NO. COA09-709

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN RE:

Iredell County S.L.G. & D.K.G. Nos. 05 JT 211, 212

Appeal by Respondent from orders entered 6 April 2009 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 19 October 2009.

No brief filed for Petitioner.

No brief filed for guardian ad litem.

David A. Perez, for Respondent-appellant.

STEELMAN, Judge.

Where Respondent failed to make any contact or maintain a relationship with her children during the relevant six-month statutory period for willful abandonment, the trial court properly concluded that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate her parental rights despite her incarceration. Where the trial court found that the children have a loving bond with Petitioner and are progressing well in that placement, the trial court did not abuse its discretion by concluding that termination of parental rights was in the best interests of the children.

I. Factual and Procedural Background

Petitioner is the paternal aunt of S.L.G. and D.K.G., born in 2000 and 1998, respectively, and their legal guardian by virtue of orders entered by the District Court of Iredell County on 22 September 2006. Respondent is the biological mother of the children, both of whom have resided in Iredell County since birth. Respondent last visited the children in January 2006. That same year, Respondent moved to Tennessee without the children. She suffered from a significant drug addiction. Between January 2006 and May 2007, Respondent was intermittently incarcerated in the Tennessee penal system. Commencing in May of 2007, Respondent was continuously incarcerated in Tennessee for eighteen months on drug-related charges. Petitioner filed petitions to terminate Respondent's parental rights as to the two children on 24 April 2008 alleging that Respondent had willfully abandoned the children for at least six months prior to the filing of the petitions and that Respondent had neglected the children.

On 6 April 2009, the trial court filed separate orders as to each child terminating Respondent's parental rights. In the orders, the trial court found that Respondent had not paid any child support, visited, written, mailed cards or sent presents to the children since 18 January 2006, with the exception of a one-time Christmas or birthday gift to S.L.G. The trial court further found in each order that:

> [Respondent] has known or should have known how to contact the Petitioner so she could have checked on the child and sen[t] child support. She failed to do so. The Petitioner's parents have lived at the same address for a number of years and the

> Petitioner has lived at the same address for a number of years and in fact the Respondent . . . has visited in the Petitioner's home prior to abandoning the child and the Petitioner still resides in the same home with the children and did not move and has not moved at any time since the Respondent . . . left the minor child to go to Tennessee. [Respondent] has had the ability to maintain communication with the minor child and to pay child support. She has willfully failed to do so.

The trial court also found that Respondent was not under any disability and was an able-bodied person, and that it was in the best interest of the children that Respondent's parental rights be terminated. The trial court terminated Respondent's parental rights on the ground that she willfully abandoned the children for at least six months prior to the filing of the petitions. Respondent appeals.[1]

II. Grounds for Termination of Parental Rights

In her first argument, Respondent contends that the trial court's findings of fact are not supported by clear, cogent, and convincing evidence and do not support its conclusion of law that Respondent willfully abandoned S.L.G. and D.K.G. for at least six consecutive months prior to the filing of the termination petitions. We disagree.

A. Standard of Review

[1]K.J.G., the biological father of S.L.G. and D.K.G., was present during the termination hearing, but was not represented by counsel as this proceeding was only against Respondent. During the hearing, K.J.G. was called to the stand and testified that if Respondent's rights were terminated, he would voluntarily relinquish his parental rights and consent to the adoption by Petitioner.

In the adjudicatory stage of a termination of parental rights proceeding, the petitioner has the burden of establishing by clear, cogent, and convincing evidence that grounds authorizing the termination exist. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). The "clear, cogent, and convincing" evidence standard of proof is one which is greater than the preponderance of the evidence standard in most civil cases, but less stringent than the proof beyond a reasonable doubt standard in criminal cases. *In re Montgomery*, 311 N.C. 101, 109–10, 316 S.E.2d 246, 252 (1984). We "must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *Id.* at 111, 316 S.E.2d at 253 (citation omitted). North Carolina appellate courts "are bound by the trial court's findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Id.* at 110–11, 316 S.E.2d at 252–53 (citation omitted).

B. Willful Abandonment

N.C. Gen. Stat. § 7B-1111(a) provides that the trial court may terminate the parental rights upon a finding that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C. Gen. Stat. § 7B-1111(a)(7) (2007). "[A]bandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child[.]" *In re Apa*, 59 N.C.

App. 322, 324, 296 S.E.2d 811, 813 (1982) (quotation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). "[T]he word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re T.C.B.*, 166 N.C. App. 482, 485, 602 S.E.2d 17, 19 (2004) (internal quotations omitted).

