NO. COA10-719

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN RE:

J.J.,
A Minor Child.

Stanly County
No. 08 JT 60

Appeal by respondent from order entered 23 March 2010 by Judge Lisa B. Thacker in Stanly County District Court. Heard in the Court of Appeals 1 November 2010.

Ferguson, Scarborough, Hayes, Hawkins & DeMay, P.A., James R. DeMay, for petitioner-appellee.

Joyce L. Terres for respondent-appellant.

HUNTER, Robert C., Judge.

Respondent-father Kristopher J. appeals from the trial court's order terminating his parental rights to his son J.J. ("John").[1] After careful review, we affirm.

Facts

Petitioner-mother Meleah O. and respondent were married in October 2004 and John was born in January 2005. On 26 April 2005, petitioner obtained an *ex parte* domestic violence protective order ("DVPO") after respondent slapped her in the mouth, grabbed John from the bathtub by one arm, and held John by his mid-section so

[1]The pseudonym "John" is used throughout this opinion to protect the juvenile's privacy and for ease of reading.

tightly that he turned blue. The parties entered into a consent order on 29 June 2005, which incorporated by reference the terms of the April 2005 *ex parte* DVPO.

Respondent was incarcerated from 1 January 2006 through 19 April 2007 based, in part, on charges stemming from the 26 April 2005 incident. During this period, the parties divorced (24 July 2006) and entered into a consent order (26 September 2006) giving petitioner primary custody of John. After respondent was released in April 2007, he and petitioner began dating again. After dating for roughly three months and living together with John for approximately three weeks, another incident of domestic violence occurred on 26 July 2007. After getting into an argument at respondent's house, petitioner left the house with John, got into her car, locked the doors, and began to drive away. Respondent grabbed onto the luggage rack, forcing petitioner to stop the car. Respondent then slashed the tires on petitioner's car with a knife. During the incident, John was in his car seat screaming for respondent to stop. The parties entered into another consent DVPO on 1 August 2007.

On 6 October 2008, petitioner filed a petition to terminate respondent's parental rights, alleging that respondent had (1) abused and neglected John, and (2) wilfully abandoned John. The trial court conducted proceedings on the petition on 27 August 2009, 12 November 2009, and 4 March 2010. The court entered an order on 23 March 2010, in which it determined that neglect existed as a basis for terminating respondent's parental rights and that

termination was in John's best interest. Consequently, the trial court terminated respondent's parental rights. Respondent timely appealed to this Court.

I

Respondent first challenges the trial court's findings of fact regarding the domestic violence proceedings involving the parties:

> 12. In April 2005, the parties were [the] subject of a Domestic Violence proceeding (Stanly County File No. 05-CVD-638) wherein the allegations included acts of physical violence toward the Petitioner and the minor child. The acts stipulated to regarding the minor child included the Respondent slapping the Petitioner in the mouth, grabbing the child by one arm from the bathtub and holding him by the mid-section tightly enough that the child turned blue.
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> 13. The parties ultimately entered into a Consent Order in Stanly County File No. 05CVD638 which is incorporated herein as findings of fact. That Consent Order was entered into without objection to the factual basis of the Complaint initiating the matter by the Respondent, and at a time when both parties were represented by counsel.
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> . . . .
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> 16. In April 2007, following the Respondent's release from a period of incarceration, the parties resumed a dating relationship for a period of approximately three (3) months, and lived together with the minor child for a period of three (3) weeks. At the end of the three (3) month period, the Petitioner again caused to be taken out a domestic violence proceeding (Stanly County File No. 07-CVD-1087) alleging violent acts toward her by the Respondent in the presence of the minor child. The allegations included Respondent trying to punch out the windows in Petitioner's car, trying to slash the tires on the car, and doing so while the minor child subject of this action was in the car causing him to become upset.

> 17. Again, the Respondent failed to object to any of the allegations and entered into another Consent Order in Stanly County File No. 07CVD1087 affording the Petitioner a protective Order for twelve months extending to July 31, 2008. The Order from Stanly County File No. 07CVD1087 is incorporated herein by reference.

Respondent contends that the trial court erred because, "rather than making its own independent findings, resolving the contradictory testimony of the witnesses, the trial court merely incorporated the findings from the domestic violence orders."

"In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004). Despite this authority, however, "the trial court may not delegate its fact finding duty" and thus should not "broadly incorporate . . . outside sources as its findings of fact." *Id.*

Here, the parties entered into a pre-trial order, in which they "stipulate[d] to [the] use and entry at trial" of the 2005 and 2007 protective orders, manifesting their intent that the orders be used by the trial court in making its findings of fact. *See Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (explaining that stipulation should be construed to effectuate intent of parties). The pre-trial order specifically provides that the protective orders, in addition to the other matters to which the parties stipulated, "accurately stated" the "matters at issue between the parties . . . ." The pre-trial order also provides

that their stipulations "[we]re binding on the parties at trial[.]" Thus the trial court's incorporation of the protective orders into its termination order was not an impermissible delegation of its fact-finding duty, but rather was consistent with the intent of the parties as reflected in the pre-trial order.

