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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-956

Filed: 3 April 2018

Catawba County, No. 16 JT 91

IN THE MATTER OF: T.D.H., a minor child.

Appeal by Respondent from order entered 17 May 2017 by Judge Wesley W. Barkley in District Court, Catawba County. Heard in the Court of Appeals 8 March 2018.

Wilson, Lackey & Rohr, P.C., by Timothy J. Rohr, for Petitioner-Appellee Mother.

Leslie C. Rawls for Respondent-Appellant Father.

STROUD, Judge.

Respondent-Father (“Respondent”) appeals from order terminating his parental rights as to the minor child, T.D.H. Respondent argues that the trial court erred in concluding that grounds existed to terminate his parental rights and that the trial court abused its discretion in concluding that terminating his parental rights was in T.D.H.’s best interest. We agree that the trial court erred in concluding that grounds existed to terminate Respondent’s parental rights as to T.D.H.

I. Factual and Procedural History

T.D.H. was born to Respondent and Petitioner-Mother (“Petitioner”) in 2005. Respondent and Petitioner never married, and T.D.H. has resided with Petitioner since his birth. Respondent has had intermittent contact with Petitioner and T.D.H., but has been unsuccessful in attempts to foster a parental relationship. Respondent filed a complaint for child custody on 8 April 2016. Respondent claimed Petitioner had “a long history of alienating [Respondent] and his family from [T.D.H.], going to such great lengths as to avoid any and all contact with [and] between [Respondent] and his family and [T.D.H.]” Respondent sought temporary and permanent physical and legal custody of T.D.H. Shortly thereafter, on 18 May 2016, Petitioner filed a petition to terminate Respondent’s parental rights. The trial court entered an order on 17 May 2017, in which it determined that grounds existed to terminate Respondent’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and (7) (abandonment) (2017). The trial court further concluded it was in T.D.H.’s best interest that Respondent’s parental rights be terminated. Accordingly, the trial court terminated Respondent’s parental rights. Respondent appeals.

II. Grounds for Termination of Parental Rights

N.C. Gen. Stat. § 7B-1111 (2017) sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). “The standard of appellate review is whether the trial court’s findings

of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law.” *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). We review the trial court’s conclusions of law *de novo*. *In re S.N., X.Z.*, 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).

A. *N.C. Gen. Stat. § 7B-1111(a)(7) - Abandonment*

Respondent first argues the trial court erred in concluding that termination of his parental rights was justified based upon the ground of abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). This subsection provides for termination of parental rights where “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]” *Id.* “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation.” *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal quotations and citations omitted). “Although the trial court may consider a parent’s conduct outside the six-month window in evaluating a parent’s credibility and intentions, the ‘determinative’ period for adjudicating willful abandonment is the six consecutive months preceding the filing

of the petition.” *In re D.M.O.*, __ N.C. App. __, 794 S.E.2d 858, 861 (2016) (internal citations, quotation marks, and alterations omitted).

Here, the relevant six-month period was between 18 November 2015 and 18 May 2016. During that period of time, on 8 April 2016, Respondent filed a civil custody action in which he sought primary legal and physical custody of T.D.H. Respondent’s attempt to gain custody of T.D.H. demonstrates that he did not intend to forego all parental duties and relinquish all parental claims to T.D.H., and “undermines” the trial court’s determination that he willfully abandoned T.D.H. *See In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012) (“Respondent’s institution of a civil custody action undermines the trial court’s finding and conclusion that he willfully abandoned the juveniles . . . and cannot support a conclusion that he had a willful determination to forego all parental duties and relinquish all parental claims to the juveniles.”). Consequently, we conclude the trial court erred by determining that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(7) to terminate Respondent’s parental rights.

B. *N.C. Gen. Stat. § 7B-1111(a)(1) - Neglect*

We next address the trial court’s finding of neglect as a ground for termination. Our juvenile code provides for termination based upon a finding that “[t]he parent has . . . neglected the juvenile” within the meaning of N.C. Gen. Stat. § 7B-101 (2017). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined as 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 lives in an environment injurious to the juvenile's welfare[.]” N.C.G.S. § 7B-101(15) (2017) (emphasis added).

In 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. . . . [W]hen, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 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 those circumstances, a 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) (internal citations and quotation marks omitted). Thus, a trial court may terminate parental rights based upon prior neglect of the juvenile only if “the trial court finds by clear and convincing evidence a probability of 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).

Here, the trial court did not make any findings regarding the two-pronged analysis described in *In re L.O.K.* The trial court's order contains no findings that T.D.H. would likely be neglected if returned to Respondent's custody. Instead, it appears the trial court's finding of neglect was based on current neglect due to Respondent's lack of contact with T.D.H. or involvement in his life. Specifically, the trial court made findings of fact that Respondent: (1) made little effort to visit with

T.D.H. or maintain a relationship with him; (2) was not involved in T.D.H.'s schooling or extra-curricular activities; (3) would only call T.D.H. sporadically and only spoke with him a few times; and (4) did not have a significant bond with T.D.H. and last visited with him in 2012.

Although not explicitly stated by the trial court, it is apparent from the trial court's findings of fact that the trial court's adjudication was based on neglect by abandonment. A trial court can terminate parental rights based on neglect by abandonment under N.C.G.S. § 7B-1111(a)(1) if the court finds that the parent's conduct manifested a willful neglect and failure to perform his natural and legal parental responsibilities. *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015). Thus, in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings reflecting the fact that the parent has acted in a way that "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child" as of the time of the termination hearing. *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009).

Previously herein, we analyzed the trial court's determination that Respondent abandoned the minor child pursuant to N.C.G.S. § 7B-1111(a)(7). That same analysis is relevant to the determination of whether Respondent neglected T.D.H. by abandonment. Respondent's attempt to gain custody of T.D.H. in 2016 demonstrates that Respondent did not intend to forego all parental duties and relinquish all

parental claims to T.D.H. at the time of the termination hearing. *See In re S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51. We similarly conclude that the filing of the civil custody action undermines the trial court's determination that Respondent neglected T.D.H. by abandonment. Therefore, we hold that the trial court erred by concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate Respondent's parental rights.

III. Conclusion

We hold the trial court erred in terminating Respondent's parental rights based upon the grounds of neglect and willful abandonment. We therefore reverse the trial court's order. Respondent additionally challenges the trial court's dispositional conclusion that termination of his parental rights was in T.D.H.'s best interest. However, because we have reversed the order based on the adjudicatory grounds, we need not address Respondent's final argument on appeal. *See In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002).

REVERSED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).