In the instant case, the termination petitions were filed on 24 April 2008. Therefore, the six-month period immediately prior to the filing of the petitions ran from 24 October 2007 to 24 April 2008. It is undisputed that Respondent was incarcerated during this period. However, Respondent's incarceration does not preclude the trial court from terminating her parental rights on the basis of willful abandonment. *See In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 511 (2000) ("[A] respondent's incarceration, standing alone, neither precludes nor requires a finding of willfulness . . . ." (citation omitted)). A determinative factor in whether an incarcerated parent willfully abandoned their child is the parent's attempt to contact and maintain a relationship with the child despite being in custody. *Id.* at 429–30, 533 S.E.2d at 510; *see also In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App.

230, 241, 615 S.E.2d 27, 34 (2005). While this Court has acknowledged that incarceration may limit a parent's ability to show love and affection, it is not an excuse for a parent's complete failure to show interest in the children's welfare. *See generally Whittington v. Hendren (In re Hendren)*, 156 N.C. App. 364, 576 S.E.2d 372, 376 (2003) (while discussing whether the incarcerated respondent neglected his child pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), this Court stated, "[a]lthough his options for showing affection are greatly limited, the respondent will not be excused from showing interest in the child's welfare by whatever means available. The sacrifices which parenthood often requires are not forfeited when the parent is in custody.").

In *In re D.J.D.*, the respondent was incarcerated during the relevant six-month period under N.C. Gen. Stat. § 7B-1111(a)(7). 171 N.C. App. at 232, 615 S.E.2d at 29. The trial court found that while the respondent had been in custody, he had absolutely no contact with his children; had not made any telephone calls, sent any cards, written any letters, nor arranged for any gifts; no one acting on the respondent's behalf had contacted DSS requesting a visit with or attempting to communicate with his children; and no child support had been paid, but that the respondent was not employed at that time. *Id.* at 235, 615 S.E.2d at 30. The trial court further found that while the respondent did have contact with his mother, sister, and the children's mother, he never requested that any of these persons contact DSS to inquire into the children's well-being or obtain an address where mail could be sent

to the children, who had been placed with their maternal grandmother. *Id.* Based upon these findings, we held that the respondent "ha[d] taken none of the steps to develop or maintain a relationship with his children" and that these findings supported the trial court's order terminating the respondent's parental rights for willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). *Id.* at 241, 615 S.E.2d at 34.

Similarly, in *In re McLemore*, the respondent was incarcerated for a portion of the relevant statutory time period and attempted to list his child's name as his dependent on a work release application so that child support payments could be deducted from his pay. *Id.* at 430, 533 S.E.2d at 510. However, various errors on the application precluded the deductions from being made. *Id.* The respondent had no other contact with his child during this time. *Id.* This Court held that "one ineffectual attempt at contact during the relevant six month period in this case would not preclude otherwise clear willful abandonment, despite the fact of respondent's incarceration during that time." *Id.* at 431, 533 S.E.2d at 511.

In the instant case, the trial court entered various findings of fact pertaining to whether Respondent willfully failed to maintain a relationship with her children and to pay child support while being incarcerated. Respondent challenges the following findings of fact[2]:

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[2]As stated above, the trial court entered separate termination orders as to each child. Respondent challenges findings of fact 6, 7, and 18 in the order pertaining to D.K.G. and findings of fact

> 6. This Petition is to terminate the parental rights of [Respondent]. [Respondent] has willfully abandoned the minor [children] for at least six (6) consecutive months immediately prior to the filing of this petition, which was filed on April 24, 2008, in the Iredell County District Court. [Respondent] has failed to pay any child support since January 18, 2006 and has not seen the [children] since January 18, 2006. [Respondent] has not written the [children] nor did she send [the children] a Christmas present in 2006 or send birthday cards nor Christmas cards or presents nor called the [children] since January 18, 2006.
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> 7. The Respondent . . . is not under any disability and is in fact an able-bodied person.
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> . . . .
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> [18. (D.K.G.) & 19. (S.L.G.)] [Respondent] has known or should have known how to contact the Petitioner so she could have checked on the [children] and sen[t] child support. She failed to do so. The Petitioner's parents have lived at the same address for a number of years and the Petitioner has lived at the same address for a number of years and in fact the Respondent . . . has visited in the Petitioner's home prior to abandoning the [children] and the Petitioner still resides in the same home with the children and did not move and has not moved at any time since the Respondent . . . left the minor [children] to go to Tennessee. [Respondent] has had the ability to maintain communication with the minor [children] and to pay child support. She has willfully failed to do so.

6, 7, and 19 in the order pertaining to S.L.G. We note Respondent attempts to bring forward additional assignments of error pertaining to other findings of fact in the orders. However, the only arguments advanced in her brief pertain to the above-cited findings. Thus, our analysis is limited to whether findings of fact 6, 7, 18, and 19 are supported by clear, cogent, and convincing evidence. N.C. R. App. P. 28(b)(6).

