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NO. COA10-513

NORTH CAROLINA COURT OF APPEALS

Filed: 2 November 2010

IN THE MATTER OF: Catawba County
No. 08 JT 263

Q.L.D.

Appeal by respondent-father from order entered 4 January 2010 by Judge J. Gary Dellinger in Catawba County District Court. Heard in the Court of Appeals 14 October 2010.

J. David Abernethy for petitioner-appellee Catawba County Department of Social Services.

Betsy J. Wolfenden for respondent-appellant father on brief.

Annick Lenoir-Peek, substituted after briefing as counsel of record, for respondent-appellant father.

Pamela Newell for guardian ad litem.

JACKSON, Judge.

Respondent-father appeals from the district court's order terminating his parental rights to his two-year-old daughter, Q.L.D. Q.L.D.'s mother is not a party to this appeal. After careful review, we affirm for the reasons set forth below.

On 11 September 2008, the Catawba County Department of Social Services ("DSS") filed a juvenile petition alleging that Q.L.D. was a neglected and dependent juvenile. At the time the petition was filed, Q.L.D.'s paternity had not been established. Another man,

John D., was listed as Q.L.D.'s father on her birth certificate. However, both John D. and the mother claimed that John D. was not Q.L.D.'s father. Instead, they believed that respondent-father was Q.L.D.'s father, and genetic testing later confirmed that respondent-father was Q.L.D.'s father. Additionally, respondent-father later admitted that he knew Q.L.D. was his daughter prior to her birth.

Q.L.D. was approximately seven months old at the time the petition was filed. The petition alleged that Q.L.D.'s mother had long-standing mental health and substance abuse problems, had been diagnosed previously with bipolar disorder and post traumatic stress disorder, had been hospitalized previously due to suicidal ideation and attempts, and had been inconsistent in attending therapy. The petition further alleged that the mother acknowledged being incapable of caring for Q.L.D. At the time, the mother was unemployed and lacked stable housing. She lived with John D. from time to time, and both the mother and John D. had positive drug tests.

The petition also alleged that respondent-father and the mother engaged in domestic violence on 30 May 2008. According to the petition, the two threatened each other with knives, and respondent-father incurred injuries as a result. The mother was charged with assault with a deadly weapon with intent to kill. On 2 June 2008, Q.L.D. had some bruising, and each parent claimed that the other was responsible.

Finally, the petition made allegations regarding respondent-father. The petition alleged that respondent-father has other children in West Virginia, but a court order forbade him from visiting these children until he completed a domestic violence assessment, completed a substance abuse assessment, and took parenting classes. The petition alleged that respondent-father was abusive in past relationships and has a criminal record.

Following the domestic violence incident, the mother voluntarily placed Q.L.D. with John D.'s mother and her husband (hereinafter referred to by the pseudonym, "the Stewarts"). On 17 October 2008, the trial court entered a nonsecure custody order, giving custody of Q.L.D. to DSS and approving the Stewarts as a placement.

On 11 September 2008, the trial court conducted an adjudication hearing and subsequently entered an order on 12 November 2008 finding Q.L.D. to be a neglected and dependent juvenile. In the adjudication order, the trial court found a factual basis for the allegations contained in the petition, with some slight amendments that did not materially alter the substance of the petition. Thus, the trial court made findings of fact establishing the mother's mental health and substance abuse problems, the parents' domestic violence incident, and respondent-father's history.

On 10 November 2008, the trial court conducted a separate disposition hearing, and, on 10 December 2008, the court entered a corresponding order. In the order, the trial court found that

respondent-father's paternity of Q.L.D. had been confirmed by a genetic test report dated 13 October 2008. At the hearing, Q.L.D. was still in a placement with the Stewarts, but the trial court found that she would need to be moved. The Stewarts were unable to obtain a foster care license. Sisters of both the mother and respondent-father showed interest in caring for Q.L.D. Respondent-father's sister was not approved, however, due to her own involvement with social services. The trial court approved the mother's sister and her husband (hereinafter referred to by the pseudonym, "the Potters"), as a placement, and Q.L.D. had begun visiting them.

By the time of the hearing, the mother's problems had escalated. The mother had been hospitalized following an overdose on prescription medication. While she was hospitalized, she also tested positive for cocaine. She completed a psychological assessment on 22 September 2008. The evaluator believed that she needed psychotherapy of an extended nature and advised against returning Q.L.D. to the mother. The mother was also pregnant at the time of the disposition. She had been living with respondent-father, but moved out following another domestic violence incident. The mother obtained a domestic violence protective order against respondent-father and moved into a shelter. The assault charge against the mother had been dismissed. The trial court ordered the mother to enter into and follow a case plan in an effort to address her problems.

