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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-464

Filed: 19 September 2017

Mecklenburg County, No. 15 JT 355

IN THE MATTER OF: D.L.W.

Appeal by respondent from order entered 1 February 2017 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2017.

*Gretchen L. Caldwell and Marc S. Gentile, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.*

*J. Thomas Diepenbrock for respondent-father.*

*Jennifer C. Baril for guardian ad litem.*

DAVIS, Judge.

D.W. (“Respondent”) appeals from an order terminating his parental rights to the minor child “Deborah.”<sup>1</sup> On appeal, he argues that the trial court erred in concluding that (1) he had neglected Deborah and there was a likelihood of the repetition of such neglect; (2) he failed to show reasonable progress to correct the

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<sup>1</sup> Pseudonyms and initials are used throughout this opinion to protect the identities of the minor children and for ease of reading.

conditions that led to Deborah’s removal; (3) he willfully failed to pay a reasonable portion of the cost of Deborah’s care; and (4) he was incapable of providing care and supervision for Deborah. After careful review, we affirm.

### **Factual and Procedural Background**

On 29 June 2015, Mecklenburg County Youth and Family Services (“YFS”) obtained non-secure custody of Deborah — when she was approximately two years of age — and filed a petition alleging that she and her four-month-old half-brother, “Edward,”<sup>2</sup> were neglected and dependent juveniles. *See* N.C. Gen. Stat. § 7B-101(9), (15) (2015). The petition described ongoing substance abuse and erratic behavior by Deborah’s mother, E.W.,<sup>3</sup> who disrupted a kinship placement arranged for Deborah and Edward by repeatedly threatening the caretaker. The petition named Respondent as Deborah’s putative father and listed his address as “Incarcerated” in Jonesborough, Tennessee.

On 6 August 2015, Respondent was served with the petition and summons by certified mail at the Washington County Detention Center in Jonesborough, Tennessee. In September 2015, he submitted to paternity testing, which confirmed that he was Deborah’s father.

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<sup>2</sup> Edward’s father is not a party to this appeal.

<sup>3</sup> E.W. was subsequently diagnosed with schizophrenia and appointed a guardian *ad litem* pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. §§ 7B-602(c), -1101.1(c) (2015).

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On 16 February 2016, the trial court adjudicated Deborah neglected and dependent. In a permanency planning order entered 7 June 2016, the court established a primary permanent plan of adoption and ordered YFS to file a petition for termination of parental rights (“TPR”) within 60 days.

On 15 July 2016, YFS filed a TPR petition asserting five grounds for termination as to Respondent: (1) neglect; (2) failure to make reasonable progress to correct the conditions leading to Deborah’s placement in foster care; (3) failure to pay a reasonable portion of Deborah’s cost of care; (4) dependency; and (5) abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6)-(7) (2015). Respondent was again served by certified mail, having been transferred to a federal prison in Lisbon, Ohio.

On 14 December 2016, the trial court held a termination hearing, and Respondent participated by telephone. During the hearing, a YFS social worker, the guardian *ad litem* for Deborah and Edward, Respondent, and Respondent’s aunt (“Ms. B.”) testified.

Respondent testified via telephone that he had learned he was Deborah’s father in the summer of 2015. He stated that he had reached out to his father, sister, and aunt about serving as a placement for both Deborah and Edward. Ms. B. testified that she and her husband were contacted about the children in October 2016 and wanted to adopt both children. She also stated that they would “be willing to accept

guardianship” of the children until Respondent is released from prison in September 2023.

After receiving the parties’ evidence, the court found grounds existed to terminate Respondent’s parental rights based on neglect, lack of reasonable progress, failure to pay a reasonable portion of Deborah’s cost of care, and dependency.<sup>4</sup> *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6). The court further determined that terminating Respondent’s parental rights was in Deborah’s best interests.<sup>5</sup> *See* N.C. Gen. Stat. § 7B-1110(a) (2015). Respondent filed a timely notice of appeal from the TPR order.

### **Analysis**

Respondent argues that the trial court erred in terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)-(3) and (6).

