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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-653

Filed 16 May 2023

Iredell County, Nos. 18 JT 256-58

In the Matter of: S.Y., A.Y., & K.Y.

Appeal by Respondent-Mother and Respondent-Father from orders entered 1 March 2022 and 9 May 2022 by Judge Bryan A. Corbett in Iredell County District Court. Heard in the Court of Appeals 25 April 2023.

Lauren Vaughan for Petitioner-Appellee Iredell County Department of Social Services.

Benjamin J. Kull for Respondent-Appellant Mother.

Garron T. Michael for Respondent-Appellant Father.

North Carolina Administrative Office of the Courts, Guardian ad Litem Division, by Michelle F. Lynch, for guardian ad litem.

GRIFFIN, Judge.

Respondents Haley Ervin (“Mother”) and Buddy Yates (“Father”) appeal from the trial court’s orders terminating their parental rights to their minor children

Sammy, Alexis, and Kelvin.¹ Mother argues the trial court erred in terminating her parental rights because (1) the ultimate finding of willfulness regarding her failure to pay child support was improperly based on an unsupported evidentiary finding, and (2) the trial court denied her constitutional due process by failing to resolve a material conflict in the evidence because there had been no proceedings regarding her newborn child living in the same home. Father argues the trial court erred because the evidence (1) failed to make requisite findings of fact as to willfulness, and (2) failed to support a finding that there was a likelihood of future neglect. We hold that at least one ground exists to terminate each Respondent's parental rights and affirm the trial court's orders.

I. Factual and Procedural History

Respondents have three minor children together: Sammy, born 6 September 2013; Alexis, born 12 December 2014; and Kelvin, born 2 June 2016. Respondents have a long relationship history marred by repeated instances of domestic violence. The Iredell County Department of Social Services ("DSS") first became involved with the family in 2016 following reports of a domestic violence incident between Respondents.

Later, in January 2018, Father got into a vehicle with the minor children inside and attempted to drive away. Mother grabbed onto the vehicle. Father continued to

¹ We use pseudonyms to protect the identity of the juveniles and for ease of reading. *See* N.C. R. App. P. 42(b).

drive, dragging Mother alongside the vehicle. As a result, Father was convicted of assault with a deadly weapon. Mother obtained a domestic violence protection order (“DVPO”) on 15 March 2018. Around this time, both Respondents entered individual case plans with DSS to ensure the safety of the children.

In May 2018, Father violated the DVPO when he entered Mother’s home, struck her in the face, and then left the home. In September 2018, police found Father hiding in the attic of Mother’s home. Police arrested Father for violating the DVPO and arrested Mother for harboring a fugitive. All three children were present for the arrest. Police arrested Father again in October 2018, after he went into Mother’s home, grabbed a knife, went outside, and slashed her tires. All three children were present for this incident. Father was incarcerated as a result.

During Father’s incarceration, DSS sent him letters and information about upcoming hearings and custody reviews with pre-addressed envelopes for him to respond more easily. Father did not respond. On 28 August 2019, Father was released from incarceration. On 3 September 2019, Father had a scheduled visitation with the children. However, Father did not see his children that day because he was arrested for the arson of Mother’s home on the date of the scheduled visitation. After being incarcerated for this new charge, Father did not communicate with DSS regarding the children until after the trial court changed the children’s permanent plan from reunification to adoption. At that point, Father requested photos of the children and sent two or three drawings to them.

Mother did visit the children regularly while they were in DSS custody, but arrived late to more than three-quarters of her visits, would spend a significant portion of the visits on her cell phone, and would often make inappropriate statements to the children. Mother was referred to two different providers for domestic violence counseling through her case plan with DSS. Mother was discharged from the first provider for missing appointments and stopped attending appointments with the second provider.

From the time the children were put into DSS custody, Mother engaged in several romantic relationships; each resulted in instances of domestic violence and criminal activity. “Throughout the pendency of the [] case,” Mother was involved in “several law enforcement reports and traffic stops.” In November of 2019, Mother was court-ordered to have no contact with three different men—including Father—as well as “any known users of illegal controlled substances.” During a seven-month period in 2019, while the children were in DSS custody: Mother convicted of driving while impaired; convicted of three counts of misdemeanor financial card fraud; and charged with assault with a deadly weapon. Mother agreed to submit to random drug screens as part of her case plan with DSS. Between December 2018 and October 2020, Mother failed to appear for drug screens twenty times and tested positive for marijuana nine times.

