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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1246

Filed: 5 July 2017

Burke County, Nos. 14 JT 24-26

IN THE MATTER OF: L.P.T., H.J.T., and T.S.T.

Appeal by respondent-father from an order entered 10 November 2016 by Judge Wesley Barkley in Burke County District Court. Heard in the Court of Appeals 8 June 2017.

*R. Kirk Randleman for petitioner-appellee Burke County Department of Social Services.*

*Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant father.*

*Michael N. Tousey for guardian ad litem.*

INMAN, Judge.

Henry Taylor, Sr. (“Father”) appeals from an order terminating his parental rights to his minor children L.P.T. (“Lisa”), H.J.T. (“Hank”), and T.S.T. (“Tim”).<sup>1</sup> Father argues, *inter alia*, that the trial court erred because its conclusions on the

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<sup>1</sup> Pseudonyms are used throughout to protect the privacy of the juveniles and for ease of reading.

grounds to terminate his parental rights are unsupported by its findings of fact. After careful review, we reverse.

### **Facts and Procedural History**

Evidence presented to the trial court tended to show the following:

On 17 March 2014, the Burke County Department of Social Services (“DSS”) obtained non-secure custody of Lisa, Hank, and Tim, and filed a petition in Burke County District Court alleging all three children were abused, neglected, and dependent juveniles. DSS alleged that the children were living with their mother and her boyfriend in Burke County, North Carolina, that the boyfriend had inappropriately disciplined Hank in violation of a safety plan put in place in November 2013, and that the mother and her boyfriend engaged in domestic violence while in the children’s presence. DSS further alleged that Father was living in Florida and was unable to provide an alternative child care arrangement at the time the petition was filed. The mother was promptly served with the petition, but Father was not.

The trial court conducted a hearing on the juvenile petition on 3 April 2014, and entered its order from the hearing on 1 May 2014. Father had not been served with the petition as of the date of the hearing and did not appear in person or through counsel. Father had been informed of the petition and told a DSS social worker that he could not afford to travel to North Carolina for the hearing. The mother stipulated

*Opinion of the Court*

to the facts alleged in the juvenile petition and entered into a case plan with DSS. Based on the stipulated facts, the trial court struck the allegations that the children were abused and dependent juveniles, but concluded that they were neglected juveniles in that they did not receive proper care, supervision, or discipline from their parent or caretaker and lived in an environment injurious to their welfare. The court ordered DSS to continue to work with the mother to eliminate the need for placement of the children. The court continued custody of the children with DSS and concluded that a plan of reunification with the parents was in the children's best interests. The mother was granted supervised visitation with the children, and ordered to submit to random drug screens; complete psychological, domestic violence, parenting, and substance abuse assessments; and follow all recommendations from the assessments. The court found that Father lived in Florida, had requested to be considered for placement of the children, and that a request for an evaluation of Father for placement had been sent to authorities in Florida.

The trial court conducted a review hearing on 26 June 2014 and entered its order from that hearing on 21 August 2014. The court found that Father remained in Florida and that he reported that his living situation was temporary and unstable. Father had not contacted DSS for more than two months, and he was currently facing criminal charges for battery. Father was out of jail on a \$2,000 bond, but he had "skipped bond" and was evading authorities. Although the trial court had authorized

*Opinion of the Court*

Father to have supervised telephone contact with the children, he had called the children only sporadically as of the date of the review hearing. The court continued custody of the juveniles with DSS and ordered the mother to comply with her case plan.

In review orders from hearings held 18 September 2014, 11 December 2014, and 18 June 2015, the trial court found that Father still had not made contact with DSS. The court otherwise maintained the *status quo* of the case and continued to focus on efforts to reunify the children with their mother. On 27 August 2015, the trial court held another review hearing, the first hearing in the juvenile matter at which Father was represented by counsel. In its order from the August 2015 hearing, entered 10 September 2015, the trial court suspended the mother's visitation with the children.

