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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-902

Filed: 18 June 2019

Beaufort County, No. 18-JT-17

IN THE MATTER OF: A.L.L.

Appeal by respondent from order entered 15 June 2018 by Judge Darrell B. Cayton, Jr. in Beaufort County District Court. Heard in the Court of Appeals 12 March 2019.

J. Edward Yeager, Jr. for petitioner-appellee mother.

Mercedes O. Chut for respondent-appellant father.

DIETZ, Judge.

Respondent appeals the trial court's order terminating his parental rights to his daughter Allison.[1] As explained below, the trial court did not err by failing to intervene on its own initiative to inquire about the performance of Respondent's counsel. Likewise, on this record, counsel's performance was not deficient and, even if it were, the alleged deficiencies did not affect the outcome of the proceeding. We thus reject Respondent's ineffective assistance of counsel claims.

[1] We use a pseudonym to protect the juvenile's identity and for ease of reading.

We also hold that the trial court's findings were supported by clear, cogent, and convincing evidence and those findings, in turn, supported the court's conclusions of law. We therefore affirm the trial court's order.

Facts and Procedural History

Allison was born in September 2010 to Petitioner, her mother, and Respondent, her father. At the time of Allison's birth, Petitioner and Respondent lived together, but were never married. Petitioner testified that her relationship with Respondent involved "[m]ore bad than good" days due to Respondent's alcohol and drug use. Shortly after Allison's birth, Petitioner moved into her mother's house with Allison, but remained in a relationship with Respondent. When Allison was six weeks old, Respondent was incarcerated for DWI. After Respondent was released in January 2011, Petitioner believed that he resumed drinking and using drugs. Petitioner broke up with Respondent in March 2011, but allowed him to "come to the house and see [Allison] every weekend as often as he wanted," as long as the visits occurred at Petitioner's house. At some point, Petitioner limited Respondent's visits to Sundays only. In 2010 or 2011, Respondent signed a handwritten statement agreeing to pay Petitioner $50 per week in child support.

Respondent's visits with Allison were "pretty normal" at first, but at some point Respondent started coming late and missing visits. Petitioner kept a journal to document Respondent's visits and financial support. From 29 January 2011 to 9

October 2011, Respondent visited Allison and paid $880 in support. Petitioner's last journal entry was dated 18 October 2011. After 11 September 2011, Respondent did not visit Allison. For more than five years, from late 2011 to early 2017, Respondent had no contact with Allison and no contact with Petitioner.

In early 2017, Respondent began sending Petitioner letters from prison. Respondent sent Petitioner 10 letters between January 2017 and February 2018. Respondent wrote that he loved Petitioner and Allison, wanted a relationship with Allison, expressed regret for his past actions, and stated that he was making efforts to change. The letters were all addressed to Petitioner. Respondent did not send any letters, cards, gifts, or financial support directed to Allison except for a Christmas card that he sent both to Petitioner and Allison on 12 December 2017.

On 22 February 2018, Petitioner filed a petition to terminate Respondent's parental rights to Allison, alleging grounds of willful abandonment and failure to pay support. The trial court held a hearing on the petition on 25 May 2018. At the time of the hearing, Respondent was incarcerated and had not seen Allison since 2011. Petitioner testified that Respondent was incarcerated from December 2015 through the date of the hearing but did not discuss Respondent's whereabouts between 2011 and 2015. Petitioner testified that she did not read Respondent's letters to Allison and that Allison does not know who Respondent is. Petitioner explained that she was now married and that Allison "already has a dad that loves her" in Petitioner's

husband. The records presented at the hearing indicate that Respondent had a 2016 conviction with the sentence beginning in January 2017, and that Respondent had been incarcerated for three and a half years at the time of the hearing. Respondent did not introduce any evidence in the adjudicatory phase of the hearing.

