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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-133

Filed: 5 July 2017

Mecklenburg County, No. 15 JT 635

IN THE MATTER OF: E.A.D.

Appeal by respondent from order entered 3 October 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 8 June 2017.

Mark L. Hayes for respondent-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman and Thomas J. Thurman, for petitioner-appellee Bethany Christian Services, Inc.

ZACHARY, Judge.

Respondent-father (Robert) appeals from an order terminating his parental rights to E.A.D. (Eva).¹ On appeal, Robert argues that the trial court erred in concluding that he neglected Eva pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), and that he failed to establish paternity, to legitimate Eva, or to provide financial support or consistent care to Eva or her mother pursuant to N.C. Gen. Stat. § 7B-1111(a)(5).

¹ We use this pseudonym to protect the juvenile's identity.

After a careful review of the record, we affirm the trial court's order on the basis of neglect.

I. Background

This case arises from an action filed by petitioner Bethany Christian Services, Inc. (BCS) to terminate the parental rights of Robert to his biological daughter, Eva. BCS is a child-placement agency licensed in North Carolina, and the events described below led to the filing of BCS's petition.

Robert and Jessica, Eva's biological mother, met in early September 2014. The two began a romantic relationship shortly thereafter, and Jessica moved into a rented room with Robert and his father. At that time, both Robert and Jessica were addicted to methamphetamines. Sometime in October or November 2014, Jessica discovered that she was pregnant after taking a pregnancy test that Robert's father had purchased for her. Jessica informed Robert of the test result.

Although Robert and Jessica discussed the need for Jessica to "get[] clean" from drugs during the pregnancy, they both continued to use methamphetamines. Jessica requested the drugs and Robert supplied them. Several weeks after the pregnancy was discovered, Robert and Jessica got in an argument and Jessica asked to leave. As a result, Robert drove Jessica, who was sick at the time, to her mother's house and dropped her off. Robert told Jessica that he was going to get her some medicine, but

he never returned. The rest of Jessica's pregnancy was marked by instability and uncertainty.

On 13 January 2015, Robert was arrested on numerous criminal charges. Robert pleaded guilty to some of those charges, which included felony possession of methamphetamines, and he was incarcerated until 10 July 2016. Although Robert had not been in any meaningful contact with Jessica since November 2014, Jessica visited Robert in January 2015. At that time, Robert was in prison and Jessica was essentially homeless, as she had left her mother's house and had been "couch surfing" as well as sleeping on the street. Robert expressed his desire to support Jessica and their child after his release from prison, and he encouraged Jessica to contact his father for anything she needed. Jessica visited Robert again the following week. After this visit, Robert and Jessica had no contact for approximately one year.

While in prison, Robert made several unsuccessful attempts to contact Jessica and to monitor the progression of her pregnancy. He sent three letters to Jessica, all of which were addressed to Jessica's mother's house. It appears that Jessica did not receive any of those letters. In May 2015, Robert sent a letter to the Henderson County Department of Social Services (DSS). DSS did not reply to Robert's inquiry, and he did not follow up. Between January and November of 2015, Robert made monthly phone calls to his father, who indicated that he would "find out what was going on with Jessica." The record is silent as to what, if any, information was

obtained and whether it was relayed to Robert. Robert also made monthly phone calls to his ex-wife, Rebecca Walls, and asked her to “stay on [Robert’s] dad about finding out something about Jessica, the child.” In addition, Robert made progress toward improving himself while incarcerated, completing a substance abuse program, a job skills course, and a “Father’s Accountability” class.

During the months that immediately preceded Eva’s birth, Jessica was living in the Rescue Mission in Hendersonville, North Carolina. Eva was born on 24 July 2015. Two days later, Jessica signed a notice of relinquishment surrendering Eva to BCS for adoptive placement. Eva was placed with her prospective adoptive parents on 4 August 2015, and she remains in their care to this day. In an affidavit included with the relinquishment paperwork, Jessica listed three potential fathers of Eva, one of whom was Robert. On 24 November 2015, BCS filed a petition to terminate the parental rights of the three putative fathers whom Jessica had identified in her notice of relinquishment. The petition was served on Robert shortly thereafter.

