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NO. COA10-641

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

IN THE MATTER OF:

S.R.K.,
Minor Child

Buncombe County
No. 08 JT 321

Appeal by respondent-father from judgment entered 25 February 2010 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 22 November 2010.

John C. Adams, for petitioner-appellee Buncombe County Department of Social Services.

M. Carridy Bender, for Guardian ad Litem.

Staples Hughes, Appellate Defender, by Wendy C. Sotolongo, Parent Representation Coordinator, and Peter Wood, for respondent-appellant father.

MARTIN, Chief Judge.

Respondent-father appeals from the trial court's order terminating his parental rights to the minor child, S.R.K., on the grounds of neglect and failure to legitimate the child.¹ He challenges both grounds as being unsupported by the evidence and contends the trial court abused its discretion in determining that

¹ The trial court's judgment also terminated the parental rights of the child's mother; however, she did not appeal and is therefore not a party to this appeal.

termination of his parental rights is in the best interests of the minor child. We affirm.

Respondent-father is the biological father of S.R.K., who was born in September 2004. A few days prior to the child's birth, respondent-father was incarcerated pursuant to a judgment sentencing him to a term of eight years, nine months. His current expected release date is 11 November 2011.

The Buncombe County Department of Social Services ("DSS") became involved in this case in 2005 upon allegations of substance abuse by the child's mother. DSS investigated various reports of domestic violence in the home, substance abuse issues, and improper care of the child and her siblings on several occasions. On 29 November 2007, the minor child was placed in a kinship placement with maternal relatives.

On 23 September 2008, DSS filed a juvenile petition alleging the minor child was neglected due to living in an environment injurious to her welfare. The allegations in the petition detail the mother's substance abuse problems and incidents of domestic violence between the mother and her boyfriend. The minor child was adjudicated neglected at a hearing held on 4 December 2008, where respondent-father and the child's mother each stipulated to the adjudication.

At a hearing held on 16 February 2009, the trial court granted custody of the minor child to DSS. The minor child was thereafter placed in a foster home with her siblings. At a hearing held on 11 March 2009, the trial court authorized a permanent plan of

guardianship with a concurrent plan of adoption, but changed the permanent plan to adoption after a hearing held on 1 July 2009.

On 28 August 2009, DSS filed a petition to terminate respondent-father's parental rights and alleged the following grounds: (1) neglect pursuant to N.C.G.S. § 7B-1111(a)(1); (2) failure to legitimate the child pursuant to N.C.G.S. § 7B-1111(a)(5); and (3) willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

The matter came on for hearing on 12 January 2010. After hearing the evidence during the adjudication phase of the hearing, the trial court determined that DSS had presented clear, cogent, and convincing evidence of the grounds of neglect and failure to legitimate, but not as to the ground of abandonment. The trial court then determined that termination of respondent-father's parental rights is in the best interests of the minor child. The trial court ordered that respondent-father's parental rights be terminated. Respondent-father appeals.

Proceedings to terminate parental rights are conducted in two parts: the adjudicatory phase and the dispositional phase. See *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Upon review of an order terminating parental rights, this Court must determine (1) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether the court's findings of fact support its conclusions of law that one or more statutory grounds for termination exist. See *In re Huff*, 140 N.C. App. 288, 291-92, 536 S.E.2d 838, 840 (2000),

appeals dismissed and disc. reviews denied, 353 N.C. 374, 547 S.E.2d 9 (2001); see N.C. Gen. Stat. § 7B-1111(a) (2009). Findings of fact supported by competent evidence are binding on appeal "even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Once a trial court has determined at the adjudicatory phase that at least one ground for termination exists, the case moves to the dispositional phase where the trial court decides whether a termination of parental rights is in the best interests of the child. See *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The decision of the trial court regarding best interests is within the discretion of the trial court and will not be overturned absent an abuse of discretion. See *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). Abuse of discretion occurs when the trial court's "challenged actions are manifestly unsupported by reason." *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007) (internal quotation marks omitted), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008).

