

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-995

Filed 15 August 2023

Iredell County, No. 22 JT 46

IN THE MATTER OF:

R.L.R., Minor Child.

Appeal by respondent-father from orders entered 29 August 2022 and 27 September 2022 by Judge Thomas R. Young in Iredell County District Court. Heard in the Court of Appeals 20 July 2023.

No brief filed on behalf of petitioner-appellee mother.

No brief filed on behalf of guardian ad litem.

Richard Croutharmel for respondent-appellant father.

ZACHARY, Judge.

Respondent-Father appeals from the trial court's order and amended order terminating his parental rights to his minor child, "Rosealee."¹ After careful review, we vacate the 27 September 2022 amended order, and reverse the 29 August 2022 initial order.

¹ To protect her identity, we refer to the minor child by the pseudonym adopted by the parties.

I. Background

Rosealee was born in January 2018 to Petitioner-Mother and Respondent-Father. The couple lived together with Rosealee for approximately two years in Arden, North Carolina, until they ended their relationship. Petitioner-Mother and Rosealee moved to Canton, North Carolina, in October 2019, and then to Mooresville, North Carolina in February 2020.

After Petitioner-Mother and Respondent-Father's separation, there was "scant communication" between them, and although "[t]he relationship between the parties was initially cordial[.]" it eventually became "antagonistic and contentious." Respondent-Father visited Rosealee three times in 2020, and once in 2021. However, Respondent-Father voluntarily paid Petitioner-Mother approximately \$200 in child support per month, until his child support was set by court order at \$50 per month in accordance with the North Carolina Child Support Guidelines. He also purchased several items for Rosealee, including clothing and a bicycle.

On 18 March 2022, Petitioner-Mother filed a petition to terminate Respondent-Father's parental rights ("the Petition") in Iredell County District Court, contending that "[c]lear and convincing facts sufficient to terminate . . . Respondent[-Father]'s parental rights exist" on the ground of willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Specifically, Petitioner-Mother alleged that: "Respondent[-Father] has willfully abandoned" Rosealee in that he "has not seen [Rosealee] for over six (6) months[.]" and "does not make attempts to visit" Rosealee; as a result,

Petitioner-Mother contended that “[t]here is no bond or parent/child relationship between” Rosealee and Respondent-Father. Additionally, Petitioner-Mother claimed that Respondent-Father “has been delinquent on child support and failed to pay child support for at least three (3) months preceding the filing of this action.” That same day, Petitioner-Mother filed a motion for appointment of a guardian ad litem for Rosealee. On 21 March 2022, the trial court ordered that a guardian ad litem be appointed for Rosealee.

The matter came on for hearing in Iredell County District Court on 22 July 2022 and 19 August 2022. At the close of Petitioner-Mother’s evidence for the adjudicatory stage, Respondent-Father moved for a directed verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure. After considering the arguments of counsel, the trial court voiced its reluctance to proceed on the ground of neglect:

In this particular case I think that the evidence shows certainly that . . . [R]espondent[-Father] has been less than the father he needed to be. Probably neglectful. And, if there were neglect alleged in th[e] [P]etition[,] I would have no hesitation to allow this to go on. But, since it is a singular allegation of willful abandonment[,] I’m looking very carefully at the statutes, at the facts, giving every benefit of the doubt to the non[-]moving party. Looking at those facts and looking at the case law as it is set forth in so many different ways[,] I cannot find that under those circumstances that . . . [P]etitioner[-Mother] would be entitled to the relief that they are seeking. And, I will grant . . . [R]espondent[-Father]’s motion.

With that said, I’m - I want to reiterate if this had been - if neglect had been alleged in this particular set of circumstances it wouldn’t be at this result.

Petitioner-Mother’s counsel responded that “even if neglect is not specifically alleged, if the [P]etition puts the parties on notice that it is the grounds that could be argued based on the facts[,] . . . the [c]ourt can consider that for grounds for termination even if the petitioner did not specifically allege it.” After further arguments of counsel, the trial court reconsidered its ruling on Respondent-Father’s Rule 50 motion:

So, when I ask the question whether or not this is sufficient to give rise to allegations or to give notice of allegations of neglect, given the meaning of neglect as defined by statute and case law, although this [c]ourt would not find that [it is] sufficient to survive the direct verdict on willful abandonment. The [c]ourt will find it is sufficient to pass through on the ground of neglect even though not specifically pled.