Because his parentage had been called into question by the termination petition, Robert filed a motion for DNA testing through his lawyer on 3 March 2016. The lawyer initially failed to take the necessary steps to complete the paternity test, and he was sanctioned by the trial court pursuant to Rule 11 of the Rules of Civil Procedure. However, a paternity test was eventually completed in June 2016, and Robert was identified as Eva’s biological father.

Robert was released from prison on 10 July 2016. After his release, Robert requested visitation with Eva. The guardian *ad litem* attempted to contact Robert concerning visitation on 18 and 19 July 2016, but he could not be reached at that time. Counsel and the guardian *ad litem* also exchanged emails, “but no visitation could be achieved.” Although Robert called and spoke with the guardian *ad litem* on 24 August 2016, no visitation was ever arranged. As a result, Robert has never seen Eva.

The trial court held hearings on BCS’s termination petition on 31 August 2016 and 2 September 2016. After hearing testimony from Robert and Jessica, among others, the trial court announced its ruling from the bench. While announcing its findings in open court, the trial court acknowledged the substance abuse, job-related, and parental accountability classes that Robert completed in prison and the attempts that he made to contact Jessica while he was incarcerated. However, the trial court ultimately found that Robert had not provided any financial support or parental care to Eva, and that Robert would likely experience a “relapse . . . due to his unfortunately long history” of substance abuse. Based on these and other findings, the trial court concluded that because Robert had neglected Eva and the neglect was likely to continue in the future, grounds existed to terminate Robert’s parental rights on the basis of neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). The trial court also concluded that grounds existed to terminate Robert’s parental rights pursuant to

N.C. Gen. Stat. § 7B-1111(a)(5) for failure to establish paternity, to legitimate Eva, or to provide support or care for Eva. At disposition, the trial court concluded that it was in Eva's best interest that Robert's parental rights be terminated. A written order memorializing the trial court's ruling was entered on 3 October 2016. Robert now appeals from the termination order.

II. Termination Order

A. Standard of Review

Termination of parental rights proceedings are conducted in two distinct stages: adjudication and disposition. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). "In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a)." *In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014); *see* N.C. Gen. Stat. § 7B-1109(e) (2015). "This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (quotation marks omitted), *appeal dismissed*, 363 N.C. 654, 686

S.E.2d 676 (2009). Unchallenged findings of fact are also binding upon this Court, as they “are deemed supported by competent evidence.” *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). The trial court’s conclusions of law, however, are subject to *de novo* review. *In re A.B.*, 239 N.C. App. at 160, 768 S.E.2d at 575.

“If the trial court determines that a ground for termination exists, the court moves to the disposition stage, where it must determine whether termination is in the best interest of the child.” *In re S.T.P.*, 202 N.C. App. 468, 473, 689 S.E.2d 223, 227 (2010). “The court’s determination of the juvenile’s best interest will not be disturbed absent a showing of an abuse of discretion[.]” *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630, *cert. denied*, 364 N.C. 325, 700 S.E.2d 749 (2010), which occurs only “where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013) (citation omitted).

B. Neglect

Robert’s first argument on appeal is that the trial court erred in concluding that grounds existed to terminate his parental rights on the basis of neglect. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2015), the trial court may terminate a party’s parental rights upon a finding that “[t]he parent has abused or

neglected the juvenile.” For purposes of subdivision 7B-1111(a)(1), a neglected child is one

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) (2015). To establish neglect as a ground for termination of parental rights, the petitioner must present “clear, cogent, and convincing evidence [that] (1) the juvenile is neglected within the meaning of N.C.G.S. 7B-101(15), and [that] (2) the juvenile has sustained some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment as a consequence of the neglect.” *In re Beasley*, 147 N.C. App. 399, 403, 555 S.E.2d 643, 646 (2001) (citations and quotation marks omitted). However, “[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.” *In re Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340.

