

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-613

Filed: 19 January 2016

New Hanover County, No. 13 JT 218

IN THE MATTER OF: C.L.S.

Appeal by Respondent–Father from order entered 4 March 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 29 December 2015.

David A. Perez for Respondent–Appellant Father.

Jennifer G. Cooke for New Hanover County Department of Social Services, Petitioner–Appellee.

Ellis & Winters LLP, by Steven A. Scoggan, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent–Father (“Respondent”) appeals from an order terminating his parental rights¹ as to his minor child, C.L.S. We affirm the trial court’s order.

New Hanover County Department of Social Services (“DSS”) filed a petition on 20 September 2013, alleging that C.L.S. was a neglected and dependent juvenile. DSS alleged that C.L.S. tested positive for cocaine and PCP at birth, and that C.L.S.’s mother tested positive for cocaine. The mother further admitted to using cocaine and marijuana while pregnant with C.L.S. DSS alleged that C.L.S.’s mother “ha[d] a long

¹ The parental rights of the mother of C.L.S. were also terminated by the 4 March 2015 order, but the mother does not appeal from this order.

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history with [DSS] dating back many years,” noting that she had relinquished her parental rights to another child who also tested positive for cocaine at birth. DSS also alleged that the mother had “a long history of substance abuse, and mental health issues and a drug-related criminal history,” and was unemployed and living with her mother, who “also ha[d] a long history of involvement with DSS and would not [be] recommended for placement” of C.L.S. DSS further alleged that the mother reported that C.L.S. was “the product of a one night stand and the father [wa]s unknown.”

The trial court adjudicated C.L.S. neglected and dependent on 15 November 2013 based upon the mother’s stipulations to the allegations in DSS’s petition. At the time of the adjudication, the identity of C.L.S.’s father was still unknown. Paternity tests in May 2014 determined Respondent was the father of C.L.S. The trial court ceased reunification efforts and changed the permanent plan for C.L.S. to adoption on 29 September 2014.

DSS filed a petition to terminate parental rights as to C.L.S. on 14 October 2014 on the grounds that both the mother and Respondent neglected C.L.S., had willfully abandoned C.L.S. for more than twelve months without showing reasonable progress in correcting the conditions of neglect which led to his removal, and that Respondent had failed to take steps to legitimize C.L.S. In its petition, DSS alleged that Respondent failed to enter into a Family Services Agreement when requested on

7 April 2014 indicating that “he did not wish to pursue a plan of reunification.” Although Respondent then “indicated his willingness” to enter into a case plan on 26 June 2014, Respondent “declined to sign his case plan which included requests to submit to a Comprehensive Clinical Assessment and follow any recommendations, submit to random drug screens, complete a parenting assessment and comply with any recommendations, and obtain and maintain stable housing and employment.” Respondent was also incarcerated in May 2014 on pending charges said to have included attempted first- or second-degree rape, second-degree kidnapping, breaking or entering, misdemeanor larceny, false fire alarm, resisting, delaying, or obstructing public officers, and for being a habitual felon. The trial court terminated both the mother’s and Respondent’s parental rights as to C.L.S. on 4 March 2015. Respondent appeals.

Respondent first contends the trial court erred by concluding that there was clear, cogent, and convincing evidence to support the trial court’s conclusion that C.L.S. was neglected by Respondent at the time of the hearing, and thus asserts that there was no evidence to terminate his parental rights on this statutory ground. We disagree.

N.C. Gen. Stat. § 7B-1111 sets out the statutory grounds for terminating parental rights. N.C. Gen. Stat. § 7B-1111 (2013). A finding of any one of the separately enumerated grounds is sufficient to support termination. *See In re Taylor*,

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97 N.C. App. 57, 64, 387 S.E.2d 230, 233–34 (1990). “The standard of appellate review is 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 D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005).

In the present case, the trial court first concluded that grounds existed to terminate Respondent’s parental rights to C.L.S. based upon neglect in accordance with N.C. Gen. Stat. § 7B-1111(a)(1). A “neglected” juvenile is defined in N.C. Gen. Stat. § 7B-101(15) 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) (2013). Thus, “[n]eglect is more than a parent’s failure to provide physical necessities and can include the total failure to provide love, support, affection, and personal contact.” *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (internal quotation marks omitted).

