

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1143

Filed 21 May 2024

Wake County, No. 22JT42

IN RE: A.D.

Appeal by respondent-father from order entered 15 September 2023 by Judge V.A. Davidian, III in Wake County District Court. Heard in the Court of Appeals 1 May 2024.

Wake County Attorney's Office, by David F. Hord, IV, for petitioner-appellee Wake County Department of Health and Human Services.

Administrative Office of the Courts, by Brittany T. McKinney, for the guardian ad litem-appellee.

Garron T. Michael, for respondent-appellant father.

FLOOD, Judge.

Respondent-Father appeals from order entered 15 September 2023, arguing the trial court erred in concluding grounds existed to terminate his parental rights based on neglect because Respondent-Father's incarceration alone cannot support a conclusion of neglect. After careful review, we conclude the trial court considered other factors in addition to Respondent-Father's incarceration that, when taken together, support a conclusion of neglect.

I. Factual and Procedural Background

On 15 March 2022, Wake County Department of Health and Human Services (the “Department”) filed a juvenile petition alleging Respondent-Father’s one-year-old son, “Adam,” was a neglected juvenile.¹ The petition was filed after Adam’s youngest half-sibling was born with marijuana in his system, and his mother had continued to struggle with substance abuse and maintaining stable housing for her four children.² The Department first became involved with Adam’s mother after Adam tested positive for marijuana at birth in July 2020.³ At the time the petition was filed in 2022, Respondent-Father was incarcerated in Piedmont Regional Jail in Farmville, Virginia and had not seen Adam since he was born. Also on 15 March 2022, an order for nonsecure custody was issued for Adam, and he was placed in the care of his maternal grandmother.

On 7 June 2022, Respondent-Father was released from Piedmont Regional Jail and relocated to United States Penitentiary Hazleton in West Virginia, to serve a twenty-two-year prison sentence for federal drug charges. Respondent-Father is not projected to be released from prison until 2039.

On 12 July 2022, following an adjudication hearing, the trial court entered an order adjudicating Adam as a neglected juvenile. Respondent-Father was not present at the hearing, but he was represented by counsel. Due to his incarceration,

¹ A pseudonym is used to protect the identity of the minor child pursuant to N.C.R. App. P. 42.

² The petitions allege Adam’s three half-siblings were neglected juveniles, but as they do not share the same father, they are not a part of this appeal.

³ Adam’s mother is not a party to this appeal.

Respondent-Father was not entered into a case plan; the trial court instead ordered Respondent-Father, if he were released from prison, to contact the Department and enter into an out-of-home family services agreement. The trial court further denied in-person visitation while Respondent-Father was incarcerated but authorized virtual visitations and phone calls as permitted by the facility in which Respondent-Father was housed.

Permanency planning hearings were held on 13 July, 22 August, and 7 September 2022. Respondent-Father was unable to attend any of the hearings because of his recent prison relocation, and the Department agreed to investigate what contact options were available to Respondent-Father. Adam's mother had not entered into a case plan with the Department or a visitation agreement, nor had she responded to the Department's communication attempts or engaged in any visitation with her children. In a written order filed on 5 October 2022, Adam was ordered to remain in the placement of his grandmother, and the primary permanent plan was reunification with a secondary plan of guardianship.

On 6 March 2023, the trial court held a second permanency planning hearing. Respondent-Father was again unable to attend because of his incarceration but was represented at the hearing by his attorney. Adam's mother had still not entered into a case plan with, or responded to, the Department, and she had made no efforts towards reunification. The trial court concluded it was in Adam's best interests to make the primary permanent plan adoption with a secondary plan of guardianship.

Respondent-Father was still allowed virtual visits and phone calls, if permitted by his facility. Were he to be released from prison, Respondent-Father would be allowed one hour of supervised visitation per week.

On 2 May 2023, the Department filed a petition to terminate Respondent-Father's parental rights to Adam. A termination hearing was held on 19 July and 2 August 2023. Respondent-Father participated in the hearing remotely via WebEx.

During the hearing, Social Worker Shannon McCall testified that Respondent-Father had voluntarily entered into an out-of-home family services agreement where he agreed to obtain and maintain housing for himself and Adam, obtain and maintain income, complete a parenting class, and resolve all criminal charges and refrain from further criminal activity. As of the time of the termination hearing, Respondent-Father had not been able to complete any of the requirements outlined in the out-of-home family services agreement. Respondent-Father did inform Ms. McCall that he had a fiancée with whom he intended to live when he completed his prison sentence, but he did not currently live with her. Additionally, Respondent-Father was willing to participate in parenting classes but was unable to in his current facility. Respondent-Father informed Ms. McCall that he could request a transfer to a different facility that would provide parenting classes and other services, but he could not make this request for eighteen months. Respondent-Father was able to call the Department to discuss the case plan and inquire about Adam. Ms. McCall testified that she "believed" that Respondent-Father had been provided the grandmother's

address, but she knew that he had Ms. McCall's address and did not send any cards, letters, or gifts to either address for Adam. When Ms. McCall was asked about Respondent-Father's contact with her, she stated that he called her "a total of three times" but only after she sent him a letter requesting that he call.

