IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-994

Filed: 6 March 2018

Person County, No. 12 JT 72-74

IN THE MATTER OF: J.L.S., J.N.S. and A.S.

Appeal by respondents from orders entered 14 June 2017 by Judge Thomas Foster, Jr., in Person County District Court. Heard in the Court of Appeals 15 February 2018.

*No brief for petitioner-appellee Person County Department of Social Services.*

*Michael E. Casterline for respondent-appellant mother.*

*Richard Croutharmel for respondent-appellant father.*

*James N. Freeman, Jr., for guardian ad litem.*

TYSON, Judge.

Respondents, the mother and father of the juveniles J.L.S., J.N.S., and A.S., appeal from orders terminating their parental rights. We affirm.

## I. Background

On 15 November 2012, ten-week-old J.L.S. was taken to the hospital with multiple fractures over many portions of his body, including fractures to his arm, leg,

and skull. On 16 November 2012, the Person County Department of Social Services ("DSS") filed a petition alleging J.L.S. was an abused and neglected juvenile. DSS alleged the fractures were at different stages of healing, and J.L.S.'s injuries were unexplained. Based upon J.L.S.'s injuries, DSS filed additional petitions alleging his siblings, J.N.S. and A.S., were neglected juveniles. DSS obtained nonsecure custody of the juveniles.

On 5 November 2013, the trial court adjudicated J.L.S. as an abused and neglected juvenile, and J.N.S. and A.S. as neglected juveniles. The court found J.L.S. had suffered multiple injuries while in his parents' care, sustained at different times, and his injuries were not consistent with the explanations provided by Respondents. While neither J.N.S. nor A.S. appeared to have suffered similar injuries, the trial court determined they were living in an injurious environment, because they were living in Respondents' home at the time J.L.S. had sustained his injuries.

The trial court entered a separate dispositional order placing the juveniles into DSS custody and establishing concurrent permanent plans of reunification and custody with a court-approved caretaker, along with an alternative plan of adoption. Respondents were ordered to cooperate with DSS and establish and follow a case plan.

On 19 May 2014 after a hearing, the trial court entered a review order in which it removed reunification as a permanent plan for the juveniles. The court modified

the permanent plans for the juveniles to concurrent plans of adoption and custody with a court-approved caretaker. On 3 December 2014, the court changed the permanent plan for all three juveniles to adoption.

On 4 December 2015, DSS filed petitions to terminate Respondents' parental rights. DSS also petitioned to terminate the parental rights of Respondent-mother's former husband, M.T., who was listed on the birth certificates of the juveniles, because he and Respondent-mother had been married prior to the birth of the juveniles, and had never legally divorced. It is undisputed that Respondent-father is the biological father of all the juveniles. M.T. was served by publication, but did not appear in this action, and is not a party to this appeal.

After conducting hearings over the course of three days, the trial court entered orders in which it determined grounds of neglect and failure to make reasonable progress existed to terminate Respondents' parental rights to all three juveniles pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) on 14 June 2017. The trial court concluded it was in the juveniles' best interests that Respondents' parental rights be terminated. Respondents appeal.

## II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

## III. Grounds for Termination

Both Respondents argue the trial court erred by concluding that grounds existed to terminate their parental rights.

A. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law
>
> The trial court's conclusions of law are reviewable *de novo* on appeal.

*In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

B. Neglect

The trial court concluded grounds existed to terminate both Respondents' parental rights based upon neglect. N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or . . . has been abandoned; or . . . is not provided necessary medical care; or . . . is not provided necessary remedial care; or . . . lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2017).

DSS must show by "clear, cogent and convincing evidence that . . . neglect exists at the time of the termination proceeding." *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). Where the juveniles have not been in the respondents'

custody for a significant period of time prior to the hearing, the "trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect." *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (citation and internal quotation marks omitted).

*1. Respondent-mother*

Respondent-mother argues that the trial court based its conclusion of neglect solely upon the past adjudication of neglect and failed to consider changed circumstances. Respondent-mother asserts the trial court's conclusion of a probability of repetition of neglect is not supported by findings of fact, based upon clear and convincing evidence. We disagree.

