IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1073

Filed: 3 April 2018

Stokes County, No. 16 JT 149

IN RE: D.M.P., A MINOR JUVENILE

Appeal by respondent-father from orders entered 15 and 26 June 2017, *nunc pro tunc* 16 May 2017, by Judge Charles M Neaves, Jr., in Stokes County District Court. Heard in the Court of Appeals 19 February 2018.

Gretchen Kirkman for petitioner-mother appellee.

Mercedes O. Chut, for respondent-father appellant.

BRYANT, Judge.

Where the findings of fact as stated in the trial court's adjudication order were supported by clear, cogent and convincing evidence, we affirm the adjudication of neglect. Where the evidence supported the findings of fact which in turn support the conclusion that it was in the best interests of the minor child to terminate respondent's parental rights, we affirm the trial court's amended disposition order terminating respondent's parental rights.

On 21 December 2016, petitioner-mother filed a private petition to terminate respondent-father's parental rights to their minor child. Petitioner alleged that both she and the minor child had been residents of Stokes County for the six months preceding the filing of the petition. The matter came on for hearing in Stokes County District Court 16 May 2017, the Honorable Charles M. Neaves, Jr., Judge presiding. Petitioner and respondent's mother were present.

Petitioner and respondent never married but were in a dating relationship that lasted eight months ending in November 2013. The relationship produced one child born in August 2014. However, respondent never saw the minor child. At the termination hearing, petitioner testified that respondent punched her in the stomach while she was pregnant. She did not seek a restraining order; instead, she moved and did not disclose to respondent the location of her new residence or her new cell phone number. However, she did continue to work in the same place of employment. On 23 April 2014, some four months before the child was born, respondent was incarcerated "[b]ecause he almost killed his dad with an ax for cutting off his cell phone." He remained incarcerated until he was paroled on 17 December 2016. While petitioner was pregnant, respondent sent letters to petitioner (care of petitioner's mother or respondent's mother). But after the minor child was born, petitioner received only five. Petitioner testified that between November 2014 and December 2016, she did not receive any letters, presents, or cards from respondent, and

respondent did not request to speak to petitioner or the minor child. However, respondent's mother testified that she last attempted to deliver a letter to petitioner in 2015. "[Petitioner] made it very clear she didn't want anything to do with [respondent's mother], [respondent's father], or [respondent]." And respondent's mother chose not to harass petitioner at her place of employment.

On 27 September 2016, the Stokes County District Court entered a temporary custody order granting petitioner legal and physical custody, but allowed respondent to communicate with the minor child by letter and by telephone, as allowed by the Department of Adult Correction. Petitioner testified that respondent had her mother's address and phone number if he wanted to contact her. Respondent did not send letters or call but did send one text message to petitioner's cell phone in February 2017 indicating that he may not be able to attend a court hearing. Following the 27 September 2016 temporary custody order, which allowed him to communicate with the minor child, respondent did not make a phone call or write a letter.

Respondent's mother testified that despite the lack of contact with petitioner, respondent continued to inquire about the minor child throughout the period of his incarceration and sent a letter for petitioner and the minor child just about every month in 2015 and 2016: "January, February, March, April, May." Respondent's mother attempted to contact petitioner several times by telephone, but petitioner

never answered or returned the phone call. Yet, following his release from incarceration and in the five months leading up to the termination hearing, petitioner testified that respondent did not ask to see his minor child.

Following the termination hearing, the trial court entered a 15 June 2017 adjudication order, *nunc pro tunc* 16 May 2017. The court noted that respondent had not filed an answer to petitioner's petition to terminate his parental rights or otherwise pled in response and was not present for the termination hearing, though counsel presented evidence on his behalf. The court made the following finding of fact:

> Respondent/father has had the ability to visit, parent and contact the minor child but has willfully failed to do so. . . . Respondent/father at all times has known how to reach the petitioner and communicate with her and the minor child but he has chosen not to do so. . . . Respondent/father has not filed a motion to modify the current custody order since its entry.

