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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-946

Filed 05 July 2023

Franklin County, Nos. 20 JT 28–29

IN THE MATTER OF: C.L. & C.L.

Appeal by respondent-father from orders entered 11 August 2022 by Judge Caroline Burnette in Franklin County District Court. Heard in the Court of Appeals 16 June 2023.

No brief filed for petitioner-appellee.

Sean P. Vitrano for respondent-appellant father.

FLOOD, Judge.

This case involves a private termination of parental rights proceeding initiated by Petitioner, the mother of Gary and Rob (collectively “the children”).¹ Respondent, the father of the children, appeals from the trial court’s order terminating his parental rights. As explained in further detail below, the trial court failed to announce the correct standard of proof in making its adjudicatory findings, and failed to make findings that support its adjudication order. Accordingly, we reverse the trial court’s order.

¹ Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

I. Factual and Procedural Background

Gary and Rob were born in November 2017. On 19 May 2020, Petitioner filed petitions to terminate Respondent’s parental rights in the children. Petitioner alleged that the parties had separated when the children were six months old, and Respondent had not been actively involved in the care of the children since that time. Petitioner had been the primary custodian of the children since birth, and they currently reside in Louisburg with her. Respondent was alleged to be living in a “pull-behind camper” on a lot in Henderson, had no mode of transportation, had not had any overnight visits with the children since the parties’ separation, and had only seen the children “on a handful of occasions” while being supervised by Petitioner. Respondent had never paid any support to Petitioner for the use and benefit of the children. As grounds for termination, Petitioner alleged neglect, willful failure to pay child support, and dependency. N.C. Gen. Stat. § 7B-1111(a)(1), (4), and (6).

On 4 June 2020, Petitioner amended the petitions to add allegations that termination was in the children’s best interests. On 7 August 2020, Respondent filed an answer to the petitions, opposing termination of his parental rights.

A hearing on the termination petitions was held on 26 July 2022. The trial court entered orders on 11 August 2022 concluding that grounds existed to terminate Respondent’s parental rights in the children under N.C. Gen. Stat. §§ 7B-1111(a)(1), (4), (6) and (7). The trial court also concluded that it was in the children’s best interests that Respondent’s parental rights be terminated. Respondent appeals.

II. Analysis

We first address Respondent's argument that the trial court failed to identify the standard of proof under which it made adjudicatory findings of fact as is mandated by N.C. Gen. Stat. § 7B-1109(f).

N.C. Gen. Stat. § 7B-1109 sets out the requirements of an adjudicatory hearing in a termination of parental rights proceeding. Subsection (f) states that “[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence.” N.C. Gen. Stat. § 7B-1109(f) (2021). In *In re B.L.H.*, the North Carolina Supreme Court held that N.C. Gen. Stat. § 7B-1109(f) “implicitly requires a trial court to announce the standard of proof which they are applying on the record in a termination-of-parental-rights hearing. To hold otherwise would make the provision effectively unenforceable and would defeat the purposes of the statutory scheme.” *In re B.L.H.*, 376 N.C. 118, 126, 852 S.E.2d 91, 97 (2020). Furthermore, “the trial court satisfies the announcement requirement of N.C. [Gen. Stat.] § 7B-1109(f) so long as it announces the clear, cogent, and convincing standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court.” *Id.* at 126, 852 S.E.2d at 97 (internal quotation marks omitted).

Here, the trial court failed to meet this requirement. The written termination orders merely state the trial court “makes the following findings of fact,” and the trial court did not announce the standard of proof in open court when making its oral

findings at the termination hearing. Thus, the trial court erred by failing to announce the standard of proof it applied in making adjudicatory findings in either open court or in its written termination orders. *See, e.g., In re M.R.F.*, 378 N.C. 638, 2021-NSCS-111, ¶10 (“In the present case, however, the trial court failed to announce the standard of proof for its adjudicatory findings either in open court *or* in its written order. Therefore, the trial court failed to comply with the statutory mandate.”).

This Court has held that,

[w]hen a trial court errs by not making findings using the clear, cogent, and convincing standard of proof, the reviewing court must at a minimum reverse for that error. A case reversed on these grounds can be remanded to the trial court for it to review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact . . . unless the record of the case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.

In re A.H.D., 883 S.E.2d 492, 500 (2023) (cleaned up). Thus, we must determine whether the evidence and the trial court’s findings of fact are insufficient to establish any of the four adjudicated grounds for termination. *See, e.g., id.* at 500.

A. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(1)

A trial court may terminate parental rights upon a finding that the parent has neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2021). In pertinent part, N.C. Gen. Stat. § 7B-101(15) defines a “[n]eglected juvenile” as one “whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline” or “[h]as abandoned the

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juvenile[.]” N.C. Gen. Stat. § 7B-101(15) (2021).

When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because “the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.”

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016)).

Moreover, a trial court may terminate parental rights for neglect based upon abandonment under N.C. Gen. Stat. § 7B-1111(a)(1) “in the event that the trial court finds that the parent’s conduct demonstrates a willful neglect and refusal to perform the natural and legal obligations of parental care and support.” *In re N.D.A.*, 373 N.C. 71, 81, 833 S.E.2d 768, 775 (2019) (citation and internal quotation marks omitted).

[I]n order to terminate a parent’s rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing.

In re C.K.C., 263 N.C. App. 158, 164, 822 S.E.2d 741, 745 (2018) (cleaned up). The trial court is to consider the parent’s conduct “over an extended period of time continuing up to and including the time at which the termination hearing is being held.” *In re Z.J.W.*, 376 N.C. at 779 (citation omitted).