Accordingly, the trial court denied Respondent-Father’s motion for directed verdict, and the proceeding continued.

On 29 August 2022, the trial court entered a termination order (the “Initial Order”) concluding that “[g]rounds exist to terminate the parental rights of . . . Respondent[-]Father in that he has neglected [Rosealee] within the definition of [N.C. Gen. Stat.] § 7B-101(15).” Regarding the ground of willful abandonment alleged in the Petition, the trial court concluded that “[g]rounds do not exist that . . . Respondent[-]Father has wil[l]fully abandoned” Rosealee. The trial court then found that termination of Respondent-Father’s parental rights was in Rosealee’s best interests and terminated his parental rights. Respondent-Father filed notice of

appeal from the Initial Order on 22 September 2022.

On 27 September 2022, the trial court entered another termination order (the “Amended Order”), which noted that “on review, [the trial court] has discovered an error of inadvertent omission, which the [c]ourt finds necessary to correct to assure that the interests of justice are served.” The Amended Order included a new finding of fact, absent from the Initial Order:

The [c]ourt finds that . . . Respondent[-Father]’s prior acts of neglect are likely to continue in the future. . . . Respondent[-Father] has never placed [Rosealee] as a priority in his life. Likewise, he has been very reluctant to provide appropriate support for [Rosealee]. The [c]ourt has received no evidence to believe that he has fundamentally matured or otherwise changed in a way that will reverse his prior behavior. If anything, . . . Respondent[-Father]’s recent behavior paying the lowest amount of support he could pay demonstrates that it is likely that . . . Respondent[-Father] will continue to afford [Rosealee] a low priority in the future.

Along with this new finding of fact, the court expanded its conclusion of law regarding the grounds for termination by adding the following phrase: “Grounds exist to terminate the parental rights of . . . Respondent[-]Father in that he has neglected [Rosealee] within the definition of [N.C. Gen. Stat.] § 7B-101(15) *and is likely to continue to neglect [Rosealee] in the future.*” (Emphasis added). Accordingly, the trial court vacated the Initial Order, and again terminated Respondent-Father’s parental rights to Rosealee. Respondent-Father filed notice of appeal from the Amended Order on 26 October 2022.

II. Discussion

On appeal, Respondent-Father first argues that the trial court did not have jurisdiction to enter the Amended Order after he filed notice of appeal from the Initial Order. He also argues that the trial court erred by terminating his parental rights on the ground of neglect.

A. Jurisdiction to Enter Amended Order

Respondent-Father argues that “[t]he trial court lacked subject[-]matter jurisdiction to amend its [termination-of-parental-rights] order because [he] had already filed notice of appeal” from the Initial Order. As a result, Respondent-Father contends that the Amended Order was void *ab initio*. We agree.

1. Standard of Review

“Subject[-]matter jurisdiction refers to the power of the court to deal with the kind of action in question.” *In re J.D.*, 234 N.C. App. 342, 344, 759 S.E.2d 375, 377 (2014) (citation omitted). “Absent subject[-]matter jurisdiction a court has no power to act and any resulting judgment is void. When the record shows a lack of subject[-]matter jurisdiction in the lower court, the appropriate action on the part of the appellate court is to vacate any order entered without authority.” *In re N.P.*, 376 N.C. 729, 731–32, 855 S.E.2d 203, 206 (2021) (citations, internal quotation marks, brackets, and ellipsis omitted).

“[T]he issue of subject[-]matter jurisdiction may be raised for the first time on appeal[,]” and this Court reviews de novo whether a court has subject-matter

jurisdiction as a question of law. *J.D.*, 234 N.C. App. at 344, 759 S.E.2d at 377 (citation omitted). When conducting de novo review, the appellate court “considers the matter anew and freely substitutes its own judgment for that of the trial court.” *In re M.R.F.*, 378 N.C. 638, 641, 862 S.E.2d 758, 762 (2021) (citation and brackets omitted).