Additionally, “[i]ncarceration alone . . . does not negate a father’s neglect of his child,” *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003), because “[t]he sacrifices which parenthood often requires are not forfeited when the parent is in custody.” *Id.* Thus, while incarceration may limit a parent’s ability “to

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show affection, it is not an excuse for [a parent's] failure to show interest in [a child's] welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." *In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (citation and internal quotation marks omitted).

Further, "[a]s always, the best interests of the children and parental fitness *at the time of the termination hearing* are the determinative factors." *Id.* at 239–40, 615 S.E.2d at 33 (emphasis added). Where "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect," *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 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.*

In the present case, evidence was presented by the DSS social worker that, when Respondent's paternity of C.L.S. was confirmed, Respondent "stated that he didn't want to pursue a plan of reunification" with C.L.S. The DSS social worker also testified that, before Respondent was incarcerated, she "attempted to engage [Respondent] a couple of times by asking him to come in and meet with [her] and enter into a visitation plan, and he called to reschedule a couple of times, [and then] he no-showed a couple of times to those appointments." Although the DSS social

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worker testified that, after Respondent was incarcerated, he “did say that he wanted to enter into a case plan,” when she “brought the case plan with [her] to visit him in jail, . . . he declined to sign [it], saying that he wanted the input of his attorney before signing it,” and when she asked Respondent about it several times after that, she “never received it back from him.” The DSS social worker further testified that Respondent never provided any financial support for C.L.S., never met C.L.S., and, although he “discussed visitation briefly” with DSS before the paternity results were completed, Respondent “was never able to come back to [DSS] for any of [the] scheduled meetings.” Thus, the record before us reflects that, at the time of the termination hearing, Respondent had failed “to provide love, support, affection, and personal contact” to C.L.S. *See In re D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33. Because this evidence supported the trial court’s findings that Respondent “indicated an unwillingness to enter a Family Services Agreement,” “ha[d] never met [C.L.S.],” and “ha[d] no bond with” C.L.S., we conclude that there was evidence to support the trial court’s conclusion that the juvenile was neglected by Respondent and, thus, that there was evidence to terminate his parental rights on this statutory ground. Since we have “determine[d] there is at least one ground to support [the] conclusion that [Respondent’s] parental rights should be terminated, it is unnecessary to address the remaining grounds” challenged in Respondent’s brief. *See In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

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AFFIRMED.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

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TYSON, Judge, dissenting.

The majority's opinion finds clear, cogent, and convincing evidence supports the trial court's conclusion that the juvenile was neglected by Respondent and affirms the trial court's order to terminate his parental rights on the statutory ground of neglect. I disagree and respectfully dissent.

The majority's opinion "parades the horrors" of the actions of the mother, which formed the basis of DSS's petition to terminate the mother's parental rights. She is not a party to this appeal.

There is no indication in September 2013, when the initial petition alleging neglect by the mother was filed, that Respondent even knew he was the parent of a child. The trial court's review order, filed in February 2014, shows the juvenile's mother indicated Respondent *may* be the father of C.L.S. Subsequently, Respondent complied with a DNA paternity test in May 2014. DSS filed its petition to terminate Respondent-father's parental rights in October 2014, only five months after Respondent learned he was C.L.S.'s father.

Nothing in the record shows Respondent was ever joined to the underlying action adjudicating C.L.S. neglected and dependent. The adjudication of C.L.S. was entered on 15 November 2013, months before Respondent knew he was the parent of a child. All of the statutorily required actions taken by DSS towards the initial goal of reunification with the child were aimed solely at the mother, not at Respondent.

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The transcript shows Respondent was incarcerated one month after the DNA test revealed his paternity. At the time of the Termination of Parental Rights hearing, Respondent had not been tried for the offenses for which he was incarcerated awaiting trial.

Neglect

The majority finds there was clear, cogent and convincing evidence to support the trial court's conclusion that C.L.S. was neglected by Respondent and grounds existed for termination of Respondent's parental rights. I disagree.

“[I]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child ‘at the time of the termination proceeding.’” *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). When, however, as here, “a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 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.* (internal quotation marks and citation omitted). “In those circumstances, a trial court may find that grounds for termination exist upon a showing of a history of neglect by the parent and the probability of a repetition of neglect.” *Id.* (citation and internal quotation marks omitted).