When “a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect,” because “requiring the petitioner in such circumstances to show that the child is currently

neglected by the parent would make termination of parental rights impossible.” *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff’d*, 356 N.C. 68, 565 S.E.2d 81 (2002). “[I]f the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future.” *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007) (citation omitted). “The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.” *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citation and quotation marks omitted). A parent’s “failure to provide the personal contact, love, and affection that inheres in the parental relationship” is also a proper consideration in determining whether neglect has occurred. *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 375-76 (2003).

The fact that a parent has served or is serving an active prison sentence must be carefully considered in the analysis. Incarceration, by itself, “does not negate a father’s neglect of his child[.]” *Whittington*, 156 N.C. App. at 368, 576 S.E.2d at 376, and “[a] parent’s incarceration may be relevant to whether his child is neglected[.]” *In re C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 730. But “ ‘[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.’ ”

Id. (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (citation and internal quotation marks omitted)).

In the present case, the trial court made the following findings in support of its conclusion that Robert had neglected Eva:

26. Within three or four weeks of discovering that the Mother was pregnant, the Mother and [Robert] had a large argument which led to the Mother moving out.

27. [Robert] testified that he knew the argument was not going anywhere good and that sometimes you just have to walk away.

28. At the Mother's request, [Robert] drove the Mother to her mother's house, where she lived for a brief period.

29. The [M]other testified that [Robert] said he would come back and bring her some medicine, but she did not see him again until after the birth of the minor child.

...

40. [Robert] ran a card game while incarcerated, which made him approximately \$100.00 per month. He also received individual gifts of close to \$40.00 from his father on special occasions, which occurred approximately 4-5 times per year.

...

81. [Robert] has had no contact with the minor child and has contributed no care, control, or supervision for the minor child at any point during the child's existence.

82. [Robert] has not provided consistent care with respect to the minor child and the Mother.

...

88. The failure of Respondent to provide support to the

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[M]other of the minor child or to the minor child consistently demonstrates neglect of the minor child.

...

92. [Robert]’s testimony indicated that he is attempting to turn his life around and stay clean and sober. He has been compliant with his probation and has been working hard since his release.

93. However, given his long unfortunate history of substance abuse, the Court finds that a relapse by [Robert] is likely to occur at some point and that neglect of the minor child is likely to continue or be repeated in the future.

Robert’s argument on the issue of neglect takes several forms, but his principal contention is that the trial court improperly held him responsible for a failure to direct any care, support, or supervision to Eva during the period of his incarceration. Citing his efforts to contact Jessica directly as well as through his father, Ms. Walls, and DSS, Robert maintains that he made significant “efforts to reestablish contact [with Jessica] and to put himself in a position to support [Eva].” Robert further argues that these efforts demonstrated a consistent desire to provide care and express affection for Eva, and that he “cannot be faulted for the position he eventually found himself in: incarcerated and completely unable to convey support or affection to his child.”

We first note that any attempt by Robert to use his incarceration as a shield to the trial court’s finding of neglect must be rejected. Indeed, although incarceration, standing alone, is insufficient to support a finding of neglect, it is beyond debate that

Robert's own actions put him in a position where his ability to provide support or care for Jessica and Eva was limited. Beyond that, Robert has not shown that the trial court's findings are either unsupported by evidence or that they fail to support its legal conclusions. Instead, Robert insists that the trial court should have drawn different inferences from the underlying facts. It is well established, however, that the trial court is charged with determining "the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, [the trial judge] alone determines which inferences to draw and which to reject." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

Here, the findings show that Robert essentially abandoned Jessica when he dropped her off at her mother's house. At that time, Robert had actual notice of Jessica's pregnancy. He felt it was "better just to walk away[.]" It was then Jessica who located Robert in prison and visited him in January 2015. Robert urged Jessica to contact his father for support and he expressed his desire to support Jessica (and the yet-unborn Eva) upon his release. Even so, Robert failed to obtain contact information for Jessica.

