

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-492

Filed: 20 November 2018

Columbus County, No. 15 JT 29

IN THE MATTER OF: A.B.C.

Appeal by respondent-mother from orders entered 1 February 2018 by Judge William Fairley in Columbus County District Court. Heard in the Court of Appeals 4 October 2018.

Assistant County Attorney David S. Tedder for petitioner-appellee Columbus County Department of Social Services.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant mother.

Womble Bond Dickinson (US) LLP, by John E. Pueschel and Shawnice Orange, for guardian ad litem.

DIETZ, Judge.

Respondent appeals the trial court's order terminating her parental rights to her son Adam.¹ As explained below, Respondent has identified an arguable tension between two ultimate findings in the trial court's order. Although we reject

¹ A pseudonym is used to protect the identity of the minor child.

Respondent's contention that the trial court misapprehended the law, we remand this case for additional findings that remove this tension and permit this Court to engage in meaningful appellate review of the trial court's findings of fact and conclusions of law.

Facts and Procedural History

On 10 April 2015, bystanders found Respondent passed out and unresponsive inside a car in a commercial parking lot. Respondent's infant son Adam was crying in the back seat. The bystanders were unable to wake Respondent and called emergency responders. After this incident, Respondent agreed to place Adam with a "safety resource." The following week, bystanders again found Respondent unresponsive in a car, this time in a hospital parking lot. Respondent contends that she had an "extreme adverse reaction" after ingesting cocaine and Xanax and that caused her to lose consciousness in the hospital parking lot.

On 20 April 2015, the Columbus County Department of Social Services filed a juvenile petition alleging that Adam was neglected and dependent. After a hearing, the trial court adjudicated Adam as dependent and dismissed the neglect allegation. The record of these proceedings indicates that Respondent suffered from serious substance abuse issues that could only be addressed through focused commitment to appropriate treatment programs.

Opinion of the Court

The trial court ordered Respondent to submit to substance abuse and mental health assessments, comply with any resulting recommendations, submit to weekly random drug tests, enroll in and complete parenting classes, and establish stable housing. The permanent plan at the time was eventual reunification with a secondary plan of guardianship.

From June 2015 to January 2017, Respondent was unable to stay committed to a drug treatment program and repeatedly was arrested and jailed, in some cases for reasons Respondent could not later recall, but all of which appear related to Respondent's various substance abuse issues involving illegal drugs and alcohol. Ultimately, on 20 March 2017, the trial court changed the permanent plan to adoption with a secondary plan of guardianship.

On 12 May 2017, DSS petitioned to terminate Respondent's parental rights on numerous grounds including failure to make reasonable progress toward the conditions that led to Adam's removal. *See* N.C. Gen. Stat. § 7B-1111(a)(2).

After a hearing, the trial court entered an adjudicatory order concluding that grounds existed to terminate Respondent's parental rights for failure to make reasonable progress. The same day, the court entered a dispositional order concluding that termination was in Adam's best interests and terminating Respondent's parental rights. Respondent appealed both orders one week after the deadline to file an appeal had passed.

Analysis

I. Appellate Jurisdiction

Respondent acknowledges that her notice of appeal was not timely and has filed a petition for a writ of certiorari to review the trial court's order. *See* N.C. R. App. P. 21(a)(1). "A writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 369 (2017). Instead, "[a] petition for the writ must show merit or that error was probably committed below." *Id.* Respondent has established sufficient merit to her arguments on appeal to justify issuing a writ of certiorari under *Bishop*. Accordingly, in our discretion, we issue a writ of certiorari and review this case on the merits.

II. Challenged Factual Findings

Respondent argues that the trial court's findings of fact do not support the court's conclusions of law. Specifically, she contends that the court acted under a misapprehension of the law because the court's ultimate findings indicate that she made progress toward correcting the conditions that led to removal *after* the date DSS petitioned to terminate her parental rights, and the court mistakenly relied only

on her failures to make reasonable progress *before* DSS petitioned to terminate her parental rights.

