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NO. COA10-396

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

IN THE MATTER OF:

E.G.K.,
A Minor Child.

Wake County
No. 08 JT 248

Appeal by Respondent-Appellant Father from order entered 2 February 2010 by Judge James R. Fullwood in District Court, Wake County. Heard in the Court of Appeals 16 August 2010.

Office of the Wake County Attorney, by Scott W. Warren, Roger A. Askew and Mary Elizabeth Smerko, for Wake County Human Services, Petitioner-Appellee.

Lisa Skinner Lefler for Respondent-Appellant Father.

Susan F. Vick for Guardian ad Litem.

McGEE, Judge.

J.C. (Respondent-Father) appeals from an order entered 2 February 2010, terminating his parental rights to the minor child E.G.K. Respondent-Mother A.K. (Respondent-Mother), relinquished her parental rights as to E.G.K. on 22 July 2009 and is not a party to this appeal. For the reasons stated herein, we affirm the order of the trial court terminating Respondent-Father's parental rights to E.G.K.

Respondent-Mother came to the attention of Wake County Human Services (Petitioner) in July 2007 due to a report of alleged

sexual abuse of Respondent-Mother by her adoptive father. Respondent-Mother was pregnant with E.G.K. at the time and she was placed in a maternity home in Durham, North Carolina. Respondent-Mother named three men, including Respondent-Father, as possibly being the father of E.G.K.

Shortly after the birth of E.G.K., Respondent-Mother ran away from the maternity home and left E.G.K. behind. Petitioner filed a juvenile petition on 9 July 2008, alleging that E.G.K. was a neglected and dependent juvenile. Petitioner assumed non-secure custody of E.G.K. and placed E.G.K. in a foster home.

The trial court entered a "Consent Order on Adjudication and Disposition" on 3 September 2008, concluding that E.G.K. was a neglected juvenile. The trial court found DNA testing had established that Respondent-Father was the biological father of E.G.K. The trial court ordered Respondent-Father to enter into a family services agreement with Petitioner, which required that Respondent-Father: (1) complete a substance abuse assessment, (2) follow all treatment recommendations, (3) remain "clean and sober as evidenced by random drug screens," (4) complete parenting education, (5) maintain regular contact with the social worker, and (6) provide Petitioner with a plan to provide for housing and the financial and care needs of E.G.K. The order also granted Respondent-Father weekly supervised visitation with E.G.K.

Initially, the trial court set reunification with a respondent-parent as the plan for E.G.K. However, on 18 August 2009, the trial court ordered Petitioner to: (1) cease

reunification efforts, (2) change the permanent plan for E.G.K. to adoption, and (3) take the necessary steps for termination of parental rights. Petitioner filed a motion on 30 September 2009 to terminate Respondent-Father's parental rights on the grounds of neglect, failure to make reasonable progress, and failure to pay cost of care, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1-3). Hearings were held on 10 and 11 December 2009. The trial court entered an order on 2 February 2010, finding the existence of all the grounds alleged, and terminated Respondent-Father's parental rights to E.G.K. Respondent-Father appeals.

Respondent-Father first argues the trial court erred in concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(3) to terminate his parental rights to E.G.K. Respondent-Father contends Petitioner failed to present clear, cogent and convincing evidence to support the trial court's findings of fact that Respondent-Father failed to pay cost of care. Respondent-Father contends it is unfair for Petitioner to not have informed him of his duty to support E.G.K. and then to use his failure to pay any child support against him in the termination proceedings. Respondent-Father further argues he and his parents were willing and able to support, house, and love E.G.K. We find Respondent-Father's arguments unpersuasive.

"Termination of parental rights is a two-step process. In the first phase of the termination hearing, the petitioner must show by clear, cogent and convincing evidence that a statutory ground to terminate exists." *In re S.N.*, 194 N.C. App. 142, 145, 669 S.E.2d

55, 58 (2008) (citations omitted), *aff'd*, 363 N.C. 368, 677 S.E.2d 455 (2009).

If the petitioner succeeds in establishing the existence of any one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111, the trial court moves to the second, or dispositional, stage, where it determines whether it is in the best interests of the child to terminate the parental rights.

In re Shepard, 162 N.C. App. 215, 221, 591 S.E.2d 1, 5-6 (citations and quotations omitted), *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

"On appeal, our standard of review for the termination of parental rights is whether the [trial] court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (internal quotations and citations omitted). "[T]he trial court's findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court." *In re S.C.R.*, ___ N.C. App. ___, ___, 679 S.E.2d 905, 909 (citing *In re J.D.S.*, 170 N.C. App. 244, 250-51, 612 S.E.2d 350, 354-55, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). However, "[t]he trial court's conclusions of law are fully reviewable *de novo* by the appellate court." *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (internal quotations and citations omitted).

A trial court may terminate parental rights upon finding:

The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent,

for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2009). "A finding that a parent has ability to pay support is essential to termination for nonsupport" pursuant to N.C.G.S. § 7B-1111(a)(3). *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). A parent's "nonpayment will be deemed a failure to pay a reasonable portion if and only if the [parent] could pay some amount greater than zero." *In re McDonald*, 72 N.C. App. 234, 243, 324 S.E.2d 847, 853, *disc. review denied*, 314 N.C. 115, 332 S.E.2d 490 (1985).