DSS filed a petition alleging the children were neglected on 21 November 2018 and took custody of the children in April 2019. In the first permanency hearing on

11 June 2019, the trial court ordered: “the plan [to achieve a permanent home for the children] should be a primary plan of reunification, and a secondary plan of guardianship.” The permanency plan remained the same at two subsequent permanency hearings in August and November of 2019. On 12 February 2020, following a fourth hearing, Respondents signed a consent order changing the plan to “a primary plan of adoption, and a secondary plan of reunification.” The consent order provided that DSS would not consider termination of parental rights during the next review period to give the parents another chance to demonstrate their ability to reunify with their children. On 24 August 2020, following a fifth permanency hearing, the court entered an order finding that Respondents were not making adequate progress toward reunification. The court removed reunification as part of the children’s permanent plan, changed the primary plan to adoption, and changed the secondary plan to guardianship. On 18 November 2020, following the sixth and final permanency hearing, the court entered an order finding that “Respondent[s] failed to make sufficient, timely progress in addressing the issues that caused the juveniles to enter the purview of the court and foster care, [and] the termination of parental rights should be considered, [because] to terminate parental rights would be consistent with the juvenile’s best interest, as there no longer persist[ed] the possibility that the parent-child relationship [could] be maintained.”

On 13 January 2021, DSS filed a petition to terminate Respondents’ parental rights. The trial court heard the termination of parental rights adjudication hearings

over seventeen court dates between March 2021 and April 2022. A termination adjudication order was entered on 1 March 2022 (the “Adjudication Order”) and a termination disposition order was entered on 9 May 2022 (the “Disposition Order”). Respondents each timely appeal.²

II. Analysis

Respondents argue the trial court erred by terminating their parental rights pursuant to N.C. Gen. Stat. § 7B-1111. Section 7B-1111 of the North Carolina General Statutes sets forth multiple, independently sufficient statutory grounds for terminating parental rights. *See* N.C. Gen. Stat. §§ 7B-1110, 7B-1111 (2021). The trial court begins a termination proceeding with an adjudicatory phase to determine whether “one or more grounds listed in section 7B-1111 are present,” then the court “proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights.” *In re A.R.A.*, 373 N.C. 190, 194, 835 S.E.2d 417, 421 (2019) (citations omitted).

² DSS has filed a motion to dismiss Father’s appeal because his notice of appeal did not include Father’s signature in accordance with N.C. Gen. Stat. § 7B-1001(c). *See* N.C. Gen. Stat. § 7B-1001(c) (2021) (“Notice of appeal shall be signed by both the appealing party and counsel for the appealing party, if any.”). In response, Father petitions this Court for writ of certiorari to review his appeal.

Defense counsel concedes that Father’s failure to sign the notice of appeal was “due to an error by trial counsel,” and it does not appear from the record that DSS has been prejudiced by this error. We grant DSS’s motion to dismiss Father’s appeal, but elect to also grant Father’s petition and proceed to review the merits of his case. *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008).

We review the trial court’s adjudication of grounds for termination of parental rights by examining “whether the court’s findings of fact ‘are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law.’” *In re Z.G.J.*, 378 N.C. 500, 508, 862 S.E.2d 180, 187 (2021) (citation omitted). “Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal.” *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted). “The trial court’s conclusions of law are reviewed de novo.” *Z.G.J.*, 378 N.C. at 509, 862 S.E.2d at 187.

A. Grounds exist to terminate Mother’s parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2)

Mother’s first argument challenges the trial court’s adjudication that grounds existed to terminate her parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), and (3) based on a general violation of her constitutional rights as a parent. With respect to all three grounds, Mother argues “the [Adjudication Order] must be vacated . . . because the court failed to resolve a material conflict in the evidence regarding the fundamental constitutional question of parental fitness.”

