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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-655

Filed: 16 April 2019

Cumberland County, No. 13 JT 584

IN THE MATTER OF: S.H.J.

Appeal by respondent-father from order entered 29 March 2018 by Judge Tiffany M. Whitfield in Cumberland County District Court. Heard in the Court of Appeals 14 March 2019.

Elizabeth Kennedy-Gurnee for petitioner-appellee Cumberland County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-appellant father.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

BRYANT, Judge.

Respondent, the father of the juvenile S.H.J. (“Sara”) ¹, appeals from an order terminating his parental rights. We affirm.

On 25 November 2013, the Cumberland County Department of Social Services (“DSS”) filed a petition alleging that Sara and her two siblings² were abused,

¹ A pseudonym is used to protect the identity of the minor child.

² Respondent is not the father of Sara’s siblings, and they are not subjects of this appeal.

neglected, seriously neglected, and dependent juveniles. DSS alleged that respondent had been holding the three children and their mother³ (“mother”) against their will for approximately thirty days. During that time, respondent physically and sexually assaulted mother, who had to be hospitalized as a result, and physically assaulted Sara’s sisters, who did not require medical treatment. Sara, who was only six months old, was also in the house, but there were no allegations she was harmed. DSS deemed mother incapable of protecting her children and sought and obtained nonsecure custody of them. Sara was placed in foster care.

On 12 June 2014, the trial court entered an order adjudicating Sara as an abused, neglected, and dependent juvenile and ordering her to remain in DSS custody. On 14 October 2015, the trial court entered a disposition order. DSS was relieved of making any further reunification efforts with respondent, who was in jail awaiting trial. The trial court ordered respondent to complete parenting classes, to submit to domestic violence and psychological evaluations and follow any resulting recommendations, and to complete anger management treatment. The court concluded that visitation with respondent while he was in jail was not in Sara’s best interest.

On 29 March 2016, respondent pled guilty to assault inflicting serious bodily injury, assault by strangulation, and assault with a deadly weapon inflicting serious

³ Sara’s mother relinquished her parental rights and is not a party to this appeal.

injury. Respondent was sentenced to two consecutive prison terms totaling 42 to 72 months. He was given credit for 839 days spent in pretrial confinement.

On 3 November 2016, DSS filed a petition to terminate respondent's parental rights to Sara on the grounds of neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of Sara's cost of care, failure to legitimate, and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (5), (7) (2017). The petition was heard beginning 31 July 2017. On 29 March 2018, the trial court entered an order which concluded that respondent's rights were subject to termination based on four of the grounds alleged by DSS.⁴ The court then concluded termination was in Sara's best interest and ordered that respondent's rights be terminated. Respondent filed timely notice of appeal.

Respondent argues the trial court erred by concluding that grounds existed to terminate his parental rights. We disagree.

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re A.R.H.B.*, 186 N.C. App. 211, 214, 651 S.E.2d 247, 251 (2007)

⁴ The court did not find or conclude that respondent failed to legitimate Sara.

(citations and quotation marks omitted), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008).

Under N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights to a child upon a finding that the parent “has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]” N.C. Gen. Stat. § 7B-1111(a)(7) (2017). The petition in the instant case was filed on 3 November 2016, and therefore, the relevant period in determining whether respondent willfully abandoned Sara is from 3 May 2016 until 3 November 2016.

Abandonment has been defined as wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re Humphrey, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citation omitted). “Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986).

The trial court made the following relevant findings to support its conclusion that respondent willfully abandoned Sara:

34. Respondent . . . has not been allowed any visitation with the juvenile since the juvenile has been in the care of the Cumberland County Department of Social Services;

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however, the Court has allowed the paternal grandmother to have visitation with the juvenile. Respondent . . . has been incarcerated throughout the duration of the juvenile being in the custody of the Cumberland County Department of Social Services.