The trial court must consider the "fitness of the parent(s) to care for [the children] in light of any evidence of neglect and the probability of a repetition of neglect[.]" *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232. Here, the court made the following findings of fact in each termination order relevant to Respondent-mother:

> 33. That Respondent[-mother] has had no personal contacts with [the juveniles] other than minimal visitation suitable to assist the minor child[ren] in [their] social, physical, psychological or personal development since November 16, 2012[];
>
> 34. That the parents were provided an Out of Home Family Services Agreement by DSS, outlining the needs of the family, and the services and activities they would need to participate in, in order to have the children return to the parents['] home;

. . . .

37. The parents were aware of the need to participate in the activities outlined and detailed in such Out of Home Family Services Agreement;

. . . .

42. [Respondent-mother] did participate in some parts of the Plan, including submitting to a Psychological Evaluation;

43. The Psychological Evaluation recommended that she participate in mental health counseling;

44. [Respondent-mother] did participate in limited counseling on three or four occasions during the course of this proceeding;

45. Her participation was generally initiated in close proximity to an upcoming scheduled Court Review hearing, and frequently, DSS was unable to document her attendance, or that the appointments were in accord with the needs addressed in the Psychological Evaluation;

46. [Respondent-mother] did not complete any of the courses of counseling, nor did it enable her [to] acquire suitable parenting skills to correct the conditions which led to the removal of her [children], or to convince the Court that she should acquire a return of her children at the serial review hearings held in this cause;

47. [Respondent-mother] did attend a parenting class, but was unable to show to DSS or the Court any improvement of her parenting skills or abilities[];

. . . .

49. The children have been in care for over four years;

> 50. Visitation was initially established as weekly supervised visits for the parents; it was gradually reduced . . . until it was ceased with the mother on February 1, 2016;
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> 51. The mother did not do well with the visits; the children were usually out of control in her presence;
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> . . . .
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> 53. [Respondent-mother] was not employed at time of filing of Petition[s];
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> . . . .
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> 56. At various review hearings she would testify that she was working part time, but she provided no documentation;
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> 57. [Respondent-mother] testified that she has been regularly employed during 2016 and 2017, working 40 hours per week at $10.00 per hour but she has not provided financially for the [juveniles];
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> . . . .
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> 62. [Respondent-mother's] claim of regular employment is not credible;
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> . . . .
>
> 65. The mother failed to contact the Social Worker to check on the status of her children while they were in foster care;
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> 66. That the neglect of [Respondent-Mother] would likely be repeated if the child[ren] were returned to her.

These findings are supported by the testimony of DSS social workers Love and Thomas and the testimony of Respondent-mother herself. Respondent-mother does

not challenge these findings and we are bound by them on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (unchallenged findings are deemed supported by competent evidence and are binding on appeal).

The purposes of a case plan include rectifying the conditions which led to the removal of the juveniles and effecting the goal of reunification. Here, the conditions addressed were alleged abuse and neglect. Failure to make reasonable efforts to comply with a case plan is relevant to a determination of whether neglect would repeat if a child is returned to the parent. *See In re J.H.K.*, 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011) ("Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of [the] children.") (citation and quotation marks omitted).

DSS social worker Love testified at termination that Respondent-mother was present at the child and family team meeting with her attorney when the Out-of-Home Family Services Agreement was created. Ms. Love testified the plan included consistent mental health therapy, obtaining adequate housing, substance abuse assessment, and parenting skills courses. Ms. Love testified Respondent-mother tested positive for cocaine and marijuana. Ms. Love also testified the plan addressed substance abuse, the type and frequency of Respondent-mother's drug use and

parenting skills "in terms of the safety and well-being of the children" in a placement with the parents.