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In this case, while there was a prior adjudication of neglect, the sole party responsible for the neglect was clearly the juvenile's mother, not Respondent. Respondent never had custody of the juvenile, and his paternity of the juvenile was unknown until well after the adjudication of neglect. No evidence can support a finding that Respondent had previously neglected C.L.S. Without *any* evidence, much less the absence of clear, cogent and convincing evidence of prior neglect, Petitioner utterly failed to show neglect at the time of the hearing. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006).

The majority's opinion states "while incarceration may limit a parent's ability to show affection, it is not an excuse for [a parent's] failure to show interest in a child's welfare by whatever means available, [because a] father's neglect of his child cannot be negated by incarceration alone." (citing *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 240, 615 S.E.2d 26, 33 (2005)). This assertion is wholly inapplicable and fallacious here, where the father was incarcerated one month after learning he was a father. He was not provided any real opportunity to show interest in his child.

I do not find the testimony of the Petitioner DSS's social worker that after Respondent was incarcerated he indicated he wished to enter a case plan, wanted his attorney's review and input before he signed, and that she never received it to be clear, cogent or convincing evidence to support a failure "to provide love, support,

affection, and personal contact” to C.L.S. *In re D.J.D.*, 171 N.C. App at 240, 615 S.E.2d at 33.

The trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) to terminate Respondent’s parental rights.

After concluding termination based upon neglect was proper, the majority’s opinion does not address the remainder of Respondent’s arguments. Since termination based upon neglect was without any foundation, I address Respondent’s remaining arguments.

Failure to Make Reasonable Progress

Respondent argues the trial court erred by concluding C.L.S. had been “willfully left” in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B-1111(a)(2).

A trial court may terminate parental rights upon a finding that the parent, “willfully left the juvenile in foster care . . . for more than 12 months without showing . . . reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2) (2013). For the trial court to terminate for failure to make reasonable progress, DSS must show that the parent had the ability to make progress but was “unwilling to make the effort.” *In re O.C. and O.B.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005) (citation omitted).

Here Respondent's paternity of the juvenile was unknown both when DSS initially filed its petition and when the juvenile was adjudicated neglected and dependent. No evidence in the record shows Respondent was aware of his possible paternity of the juvenile prior to these dates until May 2015. The petition to terminate Respondent's parental rights was filed 14 October 2014, five months later, less than the statutorily required twelve months. As a consequence, and without any clear, cogent and convincing evidence, the trial court erred by concluding C.L.S. had been "willfully left" in foster care or placement outside the home for more than twelve months as set forth in N.C. Gen. Stat. § 7B-1111(a)(2).

Failure to Legitimate

The trial court also erred in its conclusion that Respondent failed to establish paternity or legitimate the child by any of the statutorily mandated methods. This conclusion is unsupported by any finding of fact and supported by no clear, cogent or convincing evidence.

In its termination order, the trial court included a conclusory statement in its FINDINGS OF FACT that DSS during the pretrial hearing had identified as a ground for termination of parental rights "that Respondent-Father has failed to take steps to legitimize the minor child." The trial court makes no further findings regarding Respondent and any failure to establish paternity or legitimate C.L.S. through any of the means enumerated in N.C. Gen. Stat. § 7B-1111(a)(5).

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N.C. Gen. Stat. § 7B-1111(a)(5) authorizes termination where the father has not prior to the petition:

- a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court. [or]
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose. [or]
- c. Legitimated the juvenile by marriage to the mother of the juvenile. [or]
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother. [or]
- e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5) (2013).

The trial court *must* make specific findings of fact as to each subsection of N.C. Gen. Stat. § 7B-1111(a)(5). *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis supplied) (citing *In re Harris*, 87 N.C. App. 179, 188, 360 S.E.2d 485, 490 (1987)). The trial court's conclusion that the ground for termination pursuant N.C. Gen. Stat. § 7B-1111(a)(5) exists is not supported by the requisite findings based upon clear, cogent and convincing evidence. The trial court's conclusion that grounds

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existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) is erroneous, and must be reversed.

For all of these reasons, the majority's opinion is wholly opposite to the statutes and controlling case law. The trial court's conclusion that statutory grounds exist to terminate the parental rights of Respondent-father is not supported by clear, cogent and convincing evidence. The trial court's order is affected by reversible error and should be reversed. I respectfully dissent.