By order entered 8 October 2015, from a review hearing held 10 September 2015, the trial court ordered the cessation of reasonable efforts to reunite the children with their mother and with Father. The court found that Father was incarcerated in Florida with an expected release in April 2017. In the sixteen months since learning about the juvenile petition, Father had made only one contact with DSS, requesting an update on the case to which DSS responded by written letter. Father had not participated in a family service case plan and had not indicated that he would participate in such a plan within the next six months. The court prohibited visitation

*Opinion of the Court*

between the children and their parents and scheduled a hearing to determine a permanent plan for the children.

The trial court held a permanency planning hearing on 8 October 2015, and entered its order from that hearing on 5 November 2015. The court found that DSS had been in communication with Father through letters and had sent Father a letter on 15 September 2015 informing him of the court's decision to cease reunification efforts, but encouraging him to continue attending NA/AA meetings and continue with his GED, parenting, and anger management classes. The court set the permanent plan for the children as adoption with a secondary plan of custody or guardianship with an approved caretaker, and ordered that Father have no contact or visitation with the children.

In its orders from permanency planning hearings held 3 December 2015, 24 March 2016, and 16 June 2016, the trial court found that Father regularly kept in contact with DSS through letters and calls. The trial court kept the permanent plan for the children the same and continued to forbid any contact between Father and the children. Despite the court's order that he not contact his children, Father sent letters to them on a regular basis.

On 22 February 2016, DSS filed a petition to terminate the mother's and Father's parental rights to the children. DSS alleged grounds to terminate Father's parental rights based on neglect, failure to correct the conditions that led to the

*Opinion of the Court*

children's removal from their home, failure to pay for the cost of care for the children, dependency, and abandonment. See N.C. Gen. Stat. §§ 7B-1111(a)(1)-(3), (6)-(7) (2015). Father was promptly served with the petition and filed a *pro se* answer.

Seven months later, on 22 September 2016, the petition proceeded to hearing, and the trial court on 10 November 2016 entered an order terminating Father's parental rights to the children.<sup>2</sup> The court concluded grounds existed to terminate Father's parental rights based only on neglect, failure to correct the conditions that led to the children's removal from their home, and abandonment. Father appeals.

**Analysis**

**I. Petition for Writ of Certiorari**

We first address Father's petition for writ of certiorari by which he seeks review of the 8 October 2015 review order and the 5 November 2015 permanency planning order, which respectively relieved DSS of having to make further reunification efforts and eliminated reunification as a permanent plan for the children. Father has lost his right of appeal of the two orders because his counsel failed to identify the orders in the record on appeal. Counsel asks this Court to issue a writ of certiorari to review the orders so as to not penalize Father for counsel's mistakes.

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<sup>2</sup> Although the trial court's order terminated the parental rights of both the mother and Father, the mother did not appeal.

*Opinion of the Court*

Father's counsel, however, has failed to include the transcripts of the hearings from which these two orders were entered, and has not filed a motion with this Court to "order additional portions of a trial court record or transcript sent up and added to the record on appeal." N.C. R. App. P. 9(b)(5)(b). Father seeks to present two arguments in relation to the orders: (1) that DSS failed to make reasonable efforts to locate him; and (2) that the trial court had insufficient evidence to determine that reunification efforts with him were futile. Both of these arguments challenge the evidence before the trial court to support the findings made in its orders. Without transcripts of the hearings, we cannot evaluate the evidence before the trial court and would be required to presume the trial court's findings are supported by competent evidence. *See Stone v. Stone*, 181 N.C. App. 688, 691, 640 S.E.2d 826, 828 (2007). Father thus cannot show a likelihood that the trial court erred in making its findings, and has not shown appropriate circumstances to justify the issuance of a writ of certiorari to review the 8 October 2015 and 5 November 2015 orders. *See* N.C. R. App. P. 21(a), (c). Accordingly, we deny Father's petition for writ of certiorari and dismiss Father's arguments as to these orders.

**II. Grounds for Termination of Parental Rights**

Father next argues that the trial court erred in concluding grounds exist to terminate his parental rights on the basis of neglect, failure to correct the conditions that led to the removal of the juveniles, and abandonment. This Court reviews orders

*Opinion of the Court*

terminating parental rights to determine “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 Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004) (citations and quotation marks omitted). “The trial court’s conclusions of law are fully reviewable *de novo* by the appellate court.” *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (quotation marks omitted), *aff’d per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

*1. Willful Abandonment*

Father argues that the trial court erred in concluding grounds exist to terminate his parental rights because he willfully abandoned his children. A trial court may terminate parental rights if “[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) (2015).

