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NO. COA10-541

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

A.K.L.,
A Minor Child.

Perquimans County
No. 09 JT 11

Appeal by respondent-father from order entered 3 March 2010 by Judge Eula E. Reid in Perquimans County District Court. Heard in the Court of Appeals 30 September 2010.

Ellis & Skinner, PLLC, by Melissa L. Skinner, for petitioner-appellee mother.

Rebekah W. Davis for respondent-appellant father.

JACKSON, Judge.

K.T.W. ("petitioner") and A.L. ("respondent") are, respectively, the natural mother and father of the minor child A.K.L. ("the juvenile"). Respondent appeals from the trial court's order terminating his parental rights. For the reasons set forth below, we affirm.

Petitioner and respondent married on 22 July 2000, but they separated on 15 August 2003 and were divorced on 21 January 2005. Petitioner, through counsel, filed a complaint on 15 May 2006 in the District Court of Bertie County, seeking custody of the juvenile. The court ordered petitioner and respondent to take part in a mediation program to see whether their custody issues could be

resolved. Petitioner and respondent failed to reach a resolution of their custody issues in mediation, and, by order entered 13 September 2006, the court directed the custody case be calendared for trial. However, the case never was calendared by either of the parties or the trial court administrator.

On 1 March 2007, petitioner filed a motion for *ex parte* temporary custody in the Bertie County custody case. The district court entered an *ex parte* temporary custody order that same day, awarding petitioner legal and physical custody of the juvenile. The order did not provide any visitation for respondent and ordered that respondent not take any action to "dispute or disturb the temporary custody rights" of petitioner. The order further directed law enforcement officers to assist petitioner in maintaining custody of her minor child and "restrain" respondent from interfering with petitioner's custody of the juvenile and, "if necessary, to prevent [respondent] from going on or about the premises of [petitioner]."

On 12 August 2009, petitioner filed a petition to terminate respondent's parental rights to the juvenile. Petitioner alleged that respondent willfully had abandoned the juvenile because he had neither seen nor visited with the juvenile in more than six consecutive months and had not given any financial support for the juvenile or purchased clothing or food for the juvenile in more than twelve consecutive months. Petitioner further averred that she had remarried, had a child with her new husband, and that her

new husband desired to adopt the juvenile should respondent's parental rights be terminated.

By order dated 10 September 2009, the trial court appointed the Public Defender to represent respondent in the termination proceedings. However, the attorney initially assigned to represent respondent left employment with the Public Defender's Office on 1 October 2009, and a replacement was not assigned until 16 December 2009. The trial court continued the hearing on the petition until 27 January 2010, and, on 19 January 2010, respondent filed a response to the petition and a motion to appoint a guardian *ad litem* for the minor child. The court appointed a guardian *ad litem* for the minor child on 27 January 2010 and continued the hearing on the petition until 4 February 2010.

After the hearing on 4 February 2010, the trial court entered an order on 3 March 2010 terminating respondent's parental rights to the juvenile. The court found the petition to terminate respondent's parental rights had not been filed to circumvent the Uniform Child-Custody Jurisdiction and Enforcement Act and that grounds existed to terminate respondent's parental rights. The trial court concluded grounds existed to terminate respondent's parental rights pursuant to North Carolina General Statutes, section 7B-1111(a)(1), in that respondent neglected the juvenile and that there was a likelihood that the neglect would continue. The court further concluded grounds existed to terminate respondent's parental rights pursuant to North Carolina General Statutes, section 7B-1111(a)(7), in that respondent willfully

abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition. Respondent filed timely notice of appeal on 5 March 2010.

On appeal, respondent argues the trial court erred in making findings of fact numbered 26 through 31, 33, 34, 38 through 41, 49, and 50. Respondent also argues the trial court erred in concluding grounds existed to terminate his parental rights for neglect pursuant to North Carolina General Statutes, section 7B-1111(a)(1) and willful abandonment pursuant to section 7B-1111(a)(7). Additionally, respondent argues the trial court failed to follow the statutory mandates of Chapter 7B to ensure that he was properly represented by counsel and that a guardian *ad litem* properly was appointed to represent the juvenile in the termination proceedings. We disagree.

"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, 145-46, 669 S.E.2d 55, 58 (2008) (citations omitted), *aff'd*, 363 N.C. 368, 677 S.E.2d 455 (2009) (per curiam).

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 (citations and internal quotation marks omitted), *disc. rev. denied*, *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) (citations and internal quotation marks 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." *In re S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citation and internal quotation marks omitted).