Respondent-Father testified that he had access to a texting service and could make phone calls, but all numbers had to be approved by the facility. While Respondent-Father testified that he submitted the grandmother's number for approval, it is unclear whether the number was approved by the facility. Respondent-Father had not called the grandmother to inquire about Adam. Respondent-Father admitted that he never sent Adam any cards, letters, or gifts, but claimed that he did not have the grandmother's address. He further testified that he had five other biological children and one adopted child. Four of the children had lived with Respondent-Father up until the time he was incarcerated, and he still speaks to all of his children except for Adam on a regular basis. Respondent-Father would send the other children text messages through the facility texting service, and birthday gifts that he purchased through his fiancée.

At the conclusion of Respondent-Father's testimony and the adjudication phase, the WebEx connection was disrupted, and he was unable to participate in the remainder of the proceedings. After concluding grounds existed to terminate Respondent-Father's parental rights based on neglect, the trial court proceeded in the absence of Respondent-Father with the best interests phase of the hearing. The

trial court gave Respondent-Father's attorney the option to present evidence on behalf of Respondent-Father on a different date if Respondent-Father so chose.

On 2 August 2023, the trial court held a second best interests hearing to allow Respondent-Father to present evidence. Respondent-Father testified virtually at the hearing. At the conclusion of the hearing, the trial court determined it was in Adam's best interests to terminate Respondent-Father's parental rights. Respondent-Father filed a timely notice of appeal to this Court.

II. Jurisdiction

This Court has jurisdiction to review this appeal from a final order issued by a superior court terminating Respondent-Father's parental rights pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 7B-1001(a)(7) (2023).

III. Analysis

Respondent-Father presents a single issue on appeal: whether the trial court erred by terminating his parental rights to Adam because it relied solely on Respondent-Father's incarceration to support its conclusion that grounds existed to terminate his rights based on neglect. To that end, Respondent-Father challenges three findings of fact contained in the trial court's order terminating his parental rights.

A. Standard of Review

"Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage." *In*

re K.D.C., 375 N.C. 784, 788, 850 S.E.2d 911, 915 (2020) (citation omitted). At the adjudicatory stage, the burden is on the petitioner to prove “by ‘clear, cogent, and convincing evidence’ that one or more grounds for termination exist under [N.C. Gen. Stat. §] 7B-1111(a)[.]” *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 797 (2020) (citation omitted). “If the trial court adjudicates one or more grounds for termination, ‘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.’” *Id.* at 797, 839 S.E.2d at 94 (citation omitted). “We review a trial court’s adjudication . . . to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusion of law. The trial court’s conclusions of law are reviewable de novo on appeal.” *In re K.H.*, 375 N.C. 610, 612, 849 S.E.2d 856, 859 (2020) (citation and internal quotation marks omitted).

“[F]indings of fact not specifically challenged by a respondent are presumed to be supported by competent evidence and binding on appeal.” *In re N.P.*, 374, N.C. 61, 65, 839 S.E.2d 801, 804 (2020). “Moreover, we review only those findings necessary to support the district court’s conclusion that grounds existed to terminate respondent’s parental rights for neglect.” *Id.* at 65, 839 S.E.2d at 805 (citation omitted). The trial court is the “sole judge of the credibility and weight to be given to the evidence . . . [and i]t is not the role of this Court to substitute its judgment for that of the trial court.” *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003).

B. Challenged Findings of Fact

1. Finding of Fact 50

First, Respondent-Father challenges the portion of Finding of Fact 50 that indicates he “intentionally chose” not to contact Adam, as unsupported by evidence. He argues his testimony shows that he did try to have the grandmother’s phone number approved for calls, and there was no evidence Respondent-Father had control over which numbers were approved and which were not. According to Respondent-Father, his testimony demonstrates that his failure to contact Adam was not his “choice.”

Finding of Fact 50 states:

50. [Respondent-Father] has not maintained contact with [Adam] or the maternal grandmother. He acknowledges that he has the grandmother’s phone number, but chose not to contact her or [Adam] because of a “falling out” he had with the grandmother. He denies having the grandmother’s address, but never asked anyone for it and never asked for alternative means by which to contact his child.

This finding is supported by the following testimony Respondent-Father gave at the hearing:

Q. Okay. So do you have [the grandmother’s] phone number?

A. I actually do have her number.

Q. Okay. And do you know -- did you ever go through the process of trying to get her phone number approved so that you could call your son [Adam].