Respondent-father's situation also had deteriorated. On 11 October 2008, he had been evicted from his residence, and his new residence did not have electricity. He subsequently was convicted of assault on a female as a result of the incident which occurred on 30 May 2008. Respondent-father also reported that he was about to lose his temporary full-time job at Owens Corning. The trial court also ordered respondent-father to enter into and follow a case plan, which included completing a psychological evaluation and following recommended treatment, completing a substance abuse evaluation and recommended treatment, submitting to random drug testing, completing a domestic violence assessment and recommended treatment, completing nurturing parenting classes, and showing improved parenting skills.

By the time of a review hearing on 2 February 2009, Q.L.D. had been moved to the placement with the Potters; however, the trial court found that the Potters had accepted a job that was inconsistent with Q.L.D.'s child care needs. Therefore, the trial court ordered that Q.L.D. be removed from their home by 14 February 2009 and transitioned to foster care. The mother had complied with some of the directives in her case plan and was visiting Q.L.D. regularly. Respondent-father, however, had failed to timely enter into his case plan, had a positive drug screen, and had gotten into a fight with John D., with whom the mother continued to have a relationship. Respondent-father's visits with Q.L.D. were inconsistent, and he finally entered into his case plan on 19 December 2008. However, he did not make any progress on it

because he was incarcerated during the month of January on a driving while impaired ("DWI") conviction.

On 20 July 2009, the mother relinquished her parental rights to Q.L.D. by signing a Relinquishment for Adoption form. On the following day, the trial court conducted a review hearing, in which it relieved DSS of further reunification efforts with respondent-father. In the trial court's corresponding order, entered on 18 August 2009, the trial court found that respondent-father had been sporadic in visiting Q.L.D. and that he had not visited Q.L.D. since 26 May 2009. The trial court also found that respondent-father was unemployed and lacked independent housing. Respondent-father was again incarcerated. He had been in jail since 29 May 2009, after a sixty-day sentence was activated. The sentence was related to convictions for DWI and assault on a female. Respondent-father also had charges for breaking or entering, larceny, and possession of stolen goods pending in Iredell County. Finally, the trial court made findings related to respondent-father's progress on his case plan. Respondent-father had attempted to make appointments for a domestic violence assessment and a nurturing parent program, but he never followed through on them. He attended his psychological evaluation, but had not attended any counseling or treatment.

On 27 August 2009, DSS filed a motion to terminate the parental rights of respondent-father, alleging the following grounds for termination: (1) neglect pursuant to North Carolina General Statutes, section 7B-1111(a)(1); (2) failure to legitimate

pursuant to North Carolina General Statutes, section 7B-1111(a)(5); and (3) willful failure to pay a reasonable portion of the cost of care for the juvenile pursuant to North Carolina General Statutes, section 7B-1111(a)(3).

The trial court conducted a termination hearing on 7 and 8 December 2009. At the hearing, respondent-father and the DSS social worker assigned to Q.L.D.'s case testified. A records custodian from Family Net, an outpatient mental health treatment center, also testified, and respondent-father's 14 June 2009 psychological evaluation was admitted into evidence. Following the hearing, the trial court entered an order on 4 January 2010, concluding that all three grounds existed to terminate respondent-father's parental rights. At disposition, the trial court found that termination of respondent-father's parental rights was in the best interest of Q.L.D. From this order, respondent-father appeals.

On appeal, respondent-father challenges only the trial court's adjudicatory conclusions that grounds existed to terminate his parental rights. He does not challenge the trial court's dispositional conclusions. Pursuant to North Carolina General Statutes, section 7B-1111(a), a trial court may terminate parental rights upon a finding of one of the ten enumerated grounds. *See* N.C. Gen. Stat. § 7B-1111(a) (2009). "So long as the findings of fact support a conclusion [that one of the enumerated grounds exists], the order terminating parental rights must be affirmed." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003)

(internal citation omitted). Here, the trial court found that three grounds existed to terminate respondent-father's parental rights to the child: neglect, failure to legitimate, and failure to pay a reasonable portion of the cost of care for the juvenile. Although respondent-father challenges all three grounds for termination, "[a] single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 789, 635 S.E.2d 916, 917 (2006) (footnote call number omitted). Therefore, upon our affirmation pursuant to one of the grounds for termination, we need not review additional grounds. *See In re Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426–27.