The trial court found Respondent-mother had participated only in limited mental health counseling on three or four occasions during the pendency of the case and usually only attended in "close proximity" to upcoming review hearings. While the timing of her attendance is not determinative, the Court found her failure to complete any counseling left Respondent-mother unable to "acquire suitable parenting skills to correct the conditions which led to the removal of her child[ren]." Additionally, although Respondent-mother attended parenting classes, her parenting skills or abilities did not improve.

The trial court also noted that during Respondent-mother's visits with her children, the juveniles were "out of control" while in her presence. The trial court's findings also demonstrate that Respondent-mother had failed to maintain stable employment or housing.

The trial court's findings are supported by clear, cogent and convincing evidence and these findings support the trial court's conclusion of a probability of a repetition of neglect should the juveniles be returned to Respondent-mother's care. Grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent-mother's parental rights. Respondent-mother's arguments are overruled.

*2. Respondent-father*

Here the court made the following findings of fact relevant to a conclusion of neglect by Respondent-father:

> 34. That the parents were provided an Out of Home Family Services Agreement by DSS, outlining the needs of the family, and the services and activities they would need to participate in, in order to have the children return to the parents['] home;
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> . . . .
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> 37. The parents were aware of the need to participate in the activities outlined and detailed in such Out of Home Family Services Agreement;
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> . . . .
>
> 39. [Respondent-father] failed to participate in any of the activities called for in the Plan, other than visitation;
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> 40. [Respondent-father] did not speak with or communicate with the Department having custody of [the juveniles]; he informed DSS that such lack of communication was at the behest of his attorney on his criminal charges;
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> 41. [Respondent-father] was requested to submit to a Psychological Evaluation, but did not participate in same;
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> . . . .
>
> 68. That [Respondent-father] has had no personal contacts with his minor child[ren] other than minimal visitation suitable to assist the minor child[ren] in [their] social, physical, psychological or personal development since June 10, 2013;
>
> . . . .

> 70. That [Respondent-father] has not provided any financial support and assistance, and he has provided no personal care for [the children] since the child[ren] came into DSS custody, or prior to the filing of [the] Petition[s];
>
> . . . .
>
> 74. That [Respondent-father] is presently incarcerated for two counts of Intentional Child Abuse [of J.L.S.]; his sentence will keep him in prison until December 2027[.]

Respondent-father argues he did not participate in many of the services required in the case plan upon the advice of his attorneys. He cites *In re T.C.B.*, 166 N.C. App. 482, 487-88, 602 S.E.2d 17, 2021 (2004) to support his assertion it is error to hold his criminal trial strategy against him in his termination hearing.

Respondent-father's reliance on *In re T.C.B.* is misplaced. In the case of *In re T.C.B.,* the respondent was charged with first-degree sexual offense of his minor child. 166 N.C. App. at 486, 602 S.E.2d at 20. The trial court found the respondent's criminal defense attorney advised him he should not attempt to make any contact with his child or the mother until the criminal matters were resolved. *Id.* Prior to the State's dismissal of the criminal charges, the mother petitioned for termination of the respondent's parental rights for willful abandonment. During this same time, a protection plan with the mother and the department of social services prohibited visitation with respondent due to the allegations of abuse. *Id.* at 487, 602 S.E.2d at 20.

Counsel's instructions to the father in *In re T.C.B.*, together with the other limitations, negated the element of willfulness required to terminate the father's parental rights for abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). This Court held the findings of fact made by the district court did not support the conclusion of willful abandonment. *Id.*

Here, DSS is not required to prove willfulness when seeking to terminate Respondent-father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) (neglect). Further, the record reflects Respondent-father refused to participate in the development of the Out-of-Home Family Services Agreement or to even sign the plan, citing the advice of his counsel. Nothing in the record indicates any specific action, contact or support for the children prohibited by Respondent-father's attorney. Respondent-father asserts he did participate in the plan by providing several urine drug screens. Unchallenged trial testimony showed Respondent-father was asked for hair samples and refused to provide them. When Respondent-father finally complied with DSS' request for a hair sample for drug testing in May 2014, the sample was positive for cocaine.