35. Although Respondent . . . has been incarcerated and he was not authorized visitation with the juvenile, Respondent . . . has never contacted the Cumberland County Department of Social Services to inquire as to the health, status, safety, or well-being of the juvenile. Furthermore, he has not sent the juvenile any cards, gifts, or letters, or attempted to provide anything for the juvenile through the Social Worker although he has had the ability to do so. The Social Worker has sent numerous letters and photographs of the juvenile to the Respondent . . . , as well as she has kept in communication with the paternal grandmother. As late as two (2) weeks prior to the hearing in July, 2017, the Social Worker sent photographs of the juvenile to Respondent Despite the Social Worker's numerous attempts to keep the lines of communication open with Respondent . . . he has never reached out to the Social Worker to make any inquiry about the juvenile. Respondent . . . has failed to provide the personal contact, love, and affection inherent in the parent/child relationship. Respondent . . . has not been an active participant in the life of the juvenile. Respondent . . . has abandoned the juvenile.

Respondent argues that these findings fail to show abandonment, because they do not address his “*ability* to contact DSS within the six month time period,” and they ignore his contact with Sara through his mother.

Essentially, respondent contends that his incarceration, coupled with the court's directive that he have no visitation with Sara, absolved him of taking actions to demonstrate he had not abandoned Sara. But this Court has repeatedly held that

“incarceration, standing alone, neither precludes nor requires a finding of willfulness [on the issue of abandonment,]” *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 511 (2000) (citation omitted). While the parent’s ability to demonstrate affection while incarcerated is limited, “the respondent will not be excused from showing interest in his child’s welfare by whatever means available.” *In re J.L.K.*, 165 N.C. App. 311, 318-19, 598 S.E.2d 387, 392, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004).

Sara’s DSS social worker testified that respondent had not provided any cards, letters, gifts, or financial support to Sara throughout the years the social worker was assigned to the case, and also that respondent had never contacted DSS to inquire about Sara or responded to the social worker’s letters about her. While some of the described behavior occurred outside of the six-month window used to determine whether respondent abandoned Sara, the trial court was free to “consider respondent’s conduct outside this window in evaluating respondent’s credibility and intentions.” *In re C.J.H.*, 240 N.C. App. 489, 503, 772 S.E.2d 82, 91 (2015). Respondent’s lack of contact during the years Sara was in DSS custody was thus relevant to the trial court’s assessment of respondent’s willfulness during the six-month abandonment window, when his behavior remained unchanged. The trial court’s findings accurately reflect the circumstances of respondent’s complete indifference towards Sara while she was in DSS custody, including during the six

months prior to the filing of the termination petition, and these findings are supported by the social worker's testimony.

Respondent also points to his own testimony at the termination hearing in an attempt to undermine the trial court's findings. Specifically, he testified that he attempted to contact DSS on some unknown dates but was unable to leave a message. Respondent also testified that the paternal grandmother would provide items to Sara during her visits, which he claimed were "sent with [his] blessing[.]" However, the trial court was free to disbelieve respondent's testimony. *See In re Whichard*, 8 N.C. App. 154, 160, 174 S.E.2d 281, 285, *appeal dismissed*, 276 N.C. 727 (1970), *cert. denied*, 403 U.S. 940, 29 L. Ed. 2d 719 (1971) ("As the trier of the facts, the [district] court ha[s] the duty to determine the weight and credibility to be given to the evidence presented, and [it] could believe or disbelieve the testimony of any witness."). The court was not required to credit respondent's assertions that he had called DSS or that he directed his mother to provide items to Sara if it did not find them credible. The trial court's order reflects that it resolved the conflict between the social worker's testimony and respondent's testimony, and this Court will not reweigh the evidence to resolve the conflict differently.

The trial court's findings of fact, which are supported by the social worker's testimony at the termination hearing, show that respondent failed to make any attempt to contact or inquire about Sara during her years in DSS custody, including

during the six months prior to the filing of the termination petition. They also demonstrated that respondent's behavior was willful. Accordingly, the trial court properly concluded that respondent's parental rights were subject to termination under N.C. Gen. Stat. § 7B-1111(a)(7). Since one ground for termination was adequately supported by the court's findings, it is unnecessary to address respondent's arguments regarding the remaining grounds. *In re M.D.*, 200 N.C. App. 35, 40, 682 S.E.2d 780, 783 (2009). The trial court's order is affirmed.

AFFIRMED.

Judges DIETZ and ARROWOOD concurs.

Report per Rule 30(e).