The court found that the minor child was a "neglected juvenile" within the meaning of our General Statutes, section 7B-101, and concluded that based on clear, cogent, and convincing evidence, there were grounds upon which to terminate respondent's parental rights pursuant to section 7B-1111(a)(1) ("The parent has abused or neglected the juvenile").

Following a dispositional hearing which began immediately after the adjudication hearing, petitioner testified that she and the minor child were living in

a residence with her fiancé and his two children. The couple shared the household expenses and the minor child had developed a strong bond with not only petitioner's fiancé but his two children. The minor child called petitioner's fiancé "daddy." In an amended order on disposition entered 26 June 2017, *nunc pro tunc* 16 May 2017, the trial court ordered that in the best interests of the minor child the respondent's parental rights be terminated. Respondent appeals.

On appeal, respondent challenges the trial court's (I) findings of fact set out in support of its conclusion of neglect and (II) conclusion that termination of respondent's parental rights is in the minor child's best interest.

Termination of Parental Rights

> A termination of parental rights proceeding consists of two phases. In the adjudicatory stage, the petitioner . . . has the burden of proving by clear, cogent, and convincing evidence at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B–1111. . . .
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> If [the petitioner] meets its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and must consider whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B–1110(a) (2001). It is within the trial court's discretion to terminate parental rights upon a finding that it would be in the best interests of the child.

In re Shermer, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406–07 (2003) (citing *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001)).

I

Respondent argues that the trial court did not have sufficient evidence to support the findings of fact establishing neglect. Respondent contends that the record contains no evidence that any lack of contact with petitioner or the minor child was a willful, purposeful act. We disagree.

> We review the trial court's adjudication to determine if its findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. Findings of fact supported by competent evidence are binding on appeal even if evidence has been presented contradicting those findings. Similarly, the trial court's findings of fact that are not challenged by the appellant are binding on appeal. However, the trial court's conclusions of law are reviewable de novo on appeal.

In re E.L.E., 243 N.C. App. 301, 305, 778 S.E.2d 445, 449 (2015) (citations omitted).

Pursuant to our General Statutes,

> [t]he court may terminate the parental rights upon a finding of one or more of the following:
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> > (1) The parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a) (2017). Within N.C. Gen. Stat. § 7B-101, a neglected juvenile is defined in pertinent part 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 . . . ." N.C. Gen. Stat. § 7B-101(15) (2017).

"Thus, neglect is more than a parent's failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact." *In re C.L.S.*, 245 N.C. App. 75, 78, 781 S.E.2d 680, 682 (citation omitted), *aff'd*, 369 N.C. 58, 791 S.E.2d 457 (2016).

In deciding whether a child is neglected for purposes of terminating parental rights, "[t]he 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 Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). "[W]here, as here, 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." *E.L.E.*, 243 N.C. App. at 307, 778 S.E.2d at 450 (citation *omitted*). "[T]he trial court must also consider evidence of changed conditions in light of the history of neglect by the parent and the probability of a repetition of neglect. In addition, visitation by the parent is a relevant factor in such cases." *Shermer*, 156 N.C. App. at 286–87, 576 S.E.2d at 407 (citation omitted). "[W]hile we acknowledge that incarceration [may] limit[] [a parent's] ability to show affection, it is not an excuse for [the parent's] failure to show 'interest in the children's welfare by whatever means available.' A father's neglect of his child cannot be negated by incarceration alone." *In re D.J.D.*, 171 N.C. App. 230, 240, 615 S.E.2d

26, 33 (2005) (quoting *Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003)).

Respondent argues the trial court's findings of fact do not indicate that his failure to communicate with the minor child was willful. He was incarcerated for a period beginning before the minor child's birth until four days before petitioner filed the petition for termination of parental rights, and during the five months between his release and the termination hearing petitioner shielded the minor child from respondent.

In re P.L.P. addresses a respondent-father's contention that a termination of his parental rights based on neglect was not supported by clear, cogent, and convincing evidence on the basis that he was incarcerated and failed to communicate or attempt to communicate with his minor child, P.L.P. 173 N.C. App. 1, 9–10, 618 S.E.2d 241, 246–47 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006). In 1999, the respondent-father was arrested and subsequently convicted of first-degree murder, receiving a sentence of fourteen to eighteen years. *Id.* at 3–4, 618 S.E.2d at 243. The petition to terminate respondent-father's parental rights was filed by the Buncombe County Department of Social Services ("DSS") in September 2003. *Id.* at 4, 618 S.E.2d at 243. This Court reasoned that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *Id.* at 10, 618 S.E.2d at 247 (citation omitted).