Grounds for termination of parental rights exist where the 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) (2009). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citing *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962)).

Abandonment has also been defined as wilful neglect and refusal to perform the natural and

legal obligations of parental care and support. It has been held that if 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.

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). In the context of termination of parental rights based upon willful abandonment, "the 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) (citations and internal quotation marks omitted).

Here, the trial court made the following relevant findings of fact with respect to respondent's abandonment of the juvenile:

25. The last physical contact the minor juvenile had with the Respondent was in July 2007 at a gas station in Windsor, North Carolina.

26. The Respondent has not given the Petitioner any monetary child support for the minor juvenile since 2005.

27. The Respondent has not given the minor juvenile any gifts for any occasion since 2006.

28. In July 2007 or July 2008, the Respondent sent a text message about visiting with the minor juvenile to which the Petitioner stated that she would let the court resolve the visitation issue. This text message is the only attempt by the Respondent since 2007 to contact the Petitioner about the minor juvenile's welfare.

29. In 2007, the Petitioner suggested to the Respondent that the Respondent and the minor

juvenile visit each other at either the Petitioner's parent's house or the Respondent's uncle's¹ house. The Respondent would not agree to these supervised visits with the minor juvenile.

30. The Petitioner and the Respondent spoke in January 2009 over the telephone. The respondent did not ask about the welfare of the minor juvenile.

31. The Petitioner called the Respondent in March 2009 to express her condolences of [sic] the Respondent's grandmother's death. The Respondent did not ask about the welfare of the minor juvenile.

32. The minor juvenile attends school in Perquimans County and is in the third grade. The Respondent has never visited the minor juvenile's school or contacted any of her teachers regarding the minor juvenile's progress.

33. The Respondent testified that the reason he had not had any contact with the minor juvenile since July 2007 was because he was waiting for a court date on the custody action in Bertie County.

34. The Respondent knew how to contact the Petitioner and failed to contact the Petitioner or the minor juvenile for more than six months before the filing of this Petition.

. . . .

38. The Respondent admitted that he has not provided clothing, gifts, money or other items for the minor juvenile since 2007.

Based upon these findings, the trial court concluded respondent willfully withheld "his love, presence, care and maintenance"; failed to "perform the natural an[d] legal obligations of care and support[,]" which would continue in the

¹ Based upon the transcript, it appears that it is petitioner's uncle, not respondent's uncle.

future; and therefore, grounds existed to terminate his parental rights due to his willful abandonment of the juvenile.

Respondent does challenge most of the trial court's findings of fact regarding abandonment. However, respondent does not argue that the court's findings are not supported by competent evidence. Rather, respondent argues that the findings do not present a complete picture of the facts of the case and that his actions toward the juvenile and petitioner must be viewed in light of petitioner's hostility toward him. Respondent contends the trial court's conclusions are not supported by the evidence presented at the hearing because petitioner willfully interfered with his relationship with the juvenile. Respondent argues he did not know where petitioner lived once she remarried in 2008, and that he generally avoided contact with her because she had threatened to "call the law" on him. Respondent further argues petitioner used the terms of the *ex parte* temporary custody order – which did not address his right to visit his child – to place unreasonable demands on him to see his child and otherwise limit his access to his child. Respondent argues petitioner's interference with any relationship undercuts the trial court's findings of fact regarding his lack of gifts, cards, and provision of support to his child, and therefore, the findings cannot support a conclusion that he abandoned his child. Respondent also contends that the terms of the custody order itself preclude a finding of willfulness.

We agree with respondent that there is evidence of hostility between him and petitioner that interfered with his ability to

establish and maintain a relationship with his child. Nonetheless, respondent's complete failure to maintain contact with the juvenile and failure to take any steps to seek resolution of the pending custody case support the trial court's conclusion that he willfully abandoned the juvenile. At the time of the filing of the petition, respondent had not had any contact with his child in more than two years. The *ex parte* temporary custody order did give petitioner full legal and physical custody of the juvenile and did not provide any visitation rights to respondent. However, the order did not prevent respondent from attempting to develop a relationship with the juvenile or to provide maintenance or gifts for the juvenile. Furthermore, the record demonstrates that the 2007 visit between respondent and the juvenile occurred after the entry of the *ex parte* order, and that petitioner's testimony indicates that she was not fully opposed to visitation, but that she would allow respondent to visit with the juvenile at petitioner's uncle's residence. Respondent made no attempts to foster a relationship of any type with the juvenile, let alone a parental relationship. Moreover, the evidence shows that during respondent's limited contact with petitioner, he never inquired about the juvenile.

