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No. COA10-609

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

M.S. Transylvania County
No. 08 JT 57

Appeal by respondent-father from order entered 8 February 2010 by Judge Athena F. Brooks in Transylvania County District Court. Heard in the Court of Appeals 13 October 2010.

Pisgah Legal Services, by Judi Bertrand, for petitioner-appellee.

Carol Ann Bauer, for respondent-appellant father.

CALABRIA, Judge.

Respondent-father appeals from the trial court's order terminating his parental rights to his minor child M.S. ("Margaret").¹ We affirm.

I. Background

Petitioner is the mother of Margaret, who was born in 2000 when petitioner was fourteen years old. Respondent-father is the biological father of Margaret, and also the adoptive father of petitioner. Before and after Margaret was born and continuing until December 2005, respondent-father repeatedly engaged in sexual

¹ Margaret is a pseudonym used to protect the identity of the minor child.

intercourse with petitioner, often while Margaret was in an adjoining room. Respondent-father is serving an active sentence of a minimum of 1488 months to a maximum of 1858 months in the North Carolina Department of Correction for convictions for multiple sex offenses committed against petitioner.

On 26 September 2008, petitioner filed a petition to terminate respondent-father's parental rights to Margaret. The trial court conducted an evidentiary hearing on 8 January 2010, and on 8 February 2010, the court entered an order terminating respondent-father's parental rights. As grounds for termination, the trial court concluded (1) that Margaret was born out of wedlock and that respondent-father, prior to the filing of the petition, had not established paternity judicially or by affidavit and had not provided financial support to Margaret; and (2) that respondent-father had neglected Margaret. The trial court also concluded that it was in the best interests of Margaret to terminate respondent-father's parental rights. Respondent-father appeals.

II. Standard of Review

A termination of parental rights proceeding consists of an adjudication stage and a disposition stage. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173 (2001). During the adjudication stage, a petitioning party has the burden of establishing by clear and convincing evidence the existence of at least one statutory ground for termination pursuant to N.C. Gen. Stat. § 7B-1111. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "We review whether the trial court's findings of

fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re Shermer*, 156 N.C. App. 281, 285, 576 S.E.2d 403, 406 (2003). We 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." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). Our review of conclusions of law is *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

If the trial court determines that a ground or grounds for termination exist, it then proceeds to the dispositional stage, where it considers whether terminating parental rights is in the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

III. Grounds for Termination

Respondent-father argues that the trial court erred by concluding that his parental rights were subject to termination based upon neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). We disagree.

Initially, respondent-father contests adjudication finding of fact number twelve:

The wilful conduct and actions of the Respondent-father as set forth above created a substantial risk to the juvenile of some physical, mental or emotional impairment and constitute a clear failure on the part of the Respondent-father to exercise that degree of

care consistent with normative standards imposed upon parents in our society.

However, respondent-father did not contest finding of fact number seven:

Both before and after the juvenile was born, and continuing until December of 2005, [respondent-father] engaged in sexual intercourse with the Petitioner. These acts would occur in the residence of the parties and while the juvenile was in the home, often in the adjoining room. [Respondent-father] told the Petitioner not to tell anyone that he was the father. The juvenile knew him as her grandfather. This pattern of illicit conduct continued until December of 2005 when the Petitioner left the home with the juvenile and found temporary shelter at SAFE House, a local shelter for victims of domestic violence. During a portion of this time, the Petitioner was, herself, a juvenile and thus was being subjected to and was a victim of abuse or neglect by her own parent, the Respondent-father, who committed numerous sex acts upon the Petitioner in violation of G.S. 14-27.7A.

"[W]here no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re S.D.J.*, 192 N.C. App. 478, 486, 665 S.E.2d 818, 824 (2008) (internal quotations and citation omitted). As noted by this unchallenged finding, respondent-father engaged in repeated incest with petitioner, who was underage for a portion of that time, while Margaret was in an adjoining room. Respondent-father specifically testified that he knew it was wrong to engage in sexual activity with petitioner, but he still continued to have sexual relations with her. This evidence provides clear, cogent, and convincing evidence to support the trial court's finding of fact twelve. Respondent-father's argument is overruled.

Respondent-father next challenges the trial court's conclusion of law number two:

The Respondent-father has neglected the juvenile within the meaning of G.S. 7B-101(15) in that from and since her birth until December of 2005 when she was taken by the Petitioner from the home of the Respondent, the juvenile lived in an environment injurious to her welfare which created a substantial risk to the juvenile of some physical, mental or emotional impairment. Moreover, the Respondent-father has not, as of the time of this hearing, provided the juvenile with proper care and supervision and will not, in all probability and because of his lengthy incarceration without work release, be able to provide the juvenile with proper care and supervision.

The Juvenile Code defines a neglected juvenile as one

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).

