IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1235

Filed: 3 July 2018

Mecklenburg County, No. 2014 JT 693

IN THE MATTER OF: E.A.V., Minor Child.

Appeal by Respondent-Father from order entered 7 August 2017 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 4 June 2018.

Mecklenburg County Department of Social Services, Youth and Family Services, by Senior Associate County Attorney Keith S. Smith, for Petitioner-Appellee.

David A. Perez for Respondent-Appellant Father.

Ellis & Winters LLP, by Emily E. Erixson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Father ("Respondent") appeals from order entered 7 August 2017 terminating his parental rights as to his minor child, E.A.V. E.A.V.'s mother surrendered her parental rights to E.A.V. and is not a party to this appeal.

I. Factual and Procedural History

Youth and Family Services ("YFS") first became involved with E.A.V. on 5 June 2013, when it received a report that Respondent was involved in a domestic violence incident with E.A.V.'s mother while E.A.V. was present. As a result, Respondent was required to attend New Options for Violent Actions ("NOVA"), a domestic violence program. However, Respondent failed to attend the program. In 2011, as a result of a domestic violence incident with a former girlfriend, Respondent had participated in the NOVA program, but was removed from the program due to excessive absences.

E.A.V.'s mother was incarcerated on 15 May 2014 for a domestic violence incident with her roommate, and Respondent received custody of E.A.V. E.A.V.'s mother was released from prison and took custody of E.A.V. on 29 May 2014, and moved in with family friends. On 5 June 2014, the family friends agreed to provide a kinship placement for E.A.V. YFS received a report of another domestic violence incident between Respondent and E.A.V.'s mother on 19 June 2014.

The kinship placement providers were unable to sustain stable housing and had received no financial support from either Respondent or E.A.V.'s mother. As a result, YFS filed a juvenile petition on 1 October 2014, alleging E.A.V. was a neglected and dependent juvenile, and he was placed in YFS custody. The trial court adjudicated E.A.V. neglected and dependent on 9 December 2014. A case plan was developed for Respondent that required him to obtain a substance abuse, mental

health, and domestic violence assessment, take parenting classes, and obtain and maintain stable employment and housing.

Respondent participated in the domestic violence assessment on 30 December 2014. The assessor stated that Respondent denied having any domestic violence incidents since his completion of the NOVA program in 2011 and therefore additional domestic violence programs were unnecessary. However, Respondent had been involved in the 5 June 2013 domestic violence incident and the 19 June 2014 incident.

Respondent participated in substance abuse treatment and cognitive behavioral therapy beginning 28 May 2015. During his time in the program, Respondent tested positive for illegal drug use on two occasions. The counselors in that program reported that Respondent's participation was "inconsistent."

While E.A.V. was in YFS custody, Respondent was allowed weekly visits with him, but Respondent's visitations were inconsistent. The visits were initially supervised by YFS social workers, but were later changed to unsupervised visits in Respondent's home. The trial court later changed Respondent's visitations to supervised visits, but left open the possibility that, if Respondent addressed several concerns about his living conditions, unsupervised visitation could be reinstituted. Respondent was also required to pay fifty dollars per month in child support while E.A.V. was in YFS custody. At the time, Respondent was employed by a plumbing company and was paid between $1,000.00 and $1,200.00 per month.

Respondent was charged with possession of a firearm by a felon and habitual misdemeanor assault on 12 October 2016 and convicted of those charges on 30 March 2017. Respondent testified that he was sentenced to seventeen to thirty months. YFS filed a motion in the cause to terminate parental rights on 5 January 2017 alleging grounds under N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (3) (2015). The trial court held a pre-trial hearing on 17 February 2017 and found that there were no additional issues that needed to be addressed before proceeding with the termination of Respondent's parental rights. YFS filed a petition to terminate parental rights on 7 April 2017 alleging grounds existed to terminate Respondent's parental rights as to E.A.V. under N.C.G.S. § 7B-1111(a)(1), (2), and (3). The trial court held a hearing on termination of parental rights on 30 June 2017 ("the TPR hearing"). The trial court entered an order terminating Respondent's parental rights as to E.A.V. on 7 August 2017 pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (3). Respondent appeals.