On appeal, we review the trial court's orders to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur . . . ." *In re Oghenekevebe*, 123 N.C. App. 434, 435–36, 473 S.E.2d 393, 395 (1996) (citation omitted). "So long as the findings of fact support a conclusion [that one of the enumerated grounds exists], the order terminating parental rights must be affirmed." *In re Humphrey*, 156 N.C. App. at 540, 577 S.E.2d at 426 (internal citation omitted). Initially, we note that respondent-father does not challenge any of the trial court's findings of fact as lacking in evidentiary support. Accordingly, the findings of fact are presumed to be supported by competent evidence and are therefore binding on appeal. *See In re M.D.*, ___

N.C. App. ___, ___, 682 S.E.2d 780, 785 (2009) ("Respondent-Father has not challenged any of the above findings of fact made by the trial court as lacking adequate evidentiary support. As a result, these findings of fact are deemed to be supported by sufficient evidence and are binding on appeal."). Therefore, we review the trial court's order to determine whether the findings of fact support the existence of grounds for termination of respondent-father's parental rights.

Here, the trial court concluded that termination of respondent-father's parental rights was justified based upon the existence of neglect. North Carolina General Statutes, section 7B-1111 lists neglect as one of the grounds for terminating parental rights and provides, in relevant part, as follows:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
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> > (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a)(1) (2009). 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).

However, when the child is not in the custody of the parent at the time of the termination hearing, and "has not been in the custody of the parent for a significant period of time," as in the case *sub judice*, "the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citing *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002)). Because the determinative factor is the parent's ability to care for the child at the time of the hearing, we previously have explained that "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984)). "If there is no evidence of neglect at the time of the termination proceeding, however, parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parent[]." *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)). When considering likelihood of repetition of neglect, however, "the trial court must also consider evidence of changed conditions . . . ." *In re Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407.

First, we turn to the trial court's findings that establish past neglect. Q.L.D. was adjudicated neglected in an order entered 12 November 2008, following a hearing on 13 October 2008, and the trial court made a finding in the termination order acknowledging the prior adjudication. Furthermore, we note that Q.L.D.'s adjudication of neglect was based not only on the mother's actions, but also on respondent-father's substance abuse and domestic violence.

However, it is well-established that a "prior adjudication of neglect alone cannot justify termination of parental rights." *In re C.C., J.C.*, 173 N.C. App. 375, 381, 618 S.E.2d 813, 818 (2005). The trial court must also find "by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parent[]." *In re Reyes*, 136 N.C. App. at 815, 526 S.E.2d at 501. The following findings of fact support the trial court's conclusion that future neglect was likely to occur:

> 8. [Respondent-father] is the father of the child. His paternity of the child was confirmed by genetic testing. [Respondent-father] knew that he was the child's father prior to the child's birth. [Respondent-father] also is the father of two other children.
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> . . . .
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> 11. After the child's mother called him, the father, his sister, the child, and the child's mother all lived in the father's leased home for some three months prior to May 30, 2008. This was the only time that the father ever lived together with the child. During that time period, the father was working at Owens Corning and provided support for the child. . . .

12. Although the father testified that both he and his sister helped to feed the child during that time, the father did not learn to feed the child properly, as shown by the fact that a social worker later had to show him how to feed the child.

13. On May 30, 2008, the father was engaged in a domestic violence incident involving the mother; he was convicted of assault on a female arising out of that incident. . . .

14. The father was convicted of driving while impaired (DWI) in 2003. He lost his job at Owens Corning in 2008 after he was jailed for two weeks due to a DWI charge; he was convicted of two DWI charges on December 11, 2008. He has no driver's license and no vehicle.

15. The father ceased to live with his sister in June or July of 2008, and moved to [] Conover, North Carolina. He attended the adjudication hearing on October 13, 2008. As of October 22, 2008, his home had no electricity; he lacked electricity for some three months, during which time he described himself as being homeless. He attended the disposition hearing on November 10, 2008, at which time he stated he did not want to parent the child. . . .

16. At the disposition hearing, the father was granted one hour per week of supervised visitation. Visitation was offered to the father on November 10 or 11 and on November 24, 2008. He declined those visits. He had no transportation at the time, as his vehicle is in West Virginia.

. . . .

18. The father did comply with taking requested drug screens. On December 19, 2008, he tested positive for Serax on a drug screen. He never showed the social worker a prescription for Serax. He showed her a prescription for a

benzodiazepine, but not Oxazepam, from Catawba Valley Behavioral Health. The father made his arrangements with Catawba Valley Behavioral Health for medication himself, but did not initiate individual counseling there. The father told the social worker he took his sister's Serax.