Our Courts have long recognized a natural parent’s “constitutionally-protected paramount right to custody, care, and control of their child.” *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). “The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects ‘a natural parent’s paramount constitutional right to custody and control of his or her children’ and ensures that ‘the

government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody’ or ‘where the parent’s conduct is inconsistent with his or her constitutionally protected status.’” *In re B.R.W.*, 381 N.C. 61, 77, 871 S.E.2d 764, 775–76 (2022) (citation omitted).

Specifically, Mother asserts that there is an “inherent inconsistency” between the fact that DSS has alleged Mother’s unfitness as to three of her children, but, as of the time of the proceedings in this case, had not alleged any claims of unfitness as to Mother’s newborn son even though her son was living in the same home. Mother argues that, “[a]bsent any meaningful differences between the children, it is logically impossible for a parent to be unfit as to only some of her children.” Mother cites *In re A.W.*, 280 N.C. App. 162, 867 S.E.2d 235 (2021), for this broad proposition. However, *In re A.W.* is not applicable in this present case.

In *In re A.W.*, the respondent-parents appealed the trial court’s order awarding permanent guardianship of their oldest child to her foster parents after she was removed from the home due to domestic violence. *Id.* at 163, 867 S.E.2d at 237. The respondents had another child together after the case began. *Id.* At the time of the permanency hearing, “there was a petition pending regarding the younger child,” but DSS “dismissed that petition prior to the entry of the order” awarding guardianship of the oldest child to her foster parents. *Id.* at 168, 867 S.E.2d at 240. In addition, at the time of the permanency hearing, “there had been no reports of any new domestic violence incidents between the parents in 580 days.” *Id.* at 172, 867 S.E.2d at 242.

This Court ultimately held that the trial court’s conclusion that “neither parent [was] fit or proper” was “not based upon clear and convincing evidence of how either parent was presently ‘unfit’ to exercise their constitutional right to parent.” *Id.* at 167, 867 S.E.2d at 239. The Court so held because, among other reasons, there had been a petition against the younger child, that petition had been dismissed, and the trial court’s order did “not explain how the [r]espondents can be fit and proper parents for the younger child but not for [the older child].” *Id.* at 168, 867 S.E.2d at 240. “The only basis for the trial court’s determination was the existence of a prior history of domestic violence in the home, and prior domestic violence would have the same effect on any child in the home.” *Id.*

In sum, both respondents in *In re A.W.* were the biological parents to the youngest child, a petition had already been filed and dismissed regarding the youngest child, and no new reports of any new domestic violence—the sole basis for their oldest child’s removal—had arisen for over one and a half years. Here, the unchallenged, binding findings of fact show that Mother’s youngest child has a different father, and, at the time of the termination of parental rights proceeding: (1) Mother was living with her boyfriend with a “history of assaultive behavior;” (2) six months prior to DSS’s petition to terminate parental rights, the court found Mother in violation of a no-contact order with an ex-boyfriend with a history of domestic violence; and (3) seven months prior to DSS’s petition to terminate parental rights, Mother called the police after an incident of domestic violence with a different ex-

boyfriend, and two days later, called the police again after the ex-boyfriend showed up at her home and attempted to flood it. These conditions persisted after the filing of the termination of parental rights proceeding. DSS removed the three older children from Respondents' care due to repeated, consistent incidents of domestic violence as well as substance abuse.

At the time of the termination of parental rights hearing, Mother's youngest child was only one month old and DSS had not filed any petition regarding that child. In contrast to *In re A.W.*, where improper conditions were alleged by a petition and later voluntarily withdrawn, in this case DSS had not yet made any allegations regarding Mother's youngest child and still had the ability to file a petition. The presence of a newborn in Mother's home, alone, does not preclude the trial court's conclusion that grounds exist to terminate her parental rights. Due to the substantial differences between this case and *In re A.W.*, we cannot conclude that the trial court's termination of parental rights proceedings and resulting orders infringed on Mother's due process rights as a natural parent.

Mother makes no further arguments challenging the termination of her parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2). We hold the trial court did not err in terminating Mother's parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2). Mother presents an additional argument that the trial court erred in concluding that grounds existed to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) because the trial court failed to resolve material

conflicts in the evidence regarding her willfulness. Because grounds exist to terminate Mother’s parental rights under N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2), and only one ground is required, we decline to address this argument. *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (“[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights.” (citation omitted)).