Testimony at the TPR hearing was that Respondent was incarcerated from 12 October 2016 until the termination hearing on 30 June 2017. Respondent was not employed while incarcerated because he was allegedly disabled; however, the trial court found that, prior to his incarceration, Respondent was employed and physically able to provide for E.A.V.'s child support. Respondent did have a bank account while incarcerated, but the highest amount in the account at any given time was around

forty dollars. The trial court found Respondent did not contribute to E.A.V.'s cost of care either before or during incarceration.

While incarcerated, Respondent claimed he completed a twenty-eight-day substance abuse program; however, Respondent's completion of the program was never confirmed by YFS social workers and the trial court made no findings regarding its completion. The YFS social worker assigned to E.A.V.'s case testified that Respondent never attended domestic violence classes or parenting classes. However, Respondent testified:

> [F]rom the first day I got there to the second day I got there I'm putting in requests to do my GED or do the substance abuse program and domestic violence.

Respondent offered no evidence to show that he began or completed any domestic violence classes or parenting classes while incarcerated, and no testimony was offered at the termination hearing about the availability of those classes. While Respondent was incarcerated he did not write or call E.A.V. Social workers testified that envelopes and writing materials were provided to Respondent to enable him to write E.A.V., but that he did not use them. Respondent never sent E.A.V. birthday or holiday gifts. The guardian ad litem assigned to E.A.V.'s case testified that the parental bond between Respondent and E.A.V. was weak.

II. Analysis

Termination of parental rights proceedings are conducted in two stages: adjudicatory and dispositional. *See In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011). In the adjudicatory stage, the trial court must determine whether any enumerated ground exists to terminate parental rights under N.C. Gen. Stat. § 7B-1111(a) (2015). *See In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). In the dispositional stage, the trial court must determine whether terminating parental rights is in the best interest of the child. *Id.* at 98, 564 S.E.2d at 602.

The trial court found grounds to terminate Respondent's parental rights as to E.A.V. under N.C.G.S. § 7B-1111(a)(1), (2), and (3). On appeal, this Court must determine whether there existed clear, cogent, and convincing evidence of the existence of one of the enumerated grounds under N.C.G.S. § 7B-1111(a). *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). If we determine the findings of fact in the trial court's order terminating parental rights support one of the enumerated grounds for termination, we need not review the remaining challenged grounds. *In re A.L.*, 245 N.C. App. 55, 61, 781 S.E.2d 856, 860 (2016).

"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 (2009) (internal quotation marks and citation omitted). Unchallenged findings of fact "are conclusive on appeal

and binding on this Court." *Id.* at 532, 679 S.E.2d at 909. "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) (internal quotation marks and citation omitted).

Respondent first challenges the trial court's determination that grounds existed to terminate his parental rights as to E.A.V. under N.C.G.S. § 7B-1111(a)(1) based on neglect. N.C.G.S. § 7B-1111(a)(1) provides for the termination of parental rights upon a finding that the parent has abused or neglected the juvenile. "The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of [N.C.]G.S. 7B-101 or a neglected juvenile within the meaning of [N.C.]G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1). The trial court found E.A.V. to be a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15).

N.C.G.S. § 7B-101(15) defines a neglected juvenile as one "who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" "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 D.J.D.*, 171 N.C. App. 230, 240, 615 S.E.2d 26, 33 (2005). "A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). Where, as here, the child has not been in the custody of the parent,

it would be impossible to show that the child is presently neglected by the parent; therefore, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re C.M.P.*, ___ N.C. App. ___, ___, 803 S.E.2d 853, 858 (2017) (citing *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984)). If a prior adjudication of neglect is considered, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (citation omitted).