We note, moreover, that, contrary to respondent's contention, there is no material conflict in the parties' testimony regarding the incidents of domestic violence. With respect to the 26 April 2005 incident, petitioner testified that respondent "slapped [her] in the mouth and pulled [John] from the bath by his arm and held him around the stomach, and he turned blue." On cross-examination, respondent acknowledged that the incident "took place" and that he was convicted of assaulting John as a result of the incident. As for the 26 July 2007 incident, petitioner testified that she decided to leave respondent's house with John because respondent had been drinking; that she put John in his car seat in the back of the car, got inside, locked the doors, and started driving away; that respondent grabbed onto the car's luggage rack and was hanging from the car as she was driving, yelling at her to stop the car and punching the windows; that when she stopped the car, respondent slashed her tires; and, that during this incident, John was screaming at respondent to stop and stating that he was scared. At the hearing, respondent again admitted that the "incident took place as alleged[.]" Although respondent testified that he did not punch the windows of petitioner's car, he did admit to "stabbing her tires."

Thus, even assuming, without deciding, that the trial court failed to make the required findings, remand is unnecessary given the parties' stipulations and the undisputed evidence regarding the incidents resulting in the entry of protective orders. *See Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) ("When a trial court fails to make findings or conclusions when they are required, the appellate court 'may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented.' However, a remand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the undisputed facts." (quoting 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2577, at 698 (1971)); *In re Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993) (upholding adjudication of neglect despite trial court's "fail[ure] to make any findings of fact concerning the detrimental effect of [respondent]'s improper care on [juvenile]'s physical, mental, or emotional well-being" as "all the evidence support[ed] such a finding").

II

Respondent's final argument on appeal is that the trial court erred in terminating his parental rights. Under our Juvenile Code, a termination of parental rights proceeding involves two distinct phases: an adjudicatory stage governed by N.C. Gen. Stat. § 7B-1109 (2009) and a dispositional stage governed by N.C. Gen. Stat. § 7B-

1110 (2009). *In re Fletcher*, 148 N.C. App. 228, 233, 558 S.E.2d 498, 501 (2002). In the adjudicatory stage, "the trial court must determine whether the evidence clearly and convincingly establishes at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7B-1111." *Id.* After the petitioner has proven at least one ground for termination, the trial court proceeds to the dispositional phase in which it "consider[s] whether termination is in the best interests of the child." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). The standard of review in termination of parental rights cases is whether the trial court's findings of fact are based upon clear, cogent, and convincing evidence and whether the court's findings, in turn, support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

Here, the trial court determined that "grounds exist pursuant to G.S. 7B-1111(a)(1) to terminate the parental rights of the Respondent . . . ." N.C. Gen. Stat. § 7B-1111(a)(1) provides that parental rights may be terminated where the parent has neglected the juvenile. A "neglected juvenile" is defined as:

> [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; or who has been placed for care or adoption in violation of law. . . .

N.C. Gen. Stat. § 7B-101(15) (2009). To prove neglect in a termination case, there must be clear, cogent, and convincing evidence that: (1) at the time of the termination proceedings, the juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) and (2) the juvenile has sustained some physical, mental, or emotional impairment or there is a substantial risk of such impairment as a consequence of the neglect. *In re Beasley*, 147 N.C. App. 399, 403, 555 S.E.2d 643, 646 (2001).

Respondent contends that "the trial court made findings of fact that were not supported by clear, cogent and convincing evidence," and thus they were "not sufficient to prove neglect." Respondent first challenges the trial court's finding that "Respondent has willfully failed and refused to [provide] any money for the benefit of the minor child." In support of his argument, respondent points to the fact that petitioner "dropped" her claim for child support and that "he didn't think he was allowed to pay anything because of the 50-B."

At trial, petitioner's uncontroverted testimony was that from the time of the parties' separation in April 2005 through the March 2010 termination hearing, she had not received any type of support, card, gift, clothing, [or] anything like that from [respondent]." Respondent testified that he was employed during some of this period, but that he never provided any support because he believed that he was not "welcome" to do so under the terms of the protective orders. The protective orders, however, were in effect for only two of the five years at issue. Although respondent

claimed that he was not aware that each of the protective orders expired after a year, "ignoran[ce] of the judicial process" does not constitute excusable neglect. *In re Hall*, 89 N.C. App. 685, 688, 366 S.E.2d 882, 885 (1988).