“The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law.” *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). A court may terminate parental rights when “[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the 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.” N.C. Gen. Stat. § 7B-1111(a)(2). A parent’s reasonable progress “is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights.” *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006).

Respondent argues that the trial court mistakenly believed it could consider only evidence of reasonable progress leading up to the filing of the petition, and not evidence of progress between that filing and the eventual hearing before the court. We are not persuaded that the trial court’s order indicates that the court acted under a misapprehension of the law. But we agree with Respondent that there is enough arguable tension in the court’s findings to prevent this Court from conducting a

Opinion of the Court

meaningful appellate review and we therefore remand this case for the trial court to clarify its findings.

The trial court made detailed findings concerning Respondent's efforts to address the substance abuse issues that are at the core of this case, including express findings that, had Respondent completed the necessary treatment programs, they "would have helped her acquire the ability to overcome factors that resulted in the child's placement," that Respondent "did not do so," and that Respondent's own testimony concerning her efforts to address her substance abuse issues was not credible:

33. . . . [R]espondent mother was released from custody on a probation violation. A condition of that release was that respondent mother would enter a substance abuse treatment facility called Our House, and complete the program. Respondent mother completed the program in August 2017.

34. That when respondent mother completed the Our House program, she was given the opportunity to enter Grace Court, a facility where she could continue with her substance abuse therapy, be monitored, and would be allowed to have the juvenile live with her. Respondent mother declined Grace Court and opted rather to live with her then (and present) boyfriend.

35. That respondent mother is in the methadone program. However there is no accompanying counseling or rehabilitation to wean her from methadone.

36. That this Court notes that respondent mother testified to receiving therapy through Narcotics Anonymous.

Opinion of the Court

37. That this Court finds this testimony to lack credibility or weight for lack of specificity as to the amount of participation therein and for lack of any corroborative evidence related to such testimony. This Court further finds that much of respondent mother's testimony, including this portion, was being made up as she testified, without regard to its veracity.

38. That since the approximate time of the filing of the underlying petition, respondent mother has been engaged in programs addressing drug abuse and treatment therefor at the Oaks, Walter B. Jones, LINC'S/RESET, and Our House. These programs would have helped her acquire the ability to overcome factors that resulted in the child's placement but she did not do so.

Based on these findings, the trial court made its ultimate finding that Respondent "willfully left the juvenile in foster care outside the home in excess of twelve months without showing to the Court's satisfaction that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." But in the immediately preceding finding, the trial court found that DSS "failed to meet its burden to prove the allegations of . . . incapability of providing care and supervision as they relate to respondent mother." We agree with Respondent that there is tension in these two findings because, if DSS failed to show that Respondent was incapable of providing care and supervision for her child going forward, it suggests that Respondent had made at least some reasonable progress—after all, the record in this case and the court's other findings indicate that

Opinion of the Court

Respondent, earlier in these proceedings, plainly lacked the ability to provide care and supervision for her child.

It is likely that the trial court's findings mean that Respondent made some marginal improvements since the filing of the petition and, thus, was not totally incapable of providing care and supervision for her child, but that, nonetheless, Respondent's progress was not enough to demonstrate "to the 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." N.C. Gen. Stat. § 7B-1111(a)(2). But because of the important liberty interests that are implicated when a court terminates parental rights, we will remand this case for additional findings that eliminate the arguable tension identified by Respondent and permit this Court to engage in a meaningful appellate review of the trial court's findings of fact and conclusions of law. *See In re A.B.*, 239 N.C. App. 157, 172, 768 S.E.2d 573, 581–82 (2015).

On remand, the trial court, in its discretion, may amend its findings based on the existing record, or may conduct any further proceedings that the court deems necessary.

Conclusion

We vacate the trial court's order and remand for additional findings.

VACATED AND REMANDED.

IN RE: A.B.C.

Opinion of the Court

Judges BRYANT and INMAN concur.

Report per Rule 30(e).