The trial court made the following findings of fact relevant to E.A.V. being a neglected juvenile:

> 9. [E.A.V.] was adjudicated neglected and dependent on December 9, 2014. The respondents were both present on this date. The disposition hearing occurred immediately after [E.A.V.] was adjudicated.
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> 10. During disposition, the court adopted case plans for the respondents. The case plans were adopted by the court so that the respondents could reduce or eliminate the barriers that were in place and prevented them from properly, safely, and appropriately parenting the juvenile.
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> 11. As part of his case plan, [Respondent] was required to address the parents' ongoing domestic violence concerns, he was to submit to a FIRST assessment and comply with all recommendations, and he was to obtain and maintain safe, stable and sufficient income and housing.
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> 12. On December 8, 2015, the [c]ourt conducted a permanency planning hearing (PPH) wherein the [c]ourt reviewed the respondent father's progress. He was having

inconsistent contact with [E.A.V.], was involved with DWI court, and had housing. He had not engaged with DV counseling services. . . . .

13. On March 23, 2016, the [c]ourt conducted the first subsequent PPH wherein the [c]ourt again reviewed the respondent father's progress. He tested positive for amphetamines on December 23, 2015 and positive for cocaine on March 16, 2016. He had not engaged in DV counseling. Concerns persisted about the parents maintaining contact despite their DV history and despite being ordered to have no contact with each other.

14. On July 26, 2016 the [c]ourt conducted the second subsequent PPH wherein the [c]ourt again reviewed the respondent father's progress. He was inconsistent with visiting [E.A.V.] and remained unengaged in DV services.

15. On November 1, 2016 . . . . [Respondent] was incarcerated . . . . He had not made any progress on addressing DV concerns or substance abuse issues.

16. On March 28, 2017 . . . . [Respondent] remained incarcerated on the aforesaid charges. He had not made any progress on addressing DV concerns or substance abuse issues. He had not had a visit with [E.A.V.] since prior to his incarceration.

17. As of the TPR [hearing], [Respondent] was not in compliance with the major aspects of his case plan. . . . . He has continued to engage in criminal and deviant conduct and has failed to accept DV services. He has had no demonstrable change in his behavior.

. . . .

19. [Respondent] has not completed a case plan such that YFS could recommend that [E.A.V.] be returned to his care. He is not currently in a position to provide care for [E.A.V.] Moreover, [Respondent] has not addressed many of the

> needs/issues that led to [E.A.V.] coming into YFS custody in the first place (e.g. DV, housing). As a result, [E.A.V.] remains in foster care and there is a high probability of a repetition of neglect.
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> 20. That as of the date of the TPR [hearing], YFS has expended $17,696.96 to maintain [E.A.V.] in an out of home placement. No portion of this cost of care was paid for by [Respondent]. Nor has he contributed any money to defray the cost of out of home placement. . . .
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> 22. . . . . Prior to his incarceration, [Respondent] was inconsistent with visiting [E.A.V.]. [Respondent] has not written any letters to [E.A.V.] since he has been incarcerated. Similarly, he has not visited with [E.A.V.] since his arrest in October 2016. [Respondent] has not nurtured a parent/child relationship. He has willfully withheld his presence and affection from [E.A.V.] who has been in YFS custody for 31 months. [E.A.V.] does not bring up his father or discuss him. [E.A.V.] has a weak bond with [Respondent].

Respondent argues findings of fact 15, 16, 17, and 19 are erroneous; therefore, the remaining findings of fact are binding on appeal. *In re S.C.R.*, 198 N.C. App. at 532, 679 S.E.2d at 909. The trial court's findings of fact are binding on appeal even if evidence contradicting the finding has been presented, as long as there is competent evidence to support them. *In re N.B.,* 195 N.C. App. 113, 116, 670 S.E.2d 923, 925 (2009). We note that incarceration alone cannot be used to either excuse Respondent's lack of progress in eliminating the conditions that led to E.A.V.'s prior adjudication of neglect or as the trial court's basis for its adjudication. *See In re*

M.A.W., 370 N.C. 149, 804 S.E.2d 513 (2017) ("Our precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.'").