It is well recognized 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) (citation omitted). The record shows that Respondent-father was not incarcerated until August 2014, almost two years after

the juveniles were removed from his care, and only four months before DSS filed the petitions to terminate his parental rights. Respondent-father had nearly two years prior to his incarceration to meet or make progress on his responsibilities as a parent, but failed to do so.

The trial court's findings support its conclusion that there would be a probability of repetition of neglect should the juveniles be returned to Respondent-father's care. These findings demonstrate that Respondent-father failed to provide any personal care to his minor children, and did not undergo a psychological evaluation or participate in counseling. Clear, cogent and convincing evidence supports the trial court's findings, which support its conclusion of law that the grounds of neglect existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent-father's parental rights. Respondent-father's argument is overruled.

C. Remaining Grounds

Respondents both argue the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) to terminate their parental rights. However, because we conclude that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to support the trial court's order, we need not address the remaining ground found by the trial court to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990) (finding of any one of the enumerated grounds is sufficient to support termination).

## IV. Best Interests

Respondent-mother does not challenge the dispositional determination that termination was in the juveniles' best interests. Respondent-father argues the trial court abused its discretion when it determined that termination of his parental rights was in the best interests of the juveniles. We disagree.

### A. Standard of Review

This Court reviews the trial court's best interests determination for abuse of discretion. *In re D.C.*, 236 N.C. App. 287, 292-93, 763 S.E.2d 314, 318 (2014). "We review this decision on an abuse of discretion standard, and will reverse a court's decision only where it is 'manifestly unsupported by reason.'" *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam,* 363 N.C. 368, 677 S.E.2d 455 (2009) (citing *Clark v. Clark,* 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

### B. Bond of Juvenile to Parent

Respondent-father contends the trial court failed to make a finding concerning the bond between him and the juveniles.

At the best interests phase of the hearing,

> The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following *that are relevant*:
>
> (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 (2017) (emphasis supplied).

The trial court made numerous findings of fact regarding the likelihood of adoption of the children, the quality of the relationship between the children and the foster parents, the stability and successes of the children since being placed in the foster parents' care, and the financial well-being of the foster parents. The current foster family has also been approved to adopt all three children, if adoption is an option. These findings are supported by the testimonies of the social worker, the appointed guardian *ad litem*, and one of the foster parents for the children.

Respondent-father does not challenge any of the findings of fact the trial court made regarding the juveniles' best interests. Respondent-father argues the court abused its discretion by omitting consideration of the bond between himself and his children.

Respondent-father asserts Respondent-mother's testimony that after Respondent-father's incarceration, the juveniles asked about him during visitation demonstrates that a strong bond exists between him and the juveniles. The trial court possesses the discretion to weigh and believe the evidence offered and make the findings thereon. *In re Hughes,* 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). The court also possesses the discretion to determine the weight and relevancy, if any, of the factors set forth in N.C. Gen. Stat. § 7B-1110(a). *In re D.H.*, 232 N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014).

With respect to each child and Respondent-father, the court found:

> 68. That Respondent [father] has had no personal contacts with his minor child other than minimal visitation, suitable to assist the minor child in [his or her] social, physical, psychological or personal development since June 10, 2013.
> . . . .
>
> 74. That [Respondent-father] is presently incarcerated for two counts of Intentional Child Abuse of [J.L.S.]; his sentence will keep him in prison until December 2027.

These findings show the trial court did, in fact, consider the bond between the children and Respondent-father. In his brief, Respondent concedes he will never be able to have care and custody of his children before they become adults. The Respondent-father will not be released from prison until after J.N.S. will have reached the age of majority. A.S. will be 17 years old, and J.L.S. will be 15 years old. Upon these facts, Respondent-father has failed to show the omission of an express

finding that a strong bond exists between Respondent-father and his children is an abuse of discretion to warrant a new hearing.

V. Conclusion

Grounds exist to terminate both Respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). The trial court's orders terminating both parents' parental rights are affirmed. The trial court did not abuse its discretion when it determined termination of Respondent-father's parental rights was in the juveniles' best interests. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).