During the dispositional phase of the hearing, the guardian ad litem testified that Petitioner's husband wants to adopt Allison, that he has been in her life for four years, and has filed an adoption petition. The guardian ad litem also testified that Respondent "loves this child" and that his substance abuse problem has "been tough for him to deal with." Respondent testified that he would be released in July 2018 and had secured a bed at a residential substance abuse treatment program to begin upon his release, as well as a welding job. During his incarceration, Respondent "sporadically" attended substance abuse counseling meetings. On cross-examination, Respondent admitted that he had not seen Allison for four years before he was incarcerated. Respondent testified that he knew nothing about Allison and had no bond with her.

On 15 June 2018, the trial court entered an order terminating Respondent's parental rights on the ground of willful abandonment. Respondent timely appealed.

Analysis

I. Respondent's right to effective assistance of counsel

Respondent first argues that the trial court erred by failing, on its own initiative, to conduct an inquiry into the performance of Respondent's counsel. Respondent contends that the trial court should have conducted this inquiry because of comments his counsel made to the court before the termination hearing and because of counsel's actions during the hearing, including counsel's failure to object to allegedly irrelevant evidence, failure to pursue certain lines of questioning in cross-examination of Petitioner, and failure to introduce beneficial evidence in the adjudicatory phase. As explained below, we reject this argument.

Parents who are subjects of a petition to terminate parental rights have a statutory right to counsel. N.C. Gen. Stat. § 7B-1101.1. "This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007). To prevail in a claim for ineffective assistance of counsel, a parent must show that (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) counsel's performance was so deficient that it prejudiced the parent. *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). Thus, "the fact that counsel made an error, even an unreasonable error, does not warrant reversal . . . unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *In re M.Z.M.*, __ N.C. App. __, __, 796 S.E.2d 22, 25 (2016) (citation omitted).

Respondent first points to statements his counsel made to the court during the pretrial hearing:

> [RESPONDENT'S COUNSEL]: Your Honor, this is [Respondent], my client and on his behalf I'd like to move to continue this matter. It's 3:30. Perhaps we could conclude it today but on my basis is that he's incarcerated at Scotland which is about three and half, four hours away and they brought him up here I think a couple of times. But he gets out in July. I think about six or seven weeks from now. What he really wants more than anything else is an opportunity to hire or retain counsel. I think he's made some inquiries prior to today but being incarcerated, you know, it makes it virtually impossible to do that from a financial stand point. I don't think it would prejudice the rights of the petitioner and a reason would be when he gets out in July—he's a welder and he has a construction job in the area waiting for him. Its Lewis and Sons Construction company in LeGrange and assuming that happens when he gets out, you know, he'd be [i]n a, you know, good place in terms of able to hire a lawyer and establish the kind of relationship that he wants to have with his daughter.

Respondent contends that these comments should have caused the trial court to question whether counsel was "making a half-hearted motion to withdraw" and to question the extent of counsel's communications with Respondent and efforts to prepare the case before the hearing. We reject this contention.

Respondent relies on *In re S.N.W.*, where this Court held that "the trial court should have inquired further about Respondent counsels' efforts" because counsel only had one contact with the respondent, there was no information in the record regarding the extent of counsel's efforts to communicate with the respondent, and counsel's fee application showed they "spent only 0.55 hours . . . in advance preparation of the termination hearing." 204 N.C. App. 556, 559–60, 698 S.E.2d 76, 78 (2010). Here, by contrast, counsel's comments show that he had adequate contact with Respondent, that Respondent had expressed his wishes to counsel, and that counsel understood Respondent's situation. Additionally, the fee application in this case shows Respondent's counsel spent a total of 14 hours working on Respondent's case, including 8 hours of out-of-court preparation. Simply put, the trial court properly viewed counsel's remarks not as a "half-hearted motion to withdraw" but as an indication that counsel had discussed the case with Respondent and merely was making an effort to ensure that the court understood his client's wishes and current situation. These comments were not a warning of potential deficient performance by counsel and did not require the trial court to conduct an inquiry into counsel's performance on its own initiative.