Abandonment has been defined as wilful [sic] neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

*In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citation omitted). “Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *In re T.C.B.*, 166 N.C. App. 482,

*Opinion of the Court*

485, 602 S.E.2d 17, 19 (2004) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986)). “The findings [of fact] must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child.” *In re B.S.O.*, 234 N.C. App. 706, 710, 760 S.E.2d 59, 63 (2014) (citation and quotation marks omitted). Additionally, “this Court has repeatedly held that ‘a respondent’s incarceration, standing alone, neither precludes nor requires a finding of willfulness’ under N.C. Gen. Stat. § 7B-1111(a)(7).” *Id.* at 711, 760 S.E.2d at 64 (quoting *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 510-11 (2000)).

In support of its conclusion that Father willfully abandoned his children the trial court made the following findings of fact:

9. . . . that [Father], who is now incarcerated in the State of Florida, did know of the whereabouts of his children prior to his incarceration and made no attempts to see his children. Up until August 2015, some months after the Adjudication in April 2014, [Father] had no contact with his children or the Department. He did write a letter in August 2015 to the Department and his children. . . .

10. That [Father] has had no contact with his children for two and one half years.

. . .

13. That pursuant to N.C.G.S. [7B-]1111(a)(7) the Court finds by clear cogent and convincing evidence that [Father] has willfully abandoned his children for six consecutive months. . . .

Father asserts the evidence did not support these findings. We agree.

*Opinion of the Court*

The relevant time period to determine if Father willfully abandoned his children is 22 August 2015 to 22 February 2016, the six months just prior to the filing of the petition to terminate his parental rights. Father had no contact with DSS or his children from April 2014 until July 2015. In July 2015, Father sent a letter to his children and a letter to DSS informing the social worker that he was working on completing his GED and attending parenting, substance abuse, and anger management classes. During the 8 October 2015 permanency planning hearing and in a written order entered thereafter, the trial court found that Father had regularly communicated with DSS through letters and phone calls from Father's father, but the order was silent as to whether Father had sent any further letters to the children.

The trial court also ordered pursuant to the 8 October 2015 hearing that "[t]here be no contact or visitation between the respondent father and the juveniles." The trial court continued prohibiting contact between Father and his children in its orders until 26 June 2016, when it directed DSS to monitor any letters sent by Father to his children. Thus, from 8 October 2015 through the filing of the petition to terminate his parental rights almost five months later, Father was under a court order to not contact his children. Father's lack of contact with his children during a time period the trial court prohibited contact cannot support a conclusion that Father willfully abandoned them. Moreover, Father's regular communication with DSS after July 2015, while he was incarcerated, evinces a desire to maintain custody of the

*Opinion of the Court*

children. Accordingly, we hold the trial court's findings of fact are insufficient to support its conclusion that Father willfully abandoned his children.

*2. Neglect*

Father argues the trial court erred in terminating his parental rights on the ground of neglect. A trial court may terminate parental rights where the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1) (2015). 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 the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law.

...

N.C. Gen. Stat. § 7B-101(15) (2015). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). However, when a child has not been in a parent's custody for a significant amount of time prior to the termination proceeding, a court may terminate parental rights if the parent previously neglected the child and the "court finds by clear and convincing evidence a probability of

*Opinion of the Court*

repetition of neglect if the juvenile were returned to her parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted); *see also In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citations omitted). While a parent may not use his incarceration to completely shield himself from his parental responsibilities such that he can never be deemed to have neglected his children, a trial court cannot use the sole fact of the parent’s incarceration to sever parental rights. *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

With respect to the ground for neglect, the trial court specifically found and concluded:

9. The Court finds pursuant to N.C.G.S. 7B-1111(a)1 that [Father], who is now incarcerated in the State of Florida, did know of the whereabouts of his children prior to his incarceration and made no attempts to see his children. Up until August 2015, some months after the Adjudication in April 2014, [Father] had no contact with his children or the Department. He did write a letter in August 2015 to the Department and his children. . . .