Neglect must exist at the time of the termination hearing, or if the parent has been separated from the child for an extended period of time, the petitioner must show that the parent has neglected the child in the past and that the parent is likely to neglect the child in the future.

In re C.W. & J.W., 182 N.C. App. 214, 220, 641 S.E.2d 725, 729 (2007). The trial court's previously discussed findings of fact support a determination that respondent-father neglected Margaret prior to his incarceration. Respondent-father argues this prior neglect is irrelevant because "that neglect . . . would not be

repeating itself since [respondent-father] is serving a 124 year prison sentence." "Incarceration alone, however, does not negate a father's neglect of his child." *Whittington v. Hendren (In Re Hendren)*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003). Indeed, "[a] parent's incarceration may be relevant to whether his child is neglected. . . ." *C.W.*, 182 N.C. App. at 220, 641 S.E.2d at 730.

While it may have been best for the trial court to make a specific finding regarding the likelihood of respondent-father to neglect Margaret in the future, there was no evidence presented that respondent-father's feelings or behavior that led to the prior neglect had changed since his incarceration. While respondent-father testified that he was "ashamed" of his abuse of petitioner, his testimony did not reflect that respondent-father realized the magnitude of his transgressions and did not indicate any positive change in behavior on the part of respondent-father that would make it unlikely that his neglect would be repeated. Rather, respondent-father testified that it did not make sense that petitioner left his home and initiated charges against him, and he insisted that he had not committed all of the crimes for which he had been convicted, that his trial had been "fixed" and "rigged," and that the case against him included "a lot of lies."

Taking into account the previously discussed findings by the trial court regarding respondent-father's sexual abuse of petitioner, the trial court's additional findings regarding respondent-father's lengthy incarceration, the testimony of

respondent-father which indicated his inability to comprehend the seriousness of the abuse perpetrated on petitioner, and the lack of any attempts on the part of respondent-father to change his behavior, we determine that the trial court properly concluded that respondent-father's parental rights could be terminated on the basis of neglect. Because we uphold the trial court's adjudication that respondent-father neglected Margaret, we need not consider respondent-father's arguments related to the remaining ground for termination. See *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005).

IV. Best Interests

Respondent-father argues that the trial court erred by determining it was in Margaret's best interests to terminate his parental rights. We disagree.

After the adjudication that the ground of neglect existed for terminating respondent-father's parental rights, the trial court was required to determine whether the termination was in the juvenile's best interests by considering the following factors:

- (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).

In the disposition portion of its order, the trial court stated that it considered the factors set forth in N.C. Gen. Stat. § 7B-1110(a), including the age of the juvenile, the likelihood of adoption, whether termination would assist in the accomplishment of the permanent plan, the bond between Margaret and respondent-father, and the quality of the relationship between Margaret and petitioner. Respondent-father acknowledges that the trial court made this statement but argues that the trial court failed to make findings based upon consideration of the factors, and thus the "parties are left in the dark as how the statutory factors are applied to the best interests of [Margaret]."

However, "[t]his Court has previously held that it is not an abuse of discretion for the trial court to omit a specific written finding on a statutory factor under section 7B-1110(a), so long as it is apparent that the trial court *considered* all relevant factors." *In re S.R.*, ___ N.C. App. ___, ___, 698 S.E.2d 535, 541 (2010). Since it is undisputed that the trial court specifically noted that it considered all of the required statutory factors, we discern no abuse of discretion in its failure to make specific findings.

Moreover, the trial court's order contains many findings that also demonstrate a consideration of the relevant statutory factors. In the adjudication portion of its order, the trial court made a finding as to Margaret's age. In the disposition portion of the order, the trial court found that petitioner is regularly employed and is the sole provider of support for Margaret; that petitioner

maintains a clean and appropriate home, provides a healthy environment, and involves herself in Margaret's school work; and that petitioner and Margaret enjoy a strong and loving relationship. The trial court additionally found that Margaret had not seen or heard from respondent-father since his incarceration in 2006; that respondent-father is highly unlikely to have any relationship with Margaret during the remainder of her minority; that respondent-father continues to blame petitioner for what happened and refuses to acknowledge fault on his part; and "that any continued relationship between the juvenile and the Respondent would have no potential benefit to the juvenile and could present the possibility of great harm to her." We hold these findings reflect a reasoned decision by the trial court to terminate respondent-father's parental rights. Respondent-father's argument is overruled.

V. Conclusion

The trial court correctly concluded, based upon findings of fact which were supported by clear, cogent, and convincing evidence, that respondent-father's parental rights to Margaret were subject to termination based upon the ground of neglect. Additionally, the trial court did not abuse its discretion in concluding that it was in Margaret's best interests to terminate respondent-father's parental rights. As a result, we affirm the trial court's order.

Affirmed.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).