Respondent also contends that the trial court failed to conduct a proper pretrial hearing as required by statute because, although Respondent concedes a pretrial hearing occurred, "the court skimmed over the required statutory analysis" and

"never addressed whether Counsel should be retained pursuant to N.C. Gen. Stat. § 7B-1108.1(a)(1)." But Respondent's counsel stated "I don't have any pre-trial motions" when asked by the court. The trial court was not required to look beyond that statement and assess whether retention or release of counsel should be considered.

Respondent next points to his counsel's failure to object to evidence pertaining to events that occurred in 2010 to 2011, arguing that his counsel should have objected because these events occurred outside of the relevant six-month period prior to the filing of the petition to terminate his rights. Again, we reject this argument.

To be sure, as Respondent argues, the relevant period for purposes of 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). But "[t]he trial court may consider respondent's conduct outside [the relevant six-month period] 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). Thus, the trial court properly admitted and considered evidence of Respondent's conduct outside of the six months preceding the petition and counsel's failure to object to this relevant, admissible evidence was not deficient performance.

Finally, Respondent points to his counsel's failure to cross-examine Petitioner about whether Respondent had the ability to contact Allison between October 2011

and January 2017, whether Petitioner knew where Respondent was during that period, and why Petitioner did not respond to Respondent's letters. He also challenges his counsel's failure to introduce evidence during the adjudicatory phase of the hearing.

Respondent relies on this Court's unpublished decision in *In re T.D.*, __ N.C. App. __, 790 S.E.2d 752, 2016 WL 3889542 (2016) (unpublished). In *T.D.*, this Court remanded the matter for review of counsel's performance because "over the course of the nineteen-minute hearing to terminate [respondent's] parental rights," the respondent's counsel "(1) uttered fewer than fifty words during the entire termination hearing, most of which were irrelevant to the proceeding; (2) did not introduce any evidence at either the adjudication or the disposition stage of the hearing; and (3) never objected to the trial court finding termination of parental rights in the juveniles' best interests." *Id.* at *2–3.

That unpublished case is readily distinguishable. Here, Respondent's counsel actively participated in a much lengthier and more thorough hearing. And although Respondent's counsel chose not to present evidence during the adjudicatory phase of the hearing, he cross-examined Petitioner's witnesses and then presented evidence—including testimony from Respondent—in the dispositional phase. Counsel's conduct in this case was nowhere close to a "total failure to advocate on [respondent's] behalf." *Id.* at *2.

This case is much more analogous to *In re M.Z.M.*, where the respondent challenged her counsel's "fail[ure] to present any evidence or argument during the adjudicatory phase of the termination hearing." __ N.C. App. __, __, 796 S.E.2d 22, 25 (2016). This Court rejected the respondent's claim that her counsel was ineffective because although "counsel asked no questions of [petitioner's] witnesses, nor presented any evidence or argument during adjudication, . . . [a]t disposition, however, counsel called [respondent] to testify and argued to the court that terminating her parental rights would be contrary to [the children's] best interests." *Id.* at __, 796 S.E.2d at 26. We emphasized that "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics. The reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at __, 796 S.E.2d at 27. Here, counsel's decision not to present evidence during the adjudication stage is within the range of reasonable strategic decisions and we will not second-guess that decision on the cold record before us. *See id.*

Moreover, where "the record contains overwhelming evidence supporting termination of respondent's parental rights," the respondent cannot show that they were prejudiced by counsel's alleged deficiencies. *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005). Here, as discussed below, there was overwhelming evidence supporting termination of Respondent's parental rights. The undisputed evidence

showed that, after having some visitation and providing some financial support for Allison during the first year of her life, Respondent had no contact with and provided no support for Allison for nearly six years; that Respondent was not incarcerated during the first four of those years; that Respondent's only attempt to communicate with Allison was sending a handful of letters to Petitioner from prison in 2017 and 2018; and that Allison did not know Respondent. Respondent has not asserted the existence of any specific evidence or information his counsel should have presented or elicited during the adjudicatory phase of the hearing which would have created a reasonable probability of a different result. Accordingly, the trial court did not err in failing to conduct an inquiry into the performance of Respondent's counsel and counsel's performance, on the record before this Court, was not deficient.