On appeal of an adjudication in a TPR proceeding,

we must determine whether the [trial court’s] findings of fact are supported by clear, cogent and convincing evidence, and whether the findings support the court’s conclusions of law. If there is competent evidence, the findings of the trial court are binding on appeal. An appellant is bound by any unchallenged findings of fact. . . . We review conclusions of law *de novo*.

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<sup>4</sup> The court did not determine whether Respondent had willfully abandoned Deborah under N.C. Gen. Stat. § 7B-1111(a)(7).

<sup>5</sup> The trial court also terminated the parental rights of E.W., but she is not a party to this appeal.

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*In re B.S.O.*, 234 N.C. App. 706, 707-08, 760 S.E.2d 59, 62 (2014) (internal citations and quotation marks omitted). Because any single adjudicated ground is sufficient to support a TPR order, “if we determine that the court properly found one ground for termination under N.C. Gen. Stat. § 7B-1111(a), we need not review the remaining grounds.” *Id.* at 708, 760 S.E.2d at 62.

The trial court made the following pertinent findings of fact in support of its adjudication:

4. The juveniles were placed in non-secure custody of the petitioner on June 29, 2015.
5. . . . At the time, paternity for neither child had been established.
6. On February 12, 2016, the juveniles were adjudicated neglected and dependent. None of the respondents were present on this date. . . .
- . . . .
15. . . . [Respondent] participated in DNA testing in mid-2015 as a result of [YFS] contacting him and arranging for said testing. . . . Once it was determined that [Respondent] was [Deborah’s] father, he fell out of contact with YFS for several months. It is unclear how many letters he actually received from YFS because he was sent to a few different jails/prisons since [Deborah] has been in YFS custody. He has been in his current facility (FCI-Elkton) since August 2016.
16. [Respondent] spoke with his own father and his sister . . . approximately a year before this TPR hearing about possibly being a placement for [Deborah]. Nothing ever came of these

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discussions . . . . [Respondent], in October 2016, spoke to his aunt, [Ms. B.] who immediately contacted YFS to express an interest in being a placement for [Deborah]. Ms. [B.], her husband, and [Deborah] visited with one another on November 18, 2016. [Respondent] is incarcerated currently and shall remain so for several years and is not in a position to parent [Deborah].

17. . . . Ms. [B.] would accept guardianship, but wanted to adopt. . . .

18. As a result of all of the above findings of fact, the juveniles remain in foster care and there is and remains a high probability of the repetition of neglect.

19. . . . [I]t has cost YFS \$22,109.77 per child to maintain [Deborah] in an out of home placement. No portion of this cost of care was paid for by [Respondent]. . . . There is no evidence [Respondent was] physically and/or financially unable to contribute to the cost of care during 2016.

. . . .

23. . . . [Respondent] has never seen [Deborah] in person . . . .

Based on these uncontested findings, the court concluded that (1) Respondent neglected Deborah “in that [he has] failed to provide proper care, supervision and discipline for the juvenile[,]” and (2) “there is a high probability of the repetition of neglect.”

Respondent first challenges the trial court’s conclusion that he neglected Deborah under N.C. Gen. Stat. § 7B-1111(a)(1). He contends that “YFS did not prove that [he] was neglecting Deborah at the time of the termination hearing or that there

was a reasonable likelihood of the repetition of neglect.” Moreover, he argues he had “nothing to do with the conditions which led to his daughter being removed from her mother’s care” and notes he was never offered a case plan by YFS.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), “the trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child.” *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003). A “[n]eglected juvenile” is defined, *inter alia*, as one “who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . [.]” N.C. Gen. Stat. § 7B-101(15).

This Court has further construed the definition of neglect: An individual’s lack of parental concern for his child is simply an alternate way of stating that the individual has failed to exercise proper care, supervision, and discipline as to that child. Further, in determining whether neglect has occurred, the trial judge may consider the parent’s failure to provide the personal contact, love, and affection that inheres in the parental relationship.

*Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 375-76 (2003) (internal citation and quotation marks omitted).