2. Analysis

Generally, the perfection of an appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]” N.C. Gen. Stat. § 1-294 (2021); accord *In re B.B.*, 381 N.C. 343, 348, 873 S.E.2d 589, 594 (2022). “However, when a specific statute addresses jurisdiction during an appeal[,] that statute controls over the general rule.” *B.B.*, 381 N.C. at 348, 873 S.E.2d at 594 (citation, internal quotation marks, brackets, and ellipsis omitted). Our Supreme Court has recognized that N.C. Gen. Stat. § 7B-1003, which addresses the trial court’s jurisdiction during the pendency of an appeal of a matter arising under the Juvenile Code, “controls over” N.C. Gen. Stat. § 1-294. *Id.*

N.C. Gen. Stat. § 7B-1003 addresses the trial court’s jurisdiction pending disposition of an appeal:

(b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:

(1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and

(2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

(c) Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-1003(b)–(c).

Subsection (c) relates to jurisdiction pending appeal in proceedings initiated by the filing of a termination petition, such as the case before us, whereas subsection (b) relates to jurisdiction pending appeal in proceedings initiated by the filing of a motion in the cause in a juvenile abuse, neglect, or dependency proceeding. *In re K.L.*, 196 N.C. App. 272, 280, 674 S.E.2d 789, 794–95 (2009). However, both subsections are similar in substance and application. *See id.*

Our Supreme Court recently resolved a case arising under subsection (b) that presented a nearly identical procedural posture to that presented in this case. In *B.B.*, “after [the] respondent filed her notice of appeal and before [our Supreme] Court took any action, the trial court entered an amended order with multiple additional findings of fact.” 381 N.C. at 349, 873 S.E.2d at 594. Those additional findings did not “correct[] a clerical mistake or error arising from oversight or omission[,]” as would be permitted by N.C. Gen. Stat. § 1A-1, Rule 60(a); rather, our Supreme Court “conclude[d] that the trial court exercised jurisdiction by entering a termination-of-

parental-rights order that made substantive changes when the trial court lacked jurisdiction to do so under [N.C. Gen. Stat.] § 7B-1003(b).” *Id.* Thus, our Supreme Court held that “the amended termination-of-parental-rights order [wa]s void” and only considered the original termination orders on appeal. *Id.*

In that subsections (b) and (c) of N.C. Gen. Stat. § 7B-1003 are substantially similar, *K.L.*, 196 N.C. App. at 280, 674 S.E.2d at 794, we conclude that the reasoning of *B.B.* controls the issue in the present case. As in *B.B.*, the Amended Order cannot reasonably be interpreted as “correct[ing] a clerical mistake or error arising from oversight or omission.” 381 N.C. at 349, 873 S.E.2d at 594. The additional finding of fact and the expanded conclusion of law each addressed the likelihood that Respondent-Father’s neglect of Rosealee would continue into the future.

Moreover, as in *B.B.*, the Amended Order was entered “after [R]espondent[-Father] filed h[is] notice of appeal and before this Court took any action,” and at a moment “when the trial court lacked jurisdiction to do so under [N.C. Gen. Stat.] § 7B-1003(c).” *Id.* Therefore, the Amended Order “is void, and we only consider” the Initial Order on appeal. *Id.*

B. Grounds for Termination

Respondent-Father also argues that the trial court erred in terminating his parental rights on the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Specifically, Respondent-Father contends that: (1) Petitioner-Mother “had not alleged that [termination-of-parental-rights] ground in her [termination-of-parental-rights]

petition,” (2) “the evidence and the findings failed to support the conclusions of law,” and (3) “the trial court used an incorrect legal standard in reaching its conclusions as to the [termination-of-parental-rights] ground of neglect.”

1. Standard of Review

The “Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage.” *In re M.B.*, 382 N.C. 82, 85, 876 S.E.2d 260, 264 (2022) (citation omitted). “At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination” as provided by N.C. Gen. Stat. § 7B-1111(a). *Id.* (citation and internal quotation marks omitted); *accord* N.C. Gen. Stat. § 7B-1109(e)–(f).