Respondent-father challenges both of the grounds for termination found by the trial court. We begin by analyzing the ground of neglect.

Pursuant to the Juvenile Code, a parent's rights to a child may be terminated upon a finding that:

The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. . . .

N.C. Gen. Stat. § 7B-101(15) (2009).

In determining neglect, the court must consider "the fitness of the parent to care for the child *at the time of the termination proceeding.*" *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). Although evidence of a prior adjudication of neglect is admissible, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* In considering whether a child is neglected, the trial court may also consider "a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship." *In re APA*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982).

Here, the trial court made the following findings of fact pertaining to respondent-father and the ground of neglect:

48. The respondent father has been incarcerated during the entire life of the minor child. On September 24, 2004, the respondent father was sentenced to eight (8) years and nine (9) months for attaining the status of a habitual felon. The respondent father was also sentenced for the following convictions: second degree trespass, resisting an officer, possession of stolen goods, reckless driving, speeding to elude

arrest and assault with a deadly weapon on a government official. In addition, the respondent father has convictions for the following: child abuse, felony breaking and entering, assault inflicting serious injury, assault on a female, possession of a firearm by a felon and driving while impaired. The respondent father has a projected release date of November 11, 2011.

. . . .

50. The respondent father testified that he qualified for social security but did not receive any benefits due to his incarceration. The respondent father is disabled. The respondent father sent gifts to the minor child prior to the filing of the petition through Angel Tree, but did not provide any other support. Otherwise, he had no contact with the minor child since she was born. He is currently incarcerated for probation violations for a consecutive term of 5 years. He has not paid any child support and stated that there is no order to pay child support. He is not sure if he is eligible for work release.

. . . .

53. The court finds that pursuant to N.C.G.S. § 7B-1111(a)(1), the respondent father has neglected the minor child. The minor child was born on September 28, 2004 and the respondent father has never provided any love, care or support for the minor child. The likelihood of repetition of neglect is high in that the respondent father has not shown an interest in providing care, love or support of the minor child during the entire life of the minor child. The respondent mother was involved with the Department due to her inappropriate care of the minor child. Although the respondent father knew the minor child was not being properly cared for by the respondent mother, he did not provide any care for the minor child. Instead, the respondent father continued to participate in a criminal lifestyle to such an extent that he was declared a Habitual Felon. The respondent father will not be released until November 2011, and based upon his past history of

extensive criminal conduct[,] it is likely that the respondent father will continue his criminal lifestyle.

Based on these findings of fact, the trial court concluded that respondent-father has neglected the minor child and that such neglect will likely be repeated in the future.

Respondent-father contends the trial court erred in finding that a probability of the repetition of neglect existed. He argues that he was never offered a case plan, the court never considered his relatives as placement options even though respondent-father requested them to be considered, and that the court's findings focused almost exclusively on the mother. Further, he asserts that he did everything that he could do as a prisoner, and that his incarceration and disability prevented him from working to provide child support. He states that DSS never showed any interest in working with him and never asked him to do anything to participate in the case beyond submitting to a paternity test. He contends the gifts he sent to the minor child, along with his attendance at every court hearing due to his own insistence, evidences his love for his child. He argues he should not be punished for DSS's refusal to cooperate with him. We are not persuaded by these arguments.

Evidence was presented at the termination hearing that respondent-father did not make any effort to provide support for the minor child, nor did he have any contact with DSS or inquire as to the status of the child despite knowing that the child was in

DSS custody. Once the child was in DSS custody, respondent-father never sent any letters, cards, or gifts to the child.

Respondent-father testified that although he had never provided child support, he was unable to work due to a disability. He stated he was not certain if he was eligible for work release, but he had never been on work release. He said he spoke with the DSS social worker when he came to court for the hearings. He noted that he had sent gifts for Christmas to the minor child through a charitable organization called Angel Tree when the child was living with her maternal grandmother. The transcript reflects that he did not send anything to the child after she came into DSS custody.