Respondent next challenges the court's finding that

> The Respondent has exhibited a pattern of continual behavior that is not in the best interest of the minor child, and put himself in a position of exclusion regarding the minor child as follows:
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> > a. Engaging in multiple acts of domestic violence toward Petitioner and the minor child and otherwise in the presence of the minor;
> > b. Engaging in repetitive and serious criminal behavior without regard to the minor child;
> > c. Assaulting the minor child;
> > d. Placing himself in a position to be repetitively in and out of incarceration;
> > e. Promoting a history of violence and substance abuse when not incarcerated creating an injurious environment for the minor child.

There is ample evidence to support this finding. As addressed above, petitioner testified, and respondent does not dispute, that he committed acts of domestic violence toward petitioner and the juvenile. Respondent admitted that he had a "horrible criminal record" and testified that he had been convicted of assault on a female (petitioner), assault on a child under 12 (John), possession of a firearm by a felon, taking indecent liberties with a minor, and failing to register as a sex offender. Respondent stipulated and testified that he was incarcerated from 1 January 2006 through 19 April 2006; 26 September 2007 through 7 November 2007; and 6 February 2008 through the termination proceedings, with a projected

release date of 15 March 2010. Respondent also admitted that he had a "substance abuse problem."

Respondent also takes issue with the trial court's finding that he abandoned John: "The behaviors of the Respondent over an extended period of time have rendered him incapable of parenting the minor child subject of this action, and have resulted in the intentional withholding of parental presence thereby concluding with the constructive abandonment of the child." Respondent argues that he did not "intentionally withhold his parental presence" because the protective orders and periods of incarceration prevented him from being in contact with John.

Respondent's argument ignores the fact that it was his conduct in assaulting petitioner and John that resulted in the protective orders and led to significant periods of his incarceration. The evidence is uncontradicted that respondent did not contact or attempt to contact petitioner after April 2005; that he never paid or offered to provide any support for John; that he did not co-operate with the department of social services' investigation after the July 2007 incident of domestic violence; and, that, when respondent was not incarcerated, "[h]e would go out all night partying and be nowhere to be found to help . . . with [John] . . . ."

Respondent further challenges the trial court's finding regarding his incarceration:

> 31. The Respondent, through his own testimony has offered the Court no information regarding his post release plan for supervision, employment, housing or engaging in any

> activity to promote a better life-style for himself.

Respondent asserts that this finding is "not consistent with the evidence." Although respondent testified that while incarcerated, he had "participated in a number of classes" designed to "assist him with transitioning back into the 'real world[,]'" he also indicated that he had not taken any action in developing a plan for post-release supervision, employment, or housing. Despite having several family members living in Stanly County and the juvenile's living there with petitioner, when asked, respondent stated that he intended to live "[e]lsewhere."

We conclude that the trial court's challenged findings are supported by clear, cogent, and convincing evidence. Respondent further contends, however, that the court's findings do not support a determination of neglect. Specifically, respondent contends that "[t]he court erroneously equated the father's incarceration with neglect of his child." While respondent is correct that "'[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision[,]'" *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003) (Tyson, J., dissenting)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006), a parent's incarceration nevertheless "may be relevant to whether his child is neglected[,]" *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007). For example, in *P.L.P.*, 173 N.C. App. at 10-11, 618 S.E.2d at 247, this Court upheld the termination of parental rights where the trial court found that the

incarcerated parent "(1) 'could have written' but did not do so; (2) 'made no efforts to provide anything for the minor child'; (3) 'has not provided any love, nurtur[ing] or support for the minor child'; and (4) 'would continue to neglect the minor child if the child was placed in his care[.]'" *See also In re Bradshaw*, 160 N.C. App. 677, 682, 587 S.E.2d 83, 86-87 (2003) (affirming termination of parental rights based on neglect where incarcerated father failed to "provide[] support for the minor child," did not s[eek] any personal contact with or attempted to convey love and affection for the minor child," and "failed to provide any financial aid to petitioner in support of the minor child").

Here, as in *P.L.P.* and *Bradshaw*, the trial court found that: (1) "[t]he Respondent has had no contact with the minor child, nor has he attempted the same, since at least July 2007"; (2) "[t]he Respondent has made no provision for gifts, cards, telephone calls, or any other in-kind contact at any time since at least July 2007"; (3) "the Respondent has willfully failed and refused to [provide] any money for the benefits of the minor child"; (4) that respondent has a significant criminal record, including domestic violence toward petitioner and the juvenile; and (5) that "[t]here exists a high probability of the repetition of this neglect" if the juvenile were in the care of respondent. These findings — either unchallenged or supported by clear, cogent, and convincing evidence — support the trial court's conclusion that neglect exists as a ground for termination of respondent's parental rights. As respondent does not contest the trial court's determination that

termination of respondent's parental rights is in the best interest of the juvenile, we do not address the issue, and, accordingly, affirm the trial court's order.

Affirmed.

Judges STROUD and Robert N. HUNTER, Jr. concur.

Report per Rule 30(e).