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24. During a telephone call on March 30, 2009, in which the father called to cancel his visit scheduled the next day, the father said he had no transportation; the father's speech was slurred and he was crying during that telephone call. The father told the social worker he needed to go to rehab, and need[ed] a diagnosis to assist in getting treatment. The father was diagnosed with alcohol dependence, and was still drinking at the time of the evaluation.

25. During the father's visit on April 7, 2009, the child had difficulty going to the father; the father's two black eyes may have caused the child concern. At the visit on April 17, 2009, the child wrapped herself around the social worker and came back to the social worker. At that visit, the father tried to feed the child macaroni and cheese while the child had a pacifier in her mouth. On April 28, 2009, the father left a voice message stating that he would not come to visit.

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28. At disposition, the father was ordered to complete a Mate Abuser Treatment program assessment and comply with all recommended treatment. He never obtained such an assessment, nor did he participate in domestic violence treatment, although the social worker scheduled an appointment for him in February of 2009. The cost of the assessment was one hundred dollars; the father was ordered in a separate court order to pay that himself. The father did not attend another such appointment in May of 2009.

29. At disposition, the father was ordered both to complete a psychological evaluation and to comply with all recommended treatment, and to complete Nurturing parenting classes and show improvement in parenting skills. Because the mother took the parenting classes first and it was desirable to have the parents in separate parenting classes due to the domestic violence which had occurred between them, the social worker asked the father to attend his psychological evaluation prior to his taking parenting classes. The father reported for a first meeting for his psychological evaluation on February 23, 2009, missed his second scheduled meeting, and attended his rescheduled second meeting on May 11, 2009.

30. Two days prior to the meeting on May 11, 2009, [John D.] and the father fought each other.

31. The father's psychological evaluation contained Axis I diagnoses of Learning Disorder NOS, Anxiety Disorder NOS (mixed anxiety/depression), and Alcohol Dependence, with physiological dependence, sustained partial remission. The evaluation report was signed on June 15, 2009. The evaluator recommended that the father take parenting classes, receive some assistance with his prescription medication bills if possible, take a basic literacy program to improve his academic abilities, and find more stable employment.

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33. The father has not taken a basic literacy program.

34. The social worker referred the father for Nurturing parenting classes, which include a one-on-one "hands on" component. The father was scheduled to start parenting classes on May 21, 2009. He did not attend that day, stating he did not have a ride. After that, the

> father could not attend because he was in jail.
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> 36. The father worked some odd jobs, including painting for two to three months, for which he was paid three to four hundred dollars, and cleaning up a job site. . . .
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> 37. The father was incarcerated on May 29, 2009, and consented for his DWI sentences to be activated on June 16, 2009. He has not been offered visits while in jail, and in any event since July 21, 2009, the Court has ordered that he have no visits. While in prison, the father has made no inquiries about the child, and has sent no letters to the child or to the social worker. He works in prison for $15.00 per week. He has not paid anything for the child's support while in prison, nor has he received any demands for payment.

At the time of the termination, respondent-father was incarcerated, and he argues that the trial court placed too much emphasis on his incarceration, citing to the dissenting opinion in *In re Yocum*, 158 N.C. App. 198, 207–08, 580 S.E.2d 399, 405 (Tyson, J., dissenting) ("Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision."), *aff'd*, 357 N.C. 568, 597 S.E.2d 674 (2003) (per curiam). He contends that the trial court should have focused on his prospective release from custody. He further contends that his changed circumstances did not support a finding that neglect would be likely upon his release from custody. We disagree.

Based upon our review of the findings of fact set forth *supra*, it is clear that the trial court took changed circumstances into consideration and did not rely solely upon respondent-father's

incarceration. The findings show that respondent-father was unable to maintain housing or employment during the pendency of the case. Furthermore, respondent-father's visitation with Q.L.D. was sporadic — even when he was not incarcerated — and he often cancelled visits. Respondent-father had a history of domestic violence, had problems with substance abuse, had very few parenting skills, and had made little progress to address these issues during the pendency of his case. Respondent-father also argues that his incarceration prohibited him from making progress on his case plan, but he did not enter into a case plan until 19 December 2008, several months after the original juvenile petition was filed. Although he was incarcerated during January of 2009, he did not go back to jail until 29 May 2009, when he consented to having his DWI sentence activated. Despite some limited efforts, respondent-father demonstrated an inability to care for Q.L.D. properly.

Therefore, we hold that the trial court did not err in concluding that there was a probability of repetition of neglect if Q.L.D. was returned to respondent-father's care, and we affirm the trial court's order finding grounds for termination of respondent-father's parental rights.

Affirmed.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).