> [The respondent-father] testified that he had written to [the minor child] P.L.P. from jail, but had stopped in 2003. In addition, he stated that he spoke with P.L.P. approximately five times in 2003. According to [the respondent-]father, he sent letters to [the] mother "up until the time Social Services took custody" and that "[the mother] probably has every one of them." Thereafter, [the respondent-]father continued, DSS offered to give address information to him for his letters but did not do so. He did not send any letters to DSS or call DSS on his own even though he had the contact information for Social Services, "because every time I'm in court, they spend most of their time trying to keep me away from [P.L.P.], instead of trying to reunite me with her in any way." A social worker testified that, in cases involving other incarcerated parents, she forwards mail from them to their children. Furthermore, according to the record of DSS, [the respondent-]father initiated no independent efforts to send letters to the child, and made no efforts to stay in contact with the assigned DSS worker. In fact, he had "never spoken with," written, or contacted "in any way" [the] social worker . . . , who had been assigned to the case since May 2003.

Id. at 13, 618 S.E.2d at 248. On this evidence,

> the trial court found [by clear, cogent and convincing evidence], *inter alia*, that father (1) "could have written" but did not do so; (2) "made no efforts to provide anything for the minor child"; (3) "has not provided any love, nurtur[ing] or support for the minor child"; and (4) "would continue to neglect the minor child if the child was placed in his care[.]"

Id. at 10–11, 618 S.E.2d at 247. This Court held that the trial court's findings of fact were supported by clear, cogent and convincing evidence and that those findings supported the conclusion that the respondent-father neglected his child. *Id.* at 13,

618 S.E.2d at 248; *cf. Shermer*, 156 N.C. App. 281, 576 S.E.2d 403 (reversing a trial court order terminating the respondent-father's parental rights entered on the basis of neglect, where, though incarcerated, the respondent-father repeatedly asserted that he did not want his parental rights terminated and continued to communicate with his children by letter).

In its 15 June 2017 adjudication order, the trial court made several challenged findings of fact regarding respondent-father's failure to communicate with petitioner or the minor child. In essence, respondent contends that because petitioner indicated her position that she would not allow respondent to communicate with her or the minor child, the court's findings that respondent's failure to communicate with petitioner or the minor child was willful cannot be supported. However, we read the trial court's findings of fact as a reflection of respondent's willful failure to even attempt to communicate with petitioner and the minor child.

> 8. . . . [S]ince the minor child was born the respondent/father has only written the petitioner approximately five letters while in prison. That before the most recent letter, the respondent/father's last contact with the petitioner / mother was by letter in November 2014. Prior to the respondent/father being released from prison in December, 2016 he sent a letter to the petitioner. He did not ask about the health and welfare of the minor child , nor did he request to be able to talk to the child by phone.
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> 9. That . . . respondent/father since being released from prison on December 17, 2016 has not contacted the petitioner asking about the child, has not notified the petitioner of his address, has not given the petitioner his

phone number, nor has he offered any money or supplies for the child. . . . [R]espondent/father texted . . . petitioner on February 8, 2017 telling her he may not be in court on February 9, 2017 because of his father.

10. That the petitioner filed a complaint for custody on September 7, 2016. A temporary order was entered allowing the respondent/father to write letters to the minor child and have phone contact with the minor child. That . . . respondent/father has not written a letter to the minor child nor has he attempted any telephone contact since the order was entered. . . .

11. That the Respondent/father has not had any contact with the minor child since November, 2014. The Respondent/father has not requested to visit with the minor child. The Respondent/father at all times since December 17, 2016 has had the ability to visit with and parent the minor child.

13. [sic] The Respondent/father has had the ability to visit, parent and contact the minor child but has willfully failed to do so. The Respondent/father at all times has known how to reach the petitioner and communicate with her and the minor child but he has chosen not to do so. . . .