Our appellate courts review adjudication orders “to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.” *M.B.*, 382 N.C. at 85, 876 S.E.2d at 264 (citation omitted). “Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal. The trial court’s conclusions of law are reviewable de novo on appeal.” *Id.* (citations and internal quotation marks omitted).

2. Analysis

Pursuant to N.C. Gen. Stat. § 7B-1104(6), a termination-of-parental-rights petition shall set forth “[f]acts 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). “While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.” *In re D.R.J.*, 381 N.C. 381, 387, 873 S.E.2d 281, 286 (2022) (citation omitted).

Generally, a trial court may not terminate a party’s parental rights on the basis of a ground for termination that “was not alleged in the termination petition.” *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). However, in rare circumstances, a trial court may nevertheless consider a ground for termination not specifically alleged in a termination petition. As this Court has previously recognized, when a termination petition alleges the existence of a particular statutory ground listed in § 7B-1111, but the trial court “finds the existence of a ground not cited in the petition, termination of parental rights on that ground may not stand *unless the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground.*” *In re T.J.F.*, 230 N.C. App. 531, 532, 750 S.E.2d 568, 569 (2013) (emphasis added).

In the case at bar, the Petition alleged only one ground to support the termination of Respondent-Father’s parental rights—the ground of willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). However, the trial court explicitly concluded in the Initial Order that the facts did not support termination of Respondent-Father’s parental rights on the ground of willful abandonment, and

instead terminated Respondent-Father's parental rights on the ground of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). Because "the termination [petition] in the present case does not even contain a bare recitation of the statutory grounds for termination pursuant to [N.C. Gen. Stat.] § 7B-1111(a)(1)[,]" *D.R.J.*, 381 N.C. at 389, 873 S.E.2d at 287 (internal quotation marks omitted), we must ascertain whether "the [P]etition allege[d] facts to place [Respondent-Father] on notice that parental rights could be terminated on th[e] ground" of neglect. *T.J.F.*, 230 N.C. App. at 532, 750 S.E.2d at 569.

A trial court may terminate parental rights on the ground of neglect when "[t]he parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of [N.C. Gen. Stat. §] 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1). Section 7B-101(15) defines a neglected juvenile, in pertinent part, as:

Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:

- a. Does not provide proper care, supervision, or discipline.
- b. Has abandoned the juvenile.
- c. Has not provided or arranged for the provision of necessary medical or remedial care.
- d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.

- e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
- f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under [N.C. Gen. Stat. §] 14-321.2.
- g. Has placed the juvenile for care or adoption in violation of law.

Id. § 7B-101(15).

“To establish neglect as a ground for termination of parental rights, the petitioner must present clear, cogent, and convincing evidence that (1) the child is neglected” pursuant to § 7B-101(15), “and (2) the child has sustained some physical, mental, or emotional impairment or there is substantial risk of such impairment as a consequence of the neglect.” *In re C.W.*, 182 N.C. App. 214, 219–20, 641 S.E.2d 725, 729 (2007) (citation, internal quotation marks, and ellipsis omitted). Additionally, “when a termination of parental rights is based upon a determination of neglect, if 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 J.M.J.-J.*, 374 N.C. 553, 556, 843 S.E.2d 94, 99 (2020) (citation and internal quotation marks omitted).

As concerns the grounds for termination of Respondent-Father's parental rights, the Petition alleged the following:

- 13. Clear and convincing facts sufficient to terminate the Respondent[-Father]'s parental rights exist, according to [N.C. Gen. Stat. § 7B-1111(a)(7)], and

are specifically as follows:

- A. Respondent[-Father] has willfully abandoned [Rosealee] for at least six (6) months immediately preceding the filing of this petition. . . . Respondent[-Father] has not seen [Rosealee] for over six (6) months. . . . Respondent[-Father] travels to the Iredell County region, but does not make attempts to visit [Rosealee].
- B. Respondent[-Father] has been delinquent on child support and failed to pay child support for at least three (3) months preceding the filing of this action. Child support enforcement is presently unable to locate . . . Respondent[-Father] and Respondent[-Father] failed to appear for his court date on December 6, 2021 in Buncombe County Child Support Court.