In the present case, the trial court concluded that Respondent had neglected

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the children in that he “does not provide proper care, supervision, or discipline and has abandoned the minor children.” However, there is no Record evidence or findings of fact made by the trial court that demonstrate past neglect and a likelihood of future neglect by respondent. *See In re E.L.E.*, 243 N.C. App. 301, 308, 778 S.E.2d 445, 450–51 (2015) (holding that the trial court erred in concluding that grounds existed to terminate the respondent’s parental rights on the ground of neglect where there was no finding made concerning the probability of repetition of neglect if the child were returned to the respondent’s care). As to the trial court’s determination that Respondent’s parental rights were subject to termination based on a neglect by abandonment theory, the trial court found that Respondent’s “conduct, or in this case the lack thereof . . . has evidenced an intent to terminate any legal relationship or obligation to the minor children.” Yet, no evidence was presented to the trial court of Respondent’s ability to visit the children, to contact Petitioner and the children, or to provide support for the children in order to determine that Respondent had the intent to forego all parental responsibilities and to find that his conduct was willful. *See In re N.D.A.*, 373 N.C. 71, 82, 833 S.E.2d 768, 776 (2019) (holding that grounds did not exist to terminate respondent’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) given the absence of findings of fact about the father’s “ability to contact petitioner or [his daughter], to exercise visitation, or to pay any support in order to determine that his abandonment was willful”), *abrogated by In re G.C.*, 884 S.E.2d 68 (2023). Accordingly, the trial court erred in concluding that grounds existed to

terminate Respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1).

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

Under N.C. Gen. Stat. § 7B-1111(a)(4), a trial court may terminate parental rights upon a finding that,

[o]ne 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).

Here, no evidence was admitted at the termination hearing that any decree or custody agreement requiring Respondent to pay for the care, support, and education for the children existed, and the trial court failed to make any finding that any such decree or custody agreement existed. We therefore hold the trial court erred by concluding that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(4) to terminate Respondent's parental rights. *See In re D.T.L.*, 219 N.C. App. 219, 221, 722 S.E.2d 516, 518 (2012) (holding that the trial court erred in concluding that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(4) where the petition failed to allege the existence of decree or custody agreement that required the respondent to pay for the care, support, and education of the juveniles; no evidence was introduced at the hearing that a decree or agreement existed; and the trial court's findings did not find there

was a decree or custody agreement).

C. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(6)

A trial court may terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(6) upon a finding that,

[t]he 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 [N.C. Gen. Stat. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, 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.

N.C. Gen. Stat. § 7B-1111(a)(6) (2021). N.C. Gen. Stat. § 7B-101 defines a “[d]ependent juvenile” as “[a] juvenile in need of assistance . . . because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9) (2021).

In the instant case, the evidence and the trial court’s findings of fact demonstrate that Petitioner had been the sole custodian of the children since they were born, the children resided with Petitioner in Louisburg, Petitioner had the financial ability to support the children, and Petitioner had supported the children since they were six months old without assistance from Respondent. The children

were not “in need of assistance or placement” at the time the petition was filed because they were within the legal and physical custody of Petitioner, their mother. *See id.* As such, neither of the children were dependent juveniles within the meaning of N.C. Gen. Stat. § 7B-101, and the trial court erred in concluding that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(6) to terminate Respondent’s parental rights. *See In re K.R.C.*, 374 N.C. 849, 860, 845 S.E.2d 56, 63 (2020) (concluding that the child was not in need of assistance or placement and was not a dependent juvenile since she was the legal and physical custody of the petitioner-mother at the time the termination petition was filed).

D. Adjudication under N.C. Gen. Stat. § 7B-1111(a)(7)

A petition for termination of parental rights must allege “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C. Gen. Stat. § 7B-1111] exist.” N.C. Gen. Stat. § 7B-1104(6) (2021). N.C. Gen. Stat. § 7B-1111(a)(7) provides that the trial court may terminate 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[.]” N.C. Gen. Stat. § 7B-1111(a)(7) (2021).

In the present case, Petitioner alleged only three grounds for termination of Respondent’s parental rights in the children: (1) neglect, (2) willful failure to pay child support, and (3) dependency. The trial court adjudicated the existence of all three grounds alleged by Petitioner but also adjudicated the existence of a fourth ground.

The trial court concluded that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Respondent's parental rights in that he had willfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition. Because Petitioner did not allege in the petitions to terminate Respondent's parental rights that he willfully abandoned the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), the trial court erred by terminating Respondent's parental rights based on this ground. *See In re C.W.*, 182 N.C. App. 214, 228, 641 S.E.2d 725, 734–35 (2007) (holding that because DSS did not allege willful abandonment as a ground for termination of parental rights, the respondent had no notice, and the trial court erred by terminating parental rights on this ground).

III. Conclusion

As the trial court failed to state the standard of proof under which it made adjudicatory findings of fact as mandated by N.C. Gen. Stat. § 7B-1109(f), and the evidence and findings of fact are insufficient to establish any of the statutory grounds for termination alleged by Petitioner and found by the trial court, the trial court's order terminating Respondent's parental rights is reversed. *See In re M.R.F.*, 378 N.C. at 642–43 (“In light of not only the failure of the trial court to announce the standard of proof which it was applying to its findings of fact but also due to petitioner's failure to present sufficient evidence to support any of the alleged grounds for the termination of the parental rights of respondent-father, we are compelled to simply, *without remand*, reverse the trial court's order.”). Because we reverse the

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trial court's order, we need not address Respondent's remaining arguments.

REVERSED.

Judges TYSON and RIGGS concur.

Report per Rule 30(e).