A. I did try to get it approved but me and the grandmother actually for whatever reason had a falling out before I got incarcerated so me and her communication [sic] is kind of (indiscernible). I don't really know what was said about that. We kind don't get along for whatever reason.

Q. Okay. But is it your testimony today that you attempted to try to get [the grandmother's] number approved so that you could communicate with [Adam]?

A. Yes. I ended up taking to [Adam's mother] a couple of times while she was there at her mother['s] house where I chances [sic] to talk to [Adam] and then that's been months ago so other than that, no.

While the testimony shows that Respondent-Father initially said he did “try” to get the grandmother’s phone number approved, it is unclear from his subsequent explanation whether he attempted to get it approved by the prison facility, and this request was denied, or whether his “falling out” with the grandmother was the reason he never called her to inquire about Adam. Instead of explaining that the grandmother’s phone number was not approved by the prison facility, he began explaining the rift that existed between himself and the grandmother. When asked to clarify whether he was testifying that he attempted to get the grandmother’s number approved, he stated “yes,” but then proceeded to explain how he had “ended up” talking to Adam’s mother while she was at the grandmother’s house.

It is solely the trial court’s role to determine the credibility of the evidence and assign the weight to be given to it, and such determinations will not be second-guessed by this Court. *See Scott*, 157 N.C. App. at 388, 579 S.E.2d at 435. Based on

a review of the Record, it appears that the trial court made a reasonable inference that Respondent-Father had the grandmother's phone number but "chose" not to call her because of their "falling out." *See In re N.P.*, 374, N.C. at 65, 839 S.E.2d at 804.

Moreover, despite Respondent-Father contending a portion is unsupported by the evidence, he does not challenge the portion of the finding that states he "has not maintained contact with [Adam] or the maternal grandmother." He likewise does not challenge the portion that he never asked for the grandmother's address or inquired about alternative means by which to contact Adam. These unchallenged portions are binding on appeal and support a conclusion of neglect.

Accordingly, the challenged portion of Finding of Fact 50 is supported by clear, cogent, and convincing evidence based on Respondent-Father's testimony, and the unchallenged portions are binding on appeal. *See In re K.H.*, 375 N.C. at 612, 849 S.E.2d at 859; *see also In re N.P.*, 374 N.C. at 65, 839 S.E.2d at 804.

2. Findings of Fact 51 and 53

Next, Respondent-Father argues Findings of Fact 51 and 53 are unsupported by the evidence because the evidence does not support an "indicat[ion]" that he never attempted to call the grandmother and "assumes" that he had the ability to do so. He further argues his testimony does not support a finding that he did not take steps to establish a relationship with Adam because the evidence shows he attempted to get the grandmother's phone number approved by the facility, and he called the mother to speak to Adam.

Findings of Fact 51 and 53 are as follows:

51. [Respondent-Father] called the assigned social worker approximately three times during the case, but never called the maternal grandmother. He did not inquire as to the well-being of his son during the calls and took no steps to establish a relationship with his son.

....

53. [Respondent-Father] has had the ability to have contact with his son and to receive regular updates on his son, but chose not to do so.

Finding of Fact 51 is supported by Respondent-Father's own testimony that he never called the grandmother, as explained above. It is further supported by Ms. McCall's testimony that Respondent-Father called her three times, and only after Ms. McCall sent Respondent-Father letters requesting that he call. As to Respondent-Father's ability to maintain contact with his son, he did not independently call Ms. McCall to ask about Adam. He never sent letters, cards, or gifts to Ms. McCall so that she could pass them on to the grandmother to give to Adam. There is no indication from the Record that he asked to receive regular updates. The letters Ms. McCall sent him and the conversations they had appear to have been purely regarding the procedural updates of Adam's case, and not about Adam's development and well-being.

Further, Respondent-Father did not testify that he called the mother for the purpose of checking on Adam's well-being. Instead, he testified that he had called the mother "a couple of times" and "chances" to talk to Adam—which seems to imply

that conversations with Adam were the result of happenstance. He did not testify that he called the mother *for the purpose of* talking to Adam. He also testified that those phone calls were “months ago.” That Respondent-Father talked to Adam on the phone “a couple of times” with the mother is insufficient to negate the evidence that he had the ability to maintain a relationship and contact with Adam, but chose not to.

Accordingly, Findings of Fact 51 and 53 are supported by clear, cogent, and convincing evidence, and are binding on appeal. *See In re K.H.*, 375 N.C. at 612, 849 S.E.2d at 859.

C. Conclusion of Neglect

Respondent-Father challenges the trial court’s conclusion that grounds to terminate his parental rights exist for neglect, arguing the trial court relied solely on his incarceration to support its conclusion. We disagree.

