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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1305

Filed: 18 June 2019

Surry County, No. 10 JT 73

IN THE MATTER OF: K.S.A.

Appeal by Respondent from orders entered 3 October 2018 by Judge Gretchen Hollar Kirkman in Surry County District Court. Heard in the Court of Appeals 30 May 2019.

No brief for petitioner-appellee.

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

BERGER, Judge.

Respondent appeals from an order terminating her parental rights. After careful review, we reverse.

Factual and Procedural Background

Respondent is the mother of the juvenile K.S.A. ("Kara").[1] Petitioner is Kara's paternal great-grandmother. In July 2010, the Surry County Department of Social

[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 3.1(b).

Services ("DSS") filed a petition alleging that Kara was a neglected juvenile. DSS alleged that Respondent, as well as Kara and Kara's sibling, were living in a mobile home that did not have working utilities and was cluttered with garbage. Additionally, marijuana plants were found growing within the premises. DSS claimed that the residence was unsafe and inappropriate for Kara, and Respondent did not have an alternative placement or a plan of care for Kara. Kara's father was not involved in her life at the time. Neither Respondent nor Kara's father contested the petition, and the order adjudicating Kara a neglected juvenile was entered on September 1, 2010. When the adjudicatory order was entered, Respondent was living in a homeless shelter, and Kara's father was unemployed and living with Petitioner. Custody was granted to DSS, but Kara was placed in Petitioner's care. Kara continued to reside with Petitioner and her father through 2011, and on May 9, 2011, the court granted custody of Kara to her father. Respondent was granted supervised visitation.

On December 22, 2017, Respondent filed a motion for review. According to Respondent, Kara's father had passed away, and she sought custody of Kara. A custody hearing was noticed for February 1, 2018. Prior to the hearing, Petitioner filed a petition alleging grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (4) (2017) to terminate Respondent's parental rights. On October 3, 2018, the trial court entered an order in which it determined grounds existed to terminate

Respondent's parental rights pursuant to Sections 7B-1111(a)(1) and (7) based on neglect and abandonment. The trial court further concluded it was in Kara's best interest to terminate Respondent's parental rights, and did so accordingly. Respondent appeals.

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

Analysis

N.C. Gen. Stat. § 7B-1111 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). We review the trial court's conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008).

First, we address the trial court's conclusion that termination of Respondent's parental rights was justified based upon the ground of abandonment, pursuant to N.C. Gen. Stat. § 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.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (internal citations, quotation marks, and alterations omitted).

Here, the relevant six-month period was between August 1, 2017 and February 1, 2018. During this period of time, on December 22, 2017, Respondent filed a motion for review seeking custody of Kara. Respondent's attempt to gain custody of Kara during this period was sufficient to demonstrate she did not intend to forego all parental duties and relinquish all parental claims to Kara, and "undermines" the trial court's determination that she willfully abandoned Kara. *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 grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Respondent's parental rights.

We next consider whether the trial court correctly determined that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent's parental rights. N.C. Gen. Stat. § 7B-1111(a)(1) 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. N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile, in turn, is defined as follows:

> 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; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]

N.C. Gen. Stat. § 7B-101(15) (2017).

Generally, "[i]n 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.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005). When, however, 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.' " *Id.* "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.' " *Id.* "The 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." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). 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 analysis described in *In re L.O.K.* The trial court's order contains no findings that Kara would likely be neglected if she were returned to Respondent's custody. Instead, 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 due to Respondent's lack of contact with Kara or involvement in her life. Specifically, the trial court made multiple, unchallenged findings of fact regarding Respondent's failures to: (1) exercise her visitation rights with Kara; (2) provide Kara with food, clothing, or care; or (3) attempt to contact Petitioner or Kara.

A trial court can terminate parental rights based on abandonment under N.C. Gen. Stat. § 7B-1111(a)(1) if the court finds that the parent's conduct manifested a

willful neglect and failure to perform her 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, as here, 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 court's determination that Respondent abandoned Kara pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). The same analysis is relevant to the determination of whether Respondent neglected Kara. We likewise determine that Respondent's attempt to gain custody of Kara in December 2019 demonstrates that she did not intend to forego all parental duties and relinquish all parental claims to Kara at the time of the termination hearing. *S.R.G.*, 195 N.C. App. at 84, 671 S.E.2d at 51. We thus similarly conclude that the filing of the motion for review seeking custody undermines the trial court's determination that Respondent neglected Kara. Therefore, we hold that the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent's parental rights.

Conclusion

In conclusion, we hold the trial court erred in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (7). We therefore reverse the trial court's order.

REVERSED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).