In regard to finding of fact 15, Candice Bolder ("Ms. Bolder"), the social worker assigned to E.A.V.'s case, testified at the TPR hearing that, as of 1 November 2016, Respondent had made no progress in his substance abuse treatment during his incarceration. She further testified that Respondent had made no progress with domestic violence classes. In support of finding of fact 16, Ms. Bolder also testified that, as of 28 March 2017, Respondent had made no progress in completing domestic violence training. She also testified Respondent claimed he was attending a twenty-eight-day substance abuse program provided by the Mecklenburg County jail system, but that she had received no confirmation of Respondent's attendance. Finally, as to findings of fact 17 and 19, Ms. Bolder testified that, as of the time of the TPR hearing, Respondent had made no progress in obtaining domestic violence services. She testified that, although Respondent was on a list to begin substance abuse treatment, he had not done so at the time of the TPR hearing.

In *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012), this Court addressed a similar factual situation. In that case, the guardian ad litem filed a petition to terminate the parental rights of an incarcerated father under N.C.G.S. § 7B-1111(a)(1), (2), (3), (5), and (6). *Id.* at 25, 721 S.E.2d at 268. In *J.K.C.*, this Court

upheld the trial court's determination that the guardian ad litem had failed to show by clear, cogent, and convincing evidence that grounds existed to terminate the father's parental rights. *Id.* at 30, 721 S.E.2d at 270. To support a finding of neglect, the guardian ad litem pointed to the fact that the father had failed to enroll in domestic violence classes while incarcerated. *Id.* The trial court pointed out that testimony showed that no such classes were offered in the prison where the father had been incarcerated. *Id.*

In the present case, the trial court made no findings of fact concerning the availability of domestic violence or substance abuse programs in the prison. Without a finding of fact that the programs were made available to Respondent, Respondent's failure to participate in them cannot be used to support a termination of his parental rights. *See In re M.A.W.*, 370 N.C. 149, 804 S.E.2d 513.

In *In re P.L.P.*, 173 N.C. App. 1, 618 S.E.2d 241 (2005), this Court upheld an adjudication of neglect under N.C.G.S. § 7B-1111(a)(1) where the respondent-father was incarcerated at the time of his TPR hearing. In *In re P.L.P.*, the trial court determined the respondent-father "(1) 'could have written' but did not do so; (2) 'made no efforts to provide anything for the minor child[;]' (3) 'ha[d] 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. "[W]hile incarceration may limit a parent's ability 'to show affection, it is not an

excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone.'" *In re C.L.S.*, 245 N.C. App. 75, 78, 781 S.E.2d 680, 682 (2016) (citing *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33). *See In re Bradshaw*, 160 N.C. App. 677, 587 S.E.2d 83 (2003) (affirming adjudication of neglect where respondent did not attempt to "convey love and affection for the minor child" while incarcerated and failed to provide any financial support for the child).

Similarly, in the case before us, there was testimony that Respondent sent no letters and made no phone calls to E.A.V. while he was incarcerated, despite having the ability to do so. Respondent was inconsistent with his visitation with E.A.V. prior to his incarceration and had no visits while incarcerated. The guardian ad litem testified that E.A.V. never brought up Respondent and had no apparent bond with Respondent. Respondent failed to contribute any money to provide for E.A.V. during the entirety of E.A.V.'s time in YFS custody, despite having the financial ability to do so. Respondent failed to provide birthday gifts or holiday gifts for E.A.V. There was ample, competent evidence to support the trial court's findings of fact and the findings of fact support the trial court's adjudication of neglect under N.C.G.S. § 7B-1111(a)(1). Having determined that there was at least one ground to support the termination of Respondent's parental rights as to E.A.V., it is unnecessary to address the remaining grounds challenged in Respondent's brief.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).