A court may terminate a parent’s rights upon a finding that “the parent has . . . neglected the juvenile” within the meaning of N.C. Gen. Stat. § 7B-101(15). N.C. Gen. Stat. § 7B-1111(a)(1) (2023). A juvenile is “neglected” if they are younger than eighteen years of age and their parent “[d]oes not provide proper care, supervision, or discipline” to the juvenile. N.C. Gen. Stat. § 7B-101(15) (2023). As to showing neglect when the parent has been separated from the child for a period of time, our Supreme Court has provided this guidance:

Generally, “termination of parental rights based upon this

statutory ground requires a showing of neglect at the time of the termination hearing.” However, “if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.” When determining whether future neglect is likely, the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect.

In re K.N., 373 N.C. 274, 281–82, 837 S.E.2d 861, 867 (2020) (brackets and citations omitted). When considering these circumstances, “the best interests of the child[] and parental fitness *at the time of the termination hearing* are the determinative factors.” *In re C.L.S.*, 245 N.C. App. 75, 78, 781 S.E.2d 680, 682 (2016) (citation and internal quotation marks omitted).

“While [a] ‘respondent’s incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect[,]’ it ‘may be relevant to the determination of whether parental rights should be terminated[.]’ *In re J.S.*, 377 N.C. 73, 79, 855 S.E.2d 487, 492 (2021) (citation omitted); *see also In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 147 (2005) (“[I]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.) (citation omitted)). “[T]he extent to which a parent’s incarceration . . . support[s] a finding of neglect depends upon an analysis of the relevant facts and circumstances, *including the length of the parent’s incarceration.*” *In re J.S.*, 377 N.C. at 79, 855 S.E.2d at 492 (first alteration in original) (citation and internal quotation marks omitted). Finally, “while 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. at 78, 781 S.E.2d at 682 (alterations in original) (citation omitted).

Here, Respondent-Father argues the trial court “ignored a variety of evidence” demonstrating Respondent-Father’s involvement in Adam’s case and relied solely on Respondent-Father’s incarceration to support its conclusion of neglect. A review of the order, however, shows that the trial court considered several factors independent from Respondent-Father’s incarceration.

The trial court made the following, relevant findings to support its ultimate conclusion of neglect:

45. [Respondent-Father] is incarcerated in federal prison in West Virginia pursuant to a plea of guilty to two drug-related felonies in federal court. [Respondent-Father] has been incarcerated since August 2020, when his son was approximately one month old. His projected release date is 2039, after his son reaches the age of majority. [Respondent-Father] has an extensive criminal record.

46. [Respondent-Father] met his son one time prior to his incarceration.

....

49. [Respondent-Father] does have the ability to access a texting service and to make phone calls. He has five other children and a fiancé[e] and is in regular contact with them through calls and texts.

50. [Respondent-Father] has not maintained contact with [Adam] or the maternal grandmother. He

acknowledges that he has the grandmother's phone number, but chose not to contact her or [Adam] because of a "falling out" he had with the grandmother. He denies having the grandmother's address, but never asked anyone for it and never asked for alternative means by which to contact his child.

....

52. [Respondent-Father] never sent any cards, gifts, letters or any token of affection to either [the Department] or the maternal grandmother for the benefit of his son.

....

64. [Adam] does not have a bond with [Respondent-Father]. [Respondent-Father] has met [Adam] one time during his lifetime. As indicated above, [Respondent-Father] had the ability to establish more of a bond with his son, and chose not to.

First, as these findings were not challenged by Respondent-Father, they are assumed to be supported by clear, cogent, and convincing evidence and therefore binding on appeal. *See In re N.P.*, 374, N.C. at 65, 839 S.E.2d at 804.

Second, it is clear from these findings that the trial court considered factors outside of Respondent-Father's incarceration such as his failure to maintain contact with Adam, despite maintaining contact with his other five children; send cards or letters to Adam; or inquire about Adam's well-being. The trial court also considered the fact that Respondent-Father had met Adam just once in Adam's life and had not established a bond with Adam. He was present at Adam's birth but did not visit his son again in the month preceding his incarceration. While the trial court did consider the length of Respondent-Father's incarceration, such a consideration is relevant to

a comprehensive analysis of neglect, particularly where the child, as is the case here, will reach the age of majority before the incarceration ends.

Accordingly, the order demonstrates that the trial court considered factors independent of Respondent-Father's incarceration to support its conclusion of neglect. *See In re J.S.*, 377 N.C. at 79, 855 S.E.2d at 492.

IV. Conclusion

For the reasons stated above, we conclude the trial court's findings of fact are supported by clear, cogent, and convincing evidence. We further conclude the findings of fact show the trial court considered factors independent of Respondent-Father's incarceration when concluding grounds existed for neglect. The trial court's order, therefore, is affirmed.

AFFIRMED.

Judges HAMPSON and GORE concur.

Report per Rule 30(e).