We find that the evidence presented at the hearing supports the trial court's findings of fact, including that respondent-father has not provided any care, love, or support to the minor child. We also find that the trial court's findings of fact support the court's conclusion that the ground of neglect has been proven by clear, cogent, and convincing evidence. Respondent-father correctly points out that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (internal quotation marks omitted), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). However, the trial court in the instant case properly considered respondent-father's extensive criminal history, his lack of contact with the child, and his lack of any support or care for the child, despite knowing that the child was not being properly cared for by the mother, in

determining that the probability of future neglect is high. Therefore, the trial court did not err in basing termination of respondent-father's parental rights on the ground of neglect.

Since we find the termination was properly based upon at least one ground for termination of respondent-father's parental rights, we need not address respondent-father's arguments regarding the remaining ground for termination of failure to legitimate. See N.C. Gen. Stat. § 7B-1111(a); *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406-07 (2003).

Next, respondent-father contends the trial court abused its discretion in determining that termination of his parental rights is in the best interests of the minor child. He argues the trial court failed to properly consider the factors enumerated in N.C.G.S. § 7B-1110. He stresses that the court repeatedly failed to consider relative placements put forth by respondent-father, and that family placement should take precedence over foster placement. His contentions have no merit.

By statute, the trial court is required to consider these factors when determining whether termination is in the best interests of the minor children:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2009). The determination by the trial court that termination is in the best interests of the children will not be overturned absent an abuse of discretion. See *Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602. Here, the trial court made the following findings of fact relating to the best interest determination:

57. A termination of parental rights of the respondent mother and the respondent father will assist the minor child in achieving permanency with the prospect of being adopted pursuant to N.C.G.S. 7B-1110 as follows:
- a. The minor child is 5 years of age.
 - b. The minor child has spent the last 26 months of her life either in kinship or foster care placements.
 - c. The minor child is a child who relates well to both her peers and to adults and whose chance of adoption is high. Her current foster parents have expressed a desire to adopt the minor child and her two siblings.
 - d. The minor child has never bonded very well with the respondent mother and does not ask for her. Visits with the respondent mother were stopped in May of 2009 at the request of the minor child's therapist.
 - e. The minor child has never met the respondent father and has no bond with him.
 - f. The extended family of the respondent father has an extensive history of involvement with the Department of Social Services and is therefore not an appropriate placement for the minor child. The respondent father is incarcerated with an expected release date of 2012.
 - g. The respondent mother is currently homeless and is living with various friends of her sister. The respondent mother has failed to comply with the orders of the court.

- h. The bond between the minor child and her current foster parents is high. On occasion the minor child will call the foster mother "mom."
- i. The minor child and her siblings relate well to each other and have expressed happiness at being together. Adoption of the three siblings would provide both, permanency to the children and a chance for them to remain together and maintain the sibling bond.

Based on these findings, the trial court determined that termination of respondent-father's parental rights is in the best interests of the minor child.

We find that the trial court's findings of fact are supported by evidence presented at the hearing, and that the findings sufficiently address the factors enumerated in N.C.G.S. § 7B-1110. Further, the court squarely confronted the issue regarding relative placements with a finding of fact that respondent's family has an extensive history with DSS and is therefore not an appropriate placement for the minor child. The court had the discretion to consider all the interests of the minor child, including her placement with her siblings, with whom she has a strong bond, and the likelihood of adoption by the foster parents. We find no abuse of discretion by the trial court in determining that termination of respondent-father's parental rights is in the best interests of the minor child.

For the foregoing reasons, we conclude the trial court did not err in concluding that at least one ground for termination is supported by clear, cogent, and convincing evidence, nor did the trial court abuse its discretion in determining that termination of

respondent-father's parental rights is in the best interests of the minor child. The trial court's order terminating respondent-father's parental rights is hereby affirmed.

Affirmed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).