Respondent emphasizes that he was incarcerated at the time Deborah was removed from E.W.’s custody and at the time of her initial adjudication as a neglected juvenile. However, as we explained in *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241 (2005), *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006),

[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. The key to a valid termination of parental rights on neglect grounds

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where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the time of the hearing. Where 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. 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.

*Id.* at 10, 618 S.E.2d at 247 (internal citations, quotation marks, brackets, ellipsis, and emphasis omitted).

Moreover, “[i]ncarceration alone . . . does not negate a father’s neglect of his child. Although his options for showing affection are greatly limited, the respondent will not be excused from showing interest in the child’s welfare by whatever means available.” *Hendren*, 156 N.C. App. at 368, 576 S.E.2d at 376 (internal citations omitted).

Our courts have repeatedly held an incarcerated parent’s complete lack of involvement with his child sufficient to establish neglect at the time of the TPR hearing for purposes of N.C. Gen. Stat. § 7B-1111(a)(1). *See, e.g., P.L.P.*, 173 N.C. App. at 13, 618 S.E.2d at 248 (affirming adjudication of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) where incarcerated father provided no support for the child, “initiated no independent efforts to send letters to the child, and made no efforts to stay in

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contact with the assigned [social] worker”); *see also In re C.L.S.*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 680, 681-83 (affirming termination of parental rights based on neglect where incarcerated father declined to enter into a case plan and neither contacted nor provided support for the child), *aff’d per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016); *In re Bradshaw*, 160 N.C. App. 677, 682-83, 587 S.E.2d 83, 86-87 (2003) (affirming termination of parental rights based on neglect where the incarcerated father “neither provided support for the minor child nor sought any personal contact with or attempted to convey love and affection for the minor child”).

In the present case, the evidence and the trial court’s findings show a similar degree of neglect by Respondent. Prior to the termination hearing, Respondent did not participate in any court proceedings involving Deborah. He did not contact YFS about Deborah, either personally or through his father, sister, or Ms. B. Other than agreeing to paternity testing, Respondent did not respond to any of YFS’s correspondence. Moreover, Respondent made no attempt to communicate with Deborah, either directly or indirectly, or contribute to her support. In addition, he did not send her gifts, cards, money, or other items to foster a relationship with her.

In support of his argument, Respondent relies on several cases in which this Court has reversed the trial court’s determination that termination of an incarcerated person’s parental rights was proper. However, in each of these cases, the incarcerated parent made affirmative efforts to establish or maintain a relationship with his child

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and preserve his parental rights. *See, e.g., In re C.W.*, 182 N.C. App. 214, 224-25, 641 S.E.2d 725, 732-33 (2007) (reversing neglect adjudication where “undisputed evidence shows respondent was very consistent in writing the children” during his incarceration); *In re Shermer*, 156 N.C. App. 281, 287-88, 576 S.E.2d 403, 408 (2003) (holding DSS failed to show neglect at time of termination of parental rights hearing where respondent “was out of prison and able and willing to care for his children,” had “told DSS from prison that he did not want his parental rights terminated,” “contacted DSS again less than two weeks after being released[,]” wrote weekly to children from prison, and visited children following his release).

Given the absence of evidence of similar acts that would demonstrate affirmative efforts by Respondent to establish and maintain a relationship with Deborah, we conclude the trial court’s adjudication of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) was proper.<sup>6</sup> Accordingly, we affirm the trial court’s order terminating Respondent’s parental rights.

**Conclusion**

For the reasons stated above, we affirm the trial court’s 1 February 2017 order.

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<sup>6</sup> Because we hold that the trial court’s finding of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) was sufficient to support the adjudication portion of its order terminating Respondent’s parental rights, we need not review the remaining grounds found by the court. *See In re B.S.O.*, 234 N.C. App. at 714, 760 S.E.2d at 65 (“Having upheld the adjudication under N.C. Gen. Stat. § 7B-1111(a)(7), we need not address the remaining grounds found by the district court for terminating Respondent’s parental rights.” (citation omitted)). Respondent does not contest the trial court’s finding at the disposition stage that terminating his parental rights would be in Deborah’s best interests.

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AFFIRMED.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).