14. That the respondent/father has neglected the juvenile. The juvenile is a neglected juvenile within the meaning of NCGS § 7B-101.

. . . .

18. Respondent's conduct is willful and intentional and shows a settled purpose to forego all parental duties and relinquish all parental claims to the minor child.

20. [sic] The respondent/father has willfully not consistently cared for the minor child emotionally, physically or financially.

> . . . .
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> 24. The petitioner has worked at the Sheetz convenience store since the parties dated. The respondent, although he knew she was working there, has not contacted the store to request information about the minor child.
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> 25. The minor child at issue herein attends the same daycare where the respondent/father's other child attends daycare. The respondent/father knew where the minor child at issue herein attended daycare. The respondent/father has not contacted the daycare nor gone by the daycare to visit with the minor child.
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> 26. The petitioner's mother has the same phone number that she had when the parties were dating. The petitioner's mother lives in the same residence that she lived in when the parties were dating. The respondent/father knew where the residence was and her phone number, however, the respondent/father has not contacted the petitioner's mother to ask how the minor child was doing or to request visitation.

We hold that the trial court's findings of fact are supported by clear, cogent and convincing evidence and are thus binding on appeal. *See E.L.E.*, 243 N.C. App. at 305, 778 S.E.2d at 449. Furthermore, we hold that the findings support the trial court's conclusion that the minor child was a neglected juvenile within the meaning of section 7B-101. *See* N.C. Gen. Stat. § 7B-101(15) ("[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 . . . ."). Therefore, we affirm the trial court's ruling that there were sufficient grounds to terminate respondent's parental rights to the minor child pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2017) ("The court may

terminate the parental rights upon a finding . . . [t]he parent has abused or neglected the juvenile . . . within the meaning of G.S. 7B-101."). Accordingly, respondent's argument is overruled.

II

Respondent next argues that the trial court abused its discretion during the dispositional phase by finding that termination of respondent's parental rights is in the minor child's best interest. We disagree.

> At the dispositional stage, "the best interests of the child are considered. There, the court shall issue an order terminating the parental rights unless it further determines that the best interests of the child require otherwise." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001); *see also* G.S. § 7B–1110(a). The fact that "the parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected. . . . 'The welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield.' " *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252 (quoting *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967)).

P.L.P., 173 N.C. App. at 8–9, 618 S.E.2d at 246.

Respondent contends that several of the trial court's findings of fact are not supported by sufficient evidence. Respondent challenges the trial court's findings that petitioner and her fiancé have sufficient income to meet the needs of the minor child and the fiancé's other two children, that petitioner has paid all the minor child's

expenses since birth, that petitioner has a stable life and home, and that petitioner "is not in need of child support from respondent/father."

However, upon review of the record evidence, it appears that the trial court had sufficient evidence to support each of the challenged findings of fact. While petitioner received public assistance to help with her bills, she lived in a double-wide trailer with her fiancé and three children that "I'll have . . . paid off in August . . . ." Petitioner and her fiancé managed the expenses of the household together, including the minor child's daycare expenses; she and her fiancé each owned a vehicle that was paid off; and when petitioner and her fiancé both have to work in the evening, petitioner's mother cares for the minor child. Petitioner sought to terminate respondent's parental rights as a step to allowing her fiancé to adopt the minor child. The minor child had a strong bond with the fiancé's children and referred to petitioner's fiancé as "daddy" because "[t]hat's all he's ever known." Petitioner's fiancé accompanied her to the termination hearing. On the other hand, respondent does not have a bond with the minor child and would not know the minor child if he saw him. And in its order, the court noted "respondent/father's choice not to be in court is strong evidence that . . . respondent/father has not intent to aid in the parenting of the minor child." We uphold the trial court's findings of fact.

Moreover, we hold that considering the welfare of the minor child as paramount, the trial court has sufficient findings of fact to conclude that terminating

respondent's parental rights is in the minor child's best interest. *See id.* Accordingly, we affirm the trial court's 26 June 2017, *nunc pro tunc* 16 May 2017, order of disposition terminating respondent's parental rights.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).