker. Because of the special health needs of the child and the mother's inability to follow through consistently with appointments and financial planning, the case worker was concerned about reunifying the child with the mother.

19. Respondent-mother, pursuant to the case plan, agreed to obtain a mental health

evaluation and to obtain counseling, if necessary. Between October 2007 and May 2008, respondent-mother had four (4) mental health intake appointments scheduled. She failed to attend any of the scheduled appointments. In June 2008, the mother did attend an intake appointment at Triumph Mental Health in Winston-Salem, North Carolina. According to the mother, she has followed through with the recommended counseling services.

20. Respondent-mother visited with the child on four (4) occasions between September 11, 2007, and October 26, 2007. Between October 26, 2007, and March 16, 2008, the mother had no visits or contacts with the juvenile. During this time, the mother did not attend the visits that were scheduled or did not contact the DEPARTMENT to schedule visits.

21. Beginning in March 2008, visits between the mother and the child resumed. Initially the visits were conducted at the foster parent's home; during several of these visits, respondent-mother was not actively engaged with the child and fell asleep on the foster parent's couch. In May 2008, the visits were moved to SCAN in Winston-Salem; again, the mother was not actively engaged with her child during these visits and did not arrive on time. In December 2008, the visits were moved to the mother's residence or at Brenner's Children's Hospital. The visits were scheduled weekly for several hours each time. During the visits, the mother had the responsibility of administering the child's medications to the child. Frequently, the mother had difficulty in administering the medications to the child. On several occasions, the visits were cancelled as a result of the mother's not contacting the DSS worker to confirm the visit. On other occasions, the visits were cancelled because no one came to the door at the mother's residence. On several of the visits, the mother's residence was not clean and picked up; small objects such as paper clips and pieces of crayons littered the living room floor, the kitchen was also not clean with dirty dishes on the counters, stove, and unwashed dishes in the sink. The visits with the mother were schedule[d] at least one week

in advance and were confirmed with the mother at least one day prior to the visit.

22. The child receives constant medical treatment for her . . . condition. The child receives three (3) oral medications twice a day. The administration of the medication is critical to maintaining the child's health. If the administration of the medications is not maintained, the . . . condition could worsen The medications are difficult to administer to the child, but are critical to maintain the child's health. The child's condition is monitored closely by her medical providers at Brenner's Children's Hospital. Personnel at Brenner's Children's Hospital have worked with the child's foster mother and respondent-mother to assist them in administering the medications to the child. The respondent-mother has experienced difficulties in administering the medications to the child both at Brenner's Children's Hospital and at her residence.

Based on these findings of fact, among others, the trial court concluded as a matter of law that:

3. The SURRY COUNTY DEPARTMENT OF SOCIAL SERVICES has proven by clear, cogent, and convincing evidence that sufficient grounds do exist for the termination of the parental rights of the respondent-parents.

. . . .

And, in particular, as to the respondent-mother: the juvenile has been in the custody of the DEPARTMENT OF SOCIAL SERVICES for more than twelve (12) months without the respondent-mother making reasonable progress under the circumstances to correct those conditions which led to the removal of the juvenile from her care.

4. It would be in the child's best interest for the parental rights of both parents to be terminated

Respondent-Mother noted an appeal to this Court from the trial court's termination order.

II. Standard of Review

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights at the dispositional stage is reviewed under an abuse of discretion standard. *Id.*

III. Grounds for Termination

On appeal, Respondent-Mother contends that the trial court erred by concluding that sufficient grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(2) when it failed to make specific findings of fact addressing the issue of willfulness or to conclude as a matter of law that Respondent-Mother's actions were willful.³ We agree.

N.C. Gen. Stat. § 7B-1111(a)(2) provides that a parent's parental rights in a child may be terminated where:

The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the

³ The trial court did not find the existence of any ground for terminating Respondent-Mother's parental rights in Zoe other than that set forth in N.C. Gen. Stat. § 7B-1111(a)(2).

satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile

This Court has clearly stated that, "to find grounds to terminate a parent's rights under [N.C. Gen. Stat.] § 7B-1111(a)(2), the trial court must perform a two part analysis." *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 396, *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005). More specifically, the trial court must determine by clear, cogent, and convincing evidence that: (1) the parent "willfully" left the juvenile in foster care for more than twelve months and (2) the parent failed to make "reasonable progress" in correcting the conditions that led to the juvenile's removal from the home. *Id.* at 464-65, 615 S.E.2d at 396. Thus, one of the required elements needed to establish the first prong of the two-part test required for the termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) is a showing of "willfulness."

The trial court's termination order does not, however, contain any findings which address the issue of whether Respondent-Mother acted willfully. Without a finding of "willfulness," the trial court's order simply failed to establish grounds for termination of Respondent-Mother's parental rights in Zoe pursuant to N.C. Gen. Stat. § 7B-1111(a)(2). *See In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002). Although DSS and the Guardian *ad Litem* argue, in reliance upon our decision in *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (stating that language utilized in a termination order "appropriately tracks the statutory language in

N.C. Gen. Stat. § 7B-1111(a) (7) regarding willful abandonment as a ground for termination of parental rights"), that we should not grant Respondent-Mother's request for appellate relief on this issue because, as the Guardian *ad Litem* puts it, the trial court's order "tracks most of the pertinent language from the statute," nothing in our opinion in that case can be read to support overlooking the omission of critical findings of fact from termination orders. As a result, we vacate the trial court's termination order and remand this case to the trial court with instructions to make appropriate findings as to the willfulness of Respondent-Mother's conduct. See *In re T.M.H.*, 186 N.C. App. 451, 452, 652 S.E.2d 1, *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007) (stating that, "[w]here the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct, the order of the trial court must be vacated and remanded for further findings"). The trial court may, in its discretion, receive additional evidence on remand. See *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999). In light of our decision with respect to the willfulness issue, there is no need for us to address respondent's remaining assignments of error.

Vacated and remanded.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).