II. Termination on ground of willful abandonment

Respondent also argues that the trial court erred in terminating his parental rights on the ground of willful abandonment because the evidence and the trial court's findings of fact do not support its conclusion that the ground of willful abandonment existed. We disagree.

"This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law." *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575

(2015). "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). 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).

The court may terminate a parent's rights upon a finding that "[t]he 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). "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." *In re D.M.O.*, __ N.C. App. __, __, 794 S.E.2d 858, 861 (2016). "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." *Id.* (citation omitted). The court is required "to consider, during the relevant six month period, the financial support respondent has provided to the child, as well as the respondent's emotional contributions to the child." *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 510 (2000). "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).

"Abandonment has also been defined as wilful [sic] 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 wilful [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "[I]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. Thus, a showing of incarceration alone is insufficient to prove willful abandonment. Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in his child's welfare by whatever means available*." *In re D.E.M.*, __ N.C. App. __, __, 810 S.E.2d 375, 378 (2018) (citations omitted).

This Court has affirmed termination of parental rights on the ground of willful abandonment where "during the relevant six-month period, respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile." *In re C.J.H.*, 240 N.C. App. 489, 504, 772 S.E.2d 82, 92 (2015). We held that "respondent's last-minute child support payments and requests for visitation do not undermine the trial court's conclusion that respondent had abandoned the juvenile"

because "[a] delinquent parent may not dissipate at will the legal effects of his abandonment by merely expressing a desire for the return of the abandoned juvenile." *Id.* Likewise, this Court affirmed a finding of willful abandonment where, "despite some fleeting messages on social media and an encounter at a juvenile court proceeding, Respondent never sought to visit his son for more than two years and never expressed any interest in his well-being." *In re P.L.B.*, __ N.C. App. __, 801 S.E.2d 397, 2017 WL 2951081, at *2 (2017) (unpublished).

Respondent argues that the trial court's Findings of Fact 11-14, 18, and 22 are improper because they address "events that occurred in 2011, well outside the six-month time frame." Respondent also contends that the portion of Finding of Fact 22 finding that Respondent only "sporadically sent monies" for Allison's support in 2011 "is not a fair interpretation of the evidence." Respondent also challenges the lack of evidence in the record to "enable findings about the precise dates of [his] incarceration" and asserts that there is no evidence "as to why the lack of contact occurred" or whether Respondent had the ability to contact Allison between 2011 and 2017. Finally, Respondent argues that Findings of Fact 21 and 24 are the only findings that address the six-month period prior to the termination petition, that they "ignore[] the love and devotion to Allison he so clearly expressed in [his] letters," and that they are not supported by any evidence showing that Respondent had the ability to maintain contact with Allison during that period.

We reject these arguments on multiple grounds. First, the trial court's findings about events in 2010-11 are proper because "[t]he trial court may consider respondent's conduct outside [the relevant six-month period] in evaluating respondent's credibility and intentions." *C.J.H.*, 240 N.C. App. at 503, 772 S.E.2d at 91. Second, even setting aside the challenged findings, there were ample findings demonstrating that Respondent had no contact with Allison and provided no support for her for many years and that, at least with respect to the more recent years, his whereabouts were known (because he was incarcerated) and he had the ability to make at least some contact with his daughter during that time but chose not to. These findings, supported by clear and convincing evidence in the record, readily support the trial court's conclusion that Respondent's conduct constituted willful abandonment. *Id.* at 504, 772 S.E.2d at 92; *P.L.B.*, 2017 WL 2951081, at *2. Accordingly, we hold that the trial court did not err in terminating Respondent's parental rights on the ground of willful abandonment.

Conclusion

For the reasons discussed above, we affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).