At the termination hearing, Petitioner testified that since January 2006, Respondent had only once sent S.L.G. a birthday present, which occurred around May 2006. Since that time Respondent had not written, called, sent her children any birthday presents, or sent any child support, and that to her knowledge none of the children's maternal relatives had attempted to contact her. Petitioner testified that Respondent had been to her residence in Statesville several times prior to January 2006, she had lived there continuously for six years, and the children have lived with her at this address since August 2005. Respondent had weekly visitations, supervised by DSS, with the children from August 2005 until January 2006. Respondent testified that she had been to Petitioner's home several times, but she stated she could not remember the name of the road it was on and could not give directions to the home.

The only evidence presented of an attempt by Respondent to maintain a relationship with her children after she left North Carolina and prior to the filing of the petition to terminate her parental rights was her testimony that some time after she was incarcerated in 2007, she allegedly asked her father, mother, and sister to "get in touch" with Petitioner and obtain her address and/or telephone number.[3] She testified that her mother could not find a listed telephone number for Petitioner. However, Respondent's father testified that Respondent's mother provided him

[3]It is unclear from the record whether this alleged request occurred during the time period from 24 October 2007 to 24 April 2008.

with a telephone number for the children's residence and that whenever he called that number he would get an answering machine message in a child's voice. He would hang up and not leave a message because he "couldn't get in touch with an adult." Respondent's father acknowledged that he could have left a message, but he did not.

Further, no evidence before the trial court tended to show that Respondent was suffering from a disability that prevented her from working in prison and providing some amount of support for the children. Respondent testified that while she was incarcerated, she participated in the work-detail program and cleaned community centers and sheriff's offices. Respondent alleged that she received a "day for day" credit on her sentence for her participation in the program, not monetary compensation. It is not clear from the record whether other work programs were available while Respondent was incarcerated in which she could have earned money.[4] Respondent admitted during the hearing that she had never sent Petitioner any child support.

Based upon the above evidence and findings, we hold the reasoning and holdings of *In re D.J.D.* and *In re McLemore* are applicable to the instant case. Respondent failed to even attempt to make any contact with her children during the six-month period

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[4]Even if we were to assume that Respondent did not have the ability to pay child support during the six months immediately preceding the filing of the termination petitions while she was incarcerated, this is only one of the factors to be considered under N.C. Gen. Stat. § 7B-1111(a)(7) and is not dispositive in and of itself. *C.f.* N.C. Gen. Stat. § 7B-1111(a)(3).

prior to the filing of the termination petition. Respondent could have obtained information about the children from several alternative sources, including DSS, which had been supervising Respondent's visits with the children until Respondent moved to Tennessee in January 2006, and the children's father and the paternal grandparents who resided a short distance away from the children and saw them regularly. Absent from the record is any evidence that Respondent attempted to contact, either personally or through her parents, these potential sources of information about the children. Respondent "has taken none of the steps to develop or maintain a relationship with [her] children[,]" despite her incarceration. *In re D.J.D.*, 171 N.C. App. at 241, 615 S.E.2d at 34. We hold that there is clear, cogent, and convincing evidence in the record to support the challenged portions of the trial court's findings of fact 6, 7, 18, and 19 and that these findings support the trial court's conclusion that Respondent willfully abandoned the children during the six-month period prior to the filing of the petitions. This argument is without merit.

III. Best Interests

In her second argument, Respondent contends that the trial court erred by concluding that it was in the best interests of the children to terminate her parental rights. We disagree.

A. Standard of Review

Once a trial court determines that a ground exists to terminate a parent's rights, it must then decide whether termination is in the best interests of the child. N.C. Gen. Stat.

§ 7B-1110(a) (2007); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The trial court's determination is reviewed only for abuse of discretion. *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406-07 (2003). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

The factors the trial court must consider in determining the children's best interests include: the child's age, the likelihood of adoption, whether termination will aid in the accomplishment of the permanent plan, the bond between the child and the parent, the quality of the relationship between the child and the proposed adoptive parent, guardian, custodian, or other permanent placement, and any other relevant consideration. N.C. Gen. Stat. § 7B-1110(a)(1)-(6) (2007).

The trial court found that S.L.G. and D.K.G., ages eight and ten, respectively, had a close and loving bond with Petitioner. The children considered Petitioner as their mother and Petitioner desired to adopt them. The father of the children stated that he would consent to adoption of the children by Petitioner. D.K.G. was performing "wonderfully in school and [was] progressing well." S.L.G. did not remember Respondent and, although D.K.G. did remember her, due to the lack of contact with her, any bond with Respondent had been replaced by a strong bond with Petitioner. The

guardian *ad litem* for the children recommended that termination of Respondent's parental rights was in the best interests of the children. The guardian *ad litem* noted that the children were in a loving and stable environment with Petitioner and that they were in need of permanence and stability at this point in their lives. We discern no abuse of discretion in the trial court's conclusion that it was in the best interests of the children to terminate Respondent's parental rights.

AFFIRMED.

Judges WYNN and ERVIN concur.

Report per Rule 30(e).