B. Grounds exist to terminate Father’s parental rights under N.C. Gen. Stat. §7B-1111(a)(1)

Father argues the trial court erred in concluding (1) “that a ground existed to terminate [his] parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) where the evidence failed to support a finding that there was a likelihood of future neglect[;]” and (2) “that a ground existed to terminate [his] parent rights pursuant to N.C.G.S. § 7B-111(a)(2) when it failed to make requisite findings of fact as to [his] willfulness.”

N.C. Gen. Stat. § 7B-1111(a)(1) permits the court to terminate parental rights upon a finding that the parent has neglected the juvenile within the meaning of N.C. Gen. Stat § 7B-101 at the time of the termination proceeding. *See In re D.W.P.*, 373 N.C. 327, 338–39, 838 S.E.2d 396, 405 (2020); *see also* N.C. Gen. Stat. § 7B-1111(a)(1). Among other enumerated statutory factors, a neglected juvenile is one whose parent “[c]reates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat § 7B-101(15)(e) (2021).

“[O]ur decisions concerning the termination of the parental rights of

incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children.” *In re A.G.D.*, 374 N.C. 317, 320, 841 S.E.2d 238, 240 (2020). “[W]hen a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent.” *D.W.P.*, 373 N.C. at 339, 828 S.E.2d at 405 (citation omitted). In addition to evidence of the parent’s progress on their case plan, “[t]he trial court may also look to the historical facts of a case to predict the probability of a repetition of neglect.” *In re A.E.S.H.*, 380 N.C. 688, 692, 869 S.E.2d 676, 679 (2022) (citation omitted).

Father does not attempt to challenge the trial court’s prior adjudication of Sammy, Alexis, and Kelvin to be neglected juveniles by Father. Rather, Father solely argues “the evidence failed to support a finding that there was likelihood of future neglect.” In particular, Father challenges Finding of Fact 42 from the Adjudication Order as being unsupported by the evidence presented to the trial court:

42. As a result of his incarceration, [Father] has not visited with the minor children. He has failed to contact [DSS] to discuss his case plan or the well-being of the minor children. [Father] has neglected the minor children. [Father’s] situation has remained unchanged throughout the pendency of the underlying case, and as such, the probability of the repetition of neglect is high.

Finding of Fact 42 is supported by clear, cogent, and convincing evidence. The evidence showed that Father was reincarcerated in September 2019. Throughout his prior incarceration and his reincarceration, Father made no efforts to contact his children. Father began to make efforts to contact DSS and send drawings to his children only after the trial court changed the permanent plan to adoption in February 2020, almost six months after he was reincarcerated. Our courts consider the limited resources available to an incarcerated parent, *A.G.D.*, 374 N.C. at 320, 841 S.E.2d at 240, but the evidence did not show that Father effectively availed himself of whatever resources may have been available to him.

Further, the evidence also showed that, within a week of being released from incarceration in 2019, Father did not show up to a scheduled visitation with his children. Though Father called DSS and requested this visitation, Father was unable to attend because he was arrested for the arson of Mother's home. Father had an opportunity to see his children but instead chose to forego this opportunity in pursuit of other desires. Despite his contentions that he has not seen Mother in years, and thus the incidents of domestic violence giving rise to the termination proceedings have little chance of repetition, a reasonable mind could conclude that future incidents of violence between Mother and Father are likely to occur.

The trial court did not err in finding the probability of Father causing an environment physically and emotionally injurious to his children to be high and in concluding grounds existed to terminate Father's parental rights under N.C. Gen.

Stat. § 7B-1111(a)(1). Because we hold that termination of Father's parental rights was proper under N.C. Gen. Stat. §7B-1111(a)(1), we decline to address his argument regarding section 7B-1111(a)(2) as an additional ground for termination. *See E.H.P.*, 372 N.C. at 395, 831 S.E.2d at 53.

III. Conclusion

For the foregoing reasons, we affirm the orders of the trial court.

AFFIRMED.

Judges ZACHARY and GORE concur.

Report per Rule 30(e).