In this case, E.G.K. had been in foster care continuously since July 2008, and the trial court made the following findings of fact regarding Respondent-Father's ability to pay a reasonable portion of E.G.K.'s care:

14. That after graduation from high school [in June 2009], [Respondent-Father] failed to secure employment sufficient to support himself and his child. He was employed at IHOP for a few weeks beginning on the day prior to the July 2009 placement review hearing. He did not provide proof of employment to Wake County Human Services. [Respondent-Father] was under no disability that would have prevented him from working. [Respondent-Father] had the ability to pay support. No court orders requiring [Respondent-Father] to pay child support have

been entered by the [c]ourt. Zero support is not a "reasonable portion" of the cost of care of [E.G.K.]. [Respondent-Father] did not request assistance with finding employment.

15. That while [Respondent-Father] provided snacks and diapers for [E.G.K.] at visits, [Respondent-Father] made no monetary contribution for the support of [E.G.K.]. The board rate for [E.G.K.] in foster care is \$475.00 per month. The paternal grandfather testified that the items purchased for [E.G.K.] were purchased by [Respondent-Father] with funds provided by the grandfather. The grandfather provided the funds needed by [Respondent-Father] to travel to Lexington, North Carolina, to see [E.G.K.'s] mother.

Respondent-Father has not specifically challenged these findings of fact. Thus, they are binding on appeal. The trial court specifically found Respondent-Father had the ability to pay at least some support and failed to do so, and that what little contributions Respondent-Father gave during visits with E.G.K. were, in fact, actually provided by the paternal grandparents.

We conclude these findings support the trial court's conclusion that, although physically and financially able to do so, Respondent-Father willfully failed to pay any portion of the cost of the care of E.G.K.

Respondent-Father further argues that it is unfair to terminate his parental rights on this ground because Petitioner never told him he should pay some support for E.G.K. while E.G.K. was in foster care. This argument is equally without merit. The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable child support. *In re T.D.P.*, 164 N.C. App. 287, 289,

595 S.E.2d 735, 737 (2004) (citing *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983) ("Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.")), *aff'd*, 359 N.C. 405, 610 S.E.2d 199 (2005); *see also In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 241 (1981) (holding "[a]ll parents have the duty to support their children within their means"). Accordingly, we hold sufficient grounds existed for termination of Respondent-Father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3).

In light of our holding with respect to this ground of termination, we need not address Respondent-Father's remaining arguments regarding the additional grounds for termination found by the trial court. *In re D.B.*, 186 N.C. App. 556, 561, 652 S.E.2d 56, 60 (2007) ("Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to any one of the statutory grounds is supported by valid findings of fact."), *aff'd per curiam*, 362 N.C. 345, 661 S.E.2d 734 (2008); *see also* N.C. Gen. Stat. § 7B-1111(a) (2009).

Respondent-Father also argues the trial court abused its discretion in concluding it was in the best interests of E.G.K. to terminate Respondent-Father's parental rights. Respondent-Father contends his actions where E.G.K. was concerned had been consistent

with those of an appropriate father. Respondent-Father further argues his incarceration¹ should not automatically result in the termination of his parental rights, that he has established an appropriate alternative plan of care for E.G.K. with his parents during his incarceration, and that placement with the paternal grandparents is the best placement for E.G.K. Again, we disagree.

When determining whether it is in the best interests of a child to terminate parental rights, the trial court must consider the following:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2009). We review a trial court's determination of whether it is in the best interests of a minor child to terminate parental rights "on an abuse of discretion standard, and will reverse a court's decision only where it is

¹On 12 July 2008, Respondent-Father was involved in a two-car accident in which his consumption of alcohol was a contributing factor and a passenger in the other car was killed. Respondent-Father was criminally charged as a result of the accident and subsequently entered a guilty plea to second-degree murder and assault with a deadly weapon with intent to inflict serious bodily injury. On 6 November 2009, Respondent-Father was sentenced to a term of 94 to 122 months in prison. At the time of the termination proceedings, Respondent-Father was incarcerated in the North Carolina Department of Correction, with a projected release date of 8 April 2019.

manifestly unsupported by reason." *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citations and quotations omitted).

In the case before us, the trial court found E.G.K. was nineteen months old at the time of the hearing and had been in foster care for the previous sixteen months. E.G.K. was in a pre-adoptive home and had lived with the foster parents since he was removed from Respondent-Mother and placed in Petitioner's custody. The trial court found: (1) that E.G.K. had a strong "parent-child" bond with the foster parents, (2) that the likelihood of adoption was high, and (3) that termination of parental rights would aid in the accomplishment of the permanent plan for E.G.K. The trial court also found that Respondent-Father loved E.G.K. and had a bond with him, but that Respondent-Father did not have an appropriate "parent-child" bond. It is clear that the trial court considered all of the factors in N.C. Gen. Stat. § 7B-1110(a), and we cannot hold the trial court's conclusion that it was in the best interests of E.G.K. to terminate parental rights is manifestly unsupported by reason. Accordingly, we affirm the order of the trial court terminating Respondent-Father's parental rights as to E.G.K.

Affirmed.

Judges BRYANT and GEER concur.

Report per Rule 30(e).