Respondent's total lack of involvement with the juvenile and the absence of his efforts to develop a relationship with the juvenile cannot be blamed entirely upon the parties' discordant relationship. Furthermore, although we are troubled by petitioner's failure to have calendared the custody proceeding, respondent shares at least some fault for the failure to have

calendared the custody case for a hearing. While we acknowledge that petitioner may have acted in a manner that deterred respondent from developing a full relationship with the juvenile, respondent did not take any action during the course of several years to show that he tried to overcome petitioner's interference or that he was interested in attempting to establish a relationship with the juvenile.

Accordingly, based upon thorough review of the record on appeal and in view of our standard of review, we hold the trial court's findings of fact are supported by competent evidence. We further conclude the trial court's findings of fact support its conclusion that grounds existed to terminate respondent's parental rights in that respondent willfully abandoned the juvenile. Because we hold that grounds for termination of respondent's parental rights properly were established pursuant to North Carolina General Statutes, section 7B-1111(a)(7), we need not address respondent's further arguments with respect to termination based upon neglect pursuant to section 7B-1111(a)(1). See N.C. Gen. Stat. § 7B-1111(a) (2009) (providing that a trial court may terminate parental rights "upon a finding of one or more of" ten enumerated grounds); *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*, 362 N.C. 345, 661 S.E.2d 734 (2008) (per curiam).

Respondent also argues the trial court erred in failing to follow the statutory mandates of the North Carolina Juvenile Code. Respondent contends he did not have meaningful counsel at the termination hearings because his counsel was not appointed until 16 December 2009, three months after service of the petition to terminate his parental rights. Respondent argues that his counsel did not have time to prepare adequately for the hearing on the petition. Respondent further argues he was prejudiced by the appointment of the guardian *ad litem* for the juvenile a week before the hearing because the guardian *ad litem* did not have time to familiarize himself with the facts of the case or the parties involved. Respondent asserts that the problems he experienced in obtaining appointed counsel and in having a guardian *ad litem* appointed for the juvenile denied his due process of law. We disagree.

A parent in a termination of parental rights proceeding has a right to counsel, and, if indigent, to appointed counsel. N.C. Gen. Stat. § 7B-1101.1(a), (f) (2009). When a parent responds to a petition to terminate parental rights and denies any material allegation in the petition, the trial court "shall appoint a guardian *ad litem* for the juvenile to represent the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-1108(b) (2009). The trial court may also, "in its discretion, appoint a guardian *ad litem* for a juvenile, either before or after determining the

existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile." N.C. Gen. Stat. § 7B-1108(c) (2009).

Here, the trial court initially appointed the Public Defender to represent respondent in the termination proceeding by order dated 10 September 2009. On 16 December 2009, upon discovering counsel had not been assigned properly by the Public Defender's Office, the trial court continued the hearing on the petition until 27 January 2010. Respondent, through counsel, filed a response to the petition and a motion to appoint a guardian *ad litem* for the juvenile on 19 January 2010. The trial court acted on defendant's motion and appointed a guardian *ad litem* for the juvenile by order entered 27 January 2010. The court also continued the hearing on the petition until 4 February 2010.

At the hearing on the petition to terminate respondent's parental rights, respondent's counsel indicated he and respondent were prepared to proceed. Respondent's counsel began the termination hearing by arguing that the petition should be dismissed because it was filed to circumvent the pending custody case in Bertie County. Respondent's counsel also argued the termination petition should be dismissed because the allegations in the petition were insufficient to put respondent on notice as to the specific grounds petitioner alleged existed to terminate his parental rights. The trial court denied both of respondent's motions to dismiss and proceeded to the adjudication phase of the hearing. At no time did respondent or his counsel move to continue

the hearing or otherwise indicate they were unprepared to proceed. Similarly, the guardian *ad litem* for the juvenile never indicated that he needed additional time to prepare for the hearing or that he was otherwise not prepared to proceed.

Respondent has failed to show the trial court erred in its appointing counsel for respondent, in its appointing the guardian *ad litem* for the juvenile, or in its conducting the hearing on the petition to terminate respondent's parental rights. Nor has respondent shown that he actually was prejudiced by the three-month delay in appointing his trial counsel or by the appointment of the guardian *ad litem* for the juvenile. Therefore, respondent's final argument on appeal is without merit.

Accordingly, for the foregoing reasons, we affirm the order terminating respondent's parental rights to the juvenile, A.K.L.

Affirmed.

Judges ELMORE and THIGPEN concur.

Report per Rule 30(e).