10. That [Father] has had no contact with his children for two and one half years.

11. That the Court finds by clear cogent and convincing evidence that [Father] has neglected his children within the meaning of N.C.G.S. 7B-101, specifically that he [h]as abandoned his children prior to the filing of this petition and up to today’s date.

*Opinion of the Court*

Although the trial court found that Father had previously neglected the children, the court made no finding that there was a probability of repetition of neglect if they were returned to his custody; instead, the trial court based its conclusion of neglect on Father's lack of contact with the children at the time of the hearing. As previously discussed, Father cannot be deemed to have abandoned the children based on lack of contact with them when he was under court order not to contact them. We note further that Father appears to have disregarded the court's no-contact order, because in its order entered from the 16 June 2016 permanency planning hearing, the trial court found that Father "sends letters to the juvenile[s] on a regular basis." Since July 2015, Father had also regularly been keeping in contact with DSS through letters and phone calls, the only methods of communication open to him due to his incarceration.

Father's regular communication with his children through letters, his continued contact with DSS about his case even though the court had eliminated reunification as a plan for the children, and his continued work toward completing his GED and attendance at parenting, substance abuse, and anger management classes do not evince an intent to abandon his children. *See In re Shermer*, 156 N.C. App. at 290, 576 S.E.2d at 409 (noting that "[b]ecause [the] respondent [father] was incarcerated, there was little involvement he could have beyond what he did--write letters to [his sons] and inform DSS that he did not want his rights terminated").

*Opinion of the Court*

Accordingly, we hold the trial court erred in concluding the ground of neglect due to abandonment exists to terminate Father's parental rights.

*3. Failure to Correct Conditions Leading to Children's Removal*

Father also argues that the trial court erred in concluding grounds exist to terminate his parental rights because he failed to correct the conditions that led to the children's removal from their home. Father contends that he was engaged in services that would have allowed him to resume custody of his children in the near future and he did not willfully leave the children in foster care.

A trial court may terminate parental rights 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 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. Provided, however, that no parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2015). In support of its conclusion that Father had failed to make reasonable progress to correct the conditions leading to the children's removal, the trial court found, *inter alia*:

9. . . . Up until very recently including August 4 and August 24, 2016 [Father] had not provided any evidence of his attempt to remedy his prior conditions including anger management and life skills.

.....

*Opinion of the Court*

12. That pursuant to N.C.G.S. [7B-]1111(a)(2), the Court finds that [Father] has willfully abandoned his children. That [Father's] incarceration occurred after the filing of this petition and that he has had two periods of incarceration . . . in Florida, including his present incarceration. That the actions that led to his incarcerations were willful actions. He is due to be released in January 2017.

The trial court's findings do not support its conclusion. The court's finding of willful abandonment does not address Father's progress toward correcting any conditions that led to the children's removal. Additionally, the court's finding that Father had only recently "provided any evidence of his attempt to remedy his prior conditions including anger management and life skills" is not a finding on his *progress* toward correcting any conditions, only the *timing* of his efforts. Neither of these findings can support a conclusion that Father had failed to make reasonable progress.

The trial court's conclusion that Father failed to make progress to correct the conditions that led to the removal of his children is based entirely upon his incarceration. Although "[a] parent's incarceration is a 'circumstance' that the trial court must consider in determining whether the parent has made 'reasonable progress' toward 'correcting those conditions which led to the removal of the juvenile[.]" *In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007), the court cannot cite Father's incarceration, standing alone, to terminate his parental rights on this ground. *Id.* at 226-27, 641 S.E.2d at 733-34; *see also In re Shermer*, 156 N.C.

*Opinion of the Court*

App. at 289-90, 576 S.E.2d at 409. The trial court made no other findings to support its conclusion that Father had failed to make adequate progress toward correcting the conditions that led to the children's removal from parental custody. Neither DSS nor the trial court ever established a case plan for Father identifying the conditions that he needed to correct to be reunified with his children. Accordingly, we hold the court erred in concluding that grounds exist pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate Father's parental rights.

**Conclusion**

None of the trial court's conclusions that grounds existed to terminate Father's parental rights is supported by its findings of fact. Accordingly, we must reverse the order terminating Father's parental rights to his children Lisa, Hank, and Tim.

REVERSED.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).