While Jessica was pregnant, Robert made efforts to contact Jessica through intermediaries—his father and Ms. Walls. He also contacted DSS, but never followed up when he did not receive a response. After Robert was served with BCS's termination petition at the end of 2015, the record indicates that he made no more

than two attempts to contact Jessica until his release from prison in July 2016. There is no evidence that Robert attempted to contact BCS or inquire as to Eva's well-being during that time frame. Robert did request visitation with Eva after his release from prison, but the guardian *ad litem*'s mid-July 2016 attempts to reach Robert and discuss his request were unsuccessful. It appears that Robert did not have a working phone "for a couple of weeks" after his release. However, Robert did not follow up with the guardian *ad litem* until over a month later, on 24 August 2016.

In addition, it is undisputed that Robert failed to provide any financial support for Jessica during her pregnancy or for Eva after her birth. While Robert's opportunities in this regard were limited,² the trial court's findings show that he received approximately \$40.00 from his father four to five times a year. There is no indication that Robert attempted to save or direct any of those funds for the care of Jessica and Eva. *See In re A.J.M.P.*, 205 N.C. App. 144, 151, 695 S.E.2d 156, 160 (2010) (noting that "the evidence showed, and the trial court found, that respondent-father has been assigned to work duty in the federal prison system since 2007 and *that he has received funds from friends and family while in prison[,]*" and holding that the father's parental rights were properly terminated under subdivision 7B-1111(a)(1), in part, because he had not provided any financial support to the minor

² On appeal, Robert asserts that the \$100.00 per month that he earned running a card game while incarcerated could only be added to his commissary account, and that there was no way for him to direct those funds to any person or entity outside the prison.

child “despite his ability to contribute to [the child’s] well-being”). As to Robert’s desire to support Jessica and Eva upon his release and his appeal to Jessica to seek support from his father in the meantime, little weight can be given to hypothetical offers of support. The trial court’s findings also show that Robert obtained employment immediately upon his release on 10 July 2016, yet Robert did not attempt to provide any financial support for Eva between that time and when the termination proceedings began on 31 August 2016.

Finally, although the trial court acknowledged the positive steps that Robert took in prison and upon his release, the court weighed Robert’s recent sobriety against approximately seventeen years of drug use, addiction, and criminal behavior. After doing so, the court reasoned that Robert’s extensive history of substance abuse could not be overlooked and that it was likely he would experience a relapse in the future. When asked about a potential for a relapse, Robert candidly answered, “None of us can tell the future.” Robert then made the painful admission that virtually everyone he knows is either dead, incarcerated, or gripped by drug addiction. Other evidence, beyond Robert’s potential for a relapse, also suggested a substantial risk of future neglect. It can be fairly said that the factual genesis of this neglect case was Robert’s decision to drop Jessica off at her mother’s house and never return. Furthermore, although Robert found employment immediately upon his release from prison, he never directed any support to Eva. Nor did Robert secure even a single

visit with Eva after his release, despite having approximately a month and a half to do so before the termination proceedings commenced. This evidence established a neglectful pattern on Robert's part, and the trial court's decision "was of necessity . . . predictive in nature[.]" *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The court had to "assess whether there [was] a substantial risk of future abuse or neglect of [Eva] based on the historical facts of the case." *Id.* Given the record before it, the trial court's finding that Eva would be at substantial risk of future neglect if allowed to reside with Robert is supported by competent evidence.

In sum, we conclude that grounds for termination of Robert's parental rights under subdivision 7B-1111(a)(1) were established by clear, cogent, and convincing evidence. The trial court's findings are supported by competent evidence, and the findings support the court's conclusions that Robert neglected Eva, and that the neglect was likely to be repeated in the future. "[B]ecause we have upheld the trial court's findings and conclusion regarding neglect, we need not address [Robert's] assignments of error contesting any other ground for termination." *In re A.J.M.P.*, 205 N.C. App. at 152, 695 S.E.2d at 160. We also conclude that the trial court properly determined that it was in Eva's best interest to terminate Robert's parental rights.

III. Conclusion

For the reasons stated above, we affirm the trial court's order terminating Robert's parental rights to Eva.

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AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).