- 14. There is no bond or parent/child relationship between [Rosealee] and . . . Respondent[-Father].

Respondent-Father emphasizes that the word “neglect” does not appear in the Petition, and that “the allegation of abandonment . . . is specifically linked to the . . . ground of abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).” Respondent-Father then maintains that while he was on notice to defend against an allegation of willful abandonment, none of the remaining statutory bases to establish the ground of neglect pursuant to N.C. Gen. Stat. §§ 7B-105(15) and 7B-1111(a)(1) “are listed in the . . . [P]etition,” nor does the Petition support a sufficient allegation of any of them. Nonetheless, the trial court terminated Respondent-Father’s parental rights on the grounds of at least one of the remaining bases.

In support of his argument, Respondent-Father relies upon our Supreme Court's recent opinion in *D.R.J.*, which offers guidance on how to evaluate whether a petition alleges sufficient facts to place a respondent on notice that his parental rights could be terminated on the ground of neglect.

In *D.R.J.*, the termination motion in an underlying neglected juvenile proceeding "alleged grounds for the termination of [the] respondent-father's parental rights based on his alleged failure to pay reasonable support for [the child]'s care and dependency." 381 N.C. at 387, 873 S.E.2d at 286; see N.C. Gen. Stat. § 7B-1111(a)(3), (6). However, the trial court's order terminating the respondent-father's parental rights contained conclusions of law that "correspond[ed] to the statutory grounds for termination based on neglect, willful failure to make reasonable progress, and willful abandonment." *D.R.J.*, 381 N.C. at 387, 873 S.E.2d at 286; see N.C. Gen. Stat. § 7B-1111(a)(1)–(2), (7).

The guardian ad litem in *D.R.J.* contended, *inter alia*, that the termination motion "contained sufficient factual allegations to provide [the] respondent-father with adequate notice that his parental rights could be terminated" on the ground of neglect "because within the paragraphs containing those citations to (a)(3) and (a)(6) the motion states: 'The parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile.'" *D.R.J.*, 381 N.C. at 387, 873 S.E.2d at 286 (internal quotation marks omitted). Our Supreme Court rejected this contention, noting that "this statement does not adequately allege

the statutory language for an adjudication of the existence of grounds to terminate parental rights pursuant to [N.C. Gen. Stat.] § 7B-1111(a)(1)[.]” *Id.* at 389, 873 S.E.2d at 287. Despite the fact that the termination motion incorporated several previous reports and orders in the underlying neglected juvenile proceeding, our Supreme Court “conclude[d] that the motion to terminate parental rights was insufficient to provide notice to [the] respondent-father that his parental rights were subject to termination for neglect[,]” and held that “the trial court’s adjudication finding the existence of [that] ground was error.” *Id.* at 390, 873 S.E.2d at 288.

In the instant case, it is manifest that the Petition did not advance neglect as a ground for the termination of Respondent-Father’s parental rights. The ground of neglect is not alleged in the Petition in any manner. Nor does the Petition allege that Respondent-Father met any of the remaining bases for neglect under N.C. Gen. Stat. § 7B-101(15). We cannot conclude that the Petition sufficiently alleged “facts to place [Respondent-Father] on notice that parental rights could be terminated on th[e] ground” of neglect resulting from one of these bases. *T.J.F.*, 230 N.C. App. at 532, 750 S.E.2d at 569. Accordingly, it was error for the trial court to consider neglect as a ground for termination. As the sole ground for termination found by the trial court in the Initial Order was in error, we reverse the trial court’s termination of Respondent-Father’s parental rights.

III. Conclusion

For the foregoing reasons, we vacate the Amended Order, and reverse the

IN RE: R.L.R.

Opinion of the Court

Initial Order.

AMENDED ORDER: VACATED.

INITIAL ORDER: REVERSED.

Judges GORE and STADING concur.

Report per Rule 30(e).