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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-838

Filed: 16 February 2016

Forsyth County, Nos. 13 JT 102-103

IN THE MATTER OF: E.D., M.D.

Appeal by respondent from order entered 2 April 2015 by Judge Lisa Menefee in Forsyth County District Court. Heard in the Court of Appeals 25 January 2016.

Assistant County Attorney Theresa A. Boucher for Forsyth County Department of Social Services, petitioner-appellee.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II, for guardian ad litem.

Jeffrey William Gillette for respondent-appellant.

TYSON, Judge.

Respondent father appeals from an order terminating his parental rights to his sons E.D and M.D. We affirm.

I. Background

On 28 May 2013, the Forsyth County Department of Social Services (“DSS”) filed petitions in juvenile court, which alleged E.D., then three weeks old, and M.D., then eleven months old, were neglected juveniles. The court adjudicated the juveniles as neglected on 12 July 2013, based upon several verbal and physical altercations between the parents. On 27 November 2012, the parents entered into a safety plan

with DSS and agreed they would not reside together. The parents continued to reside together in violation of the safety plan.

The court placed the children in the custody of DSS under a plan of reunification. After a hearing on 15 August 2014, the court amended the permanent plan to include adoption. On 7 October 2014, DSS filed a petition to terminate the parental rights of the parents to the children.

The petitions to terminate parental rights came before the court for hearing on 2 February 2015. The mother signed relinquishments of her parental rights to the juveniles. After hearing testimony and receiving other evidence, the court entered an order and concluded grounds existed to terminate Respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) and N.C. Gen. Stat. § 7B-1111(a)(2) (2013). The court also concluded it was in the juveniles' best interests to terminate Respondent's parental rights. Respondent appeals.

II. Issues

Respondent contends the trial court erred in terminating his parental rights. He argues the court erred in finding the grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and N.C. Gen. Stat. § 7B-1111(a)(2). He asserts the court failed to consider evidence of changed conditions which made repetition of neglect unlikely and the progress he made in correcting the conditions which led to the removal of the juveniles. He also argues the court abused its discretion when it

impermissibly admitted and considered out-of-court statements of the children's mother, findings of fact in prior orders, and a photo album shown to the court by DSS to determine the termination of Respondent's parental rights was in the best interest of the juveniles.

III. Standard of Review

The appellate court reviews the trial court's termination of parental rights to determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). The trial court's conclusions of law are reviewable *de novo* on appeal. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

IV. Neglect

At the adjudication stage of a parental rights termination hearing, "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2013). After determining one or more grounds for termination of parental rights exist, the court proceeds to the disposition phase and must determine whether terminating parental rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2013).

To terminate parental rights, the court must conclude the parent has abused or neglected the child pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). A parent neglects a child by failing to provide proper care, supervision, discipline, or a safe environment. N.C. Gen. Stat. § 7B-101(15) (2013). “A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997).

If the child is not within the care of the parent at the time of the termination proceeding, evidence of changed circumstances since the time of a prior adjudication must be considered and the court must weigh the probability that neglect will be repeated if the child is returned to the parent’s care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984).

The court “must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The court must consider whether the parent has made “meaningful progress in eliminating the conditions that led to the removal of [the] children.” *In re Leftwich*, 135 N.C. App. 67, 72, 518 S.E.2d 799, 803 (1999).

The district court made the following findings of fact in support of its conclusion that Respondent neglected the children under N.C. Gen. Stat. § 7B-1111(a)(1):

9. Since May 28, 2013, [Respondent] has continued to neglect E.D. and M.D. by failing to comply with the orders of the Juvenile Court and the recommendations of the Forsyth County Department of Social Services which were specifically designed to facilitate reunification of the children in a safe home.

.....

11. [Respondent] was ordered by the Juvenile Court to complete a Parenting Capacity Psychological evaluation and follow all of the recommendations of that assessment. [Respondent] completed such evaluation with Dr. Chris Sheaffer on August 13, 2013. Dr. Sheaffer was received by the Court as an expert in Psychology.

.....

13. [Respondent] disclosed to Dr. Sheaffer a relationship with [children's mother] that is both dependent and codependent. [Respondent] reported multiple incidents of domestic violence in his relationship with [children's mother] including [children's mother's] aggression toward him and him in return being aggressive toward [children's mother]. [Respondent] justified his actions toward [children's mother] (i.e., throwing her to the ground) as acts of self-protection. [Respondent] also described [children's mother] in a very positive manner and indicated he had enabled her behavior by accommodating her in an effort to keep her calm.

14. [Respondent] acknowledges frequent and repeated domestic violence to which the children have been exposed, awareness that such exposure is potentially damaging to the children and yet continued his relationship with [children's

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mother]. At the time of the evaluation [Respondent] was committed to maintaining his relationship with [children's mother] despite acknowledging that [children's mother] has significant mental health and anger management problems. . . .

15. [Respondent] also acknowledged to Dr. Sheaffer being incarcerated in the past for domestic violence. The repeated history of domestic violence is concerning.

. . . .

17. [Respondent] also revealed to Dr. Sheaffer that he and [children's mother] had deceived [DSS] regarding their relationship and specifically had lied about the two being separated. It is not safe to rely on [Respondent] or [children's mother] to accurately report the status of their relationship.

18. Dr. Sheaffer recommended that [Respondent] engage in individual therapy/counseling to address his dependency/codependency relationship with [children's mother]. [Respondent] has not complied.

19. Dr. Sheaffer also recommended that [Respondent] and [children's mother] engage in marital counseling. [Children's mother] and [Respondent] never engaged in marital counseling.

. . . .

29. [Respondent] has failed to maintain a safe stable and appropriate home for him, [E.D.] and [M.D.]. The Court does not just look at whether [Respondent] has a place for his children to live. The Court determines a safe home as one free of domestic violence. Since the removal of his children on May 28, 2013, [Respondent] has lived . . . with [children's mother]; he has stayed with friends who he has not named to [DSS]. [Respondent] told [DSS] that he has been living with his mother . . . however, [Respondent] informed the court that he only uses his mother's home to receive mail and occasionally

do his laundry [Respondent] has not provided the full names or addresses of the individuals who he is staying with.

30. [Children's mother] and [Respondent] have had an on and off relationship since prior to the removal of their children on May 28, 2013. Their on and off relationship has continued. On January 7, 2015, [children's mother] and [Respondent] appeared together at the Forsyth County Department of Social Services and told social worker Tina Garrett that they were looking for a place to live together.

. . . .

35. [Respondent] characterized his relationship with [children's mother] as one of co-parenting [s]ince [children's mother's] release from jail in December 2014, [children's mother] and [Respondent] have been together at a motel and were seen together at the hospital.

36. [Respondent] denies telling Tina Garrett that he and [children's mother] were looking for a home together on January 7, 2015. He was however present when [children's mother] announced that plan and he did not correct her or tell Tina Garrett that it was not his plan to live with [children's mother].

. . . .

42. [Respondent] has been diagnosed with Major Depressive Disorder with Psychotic features and Unspecified Anxiety Disorder [Respondent] missed his follow-up appointment with the psychiatrist at Daymark in December 2014 and has not rescheduled the appointment.

Findings of fact in a termination of parental rights order are binding on appeal where clear, cogent, and convincing evidence "support[s] 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). Findings of fact which are not challenged by appellant are also binding upon appeal. *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005).

Furthermore, “[w]hen . . . ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.” *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). The district court’s findings were supported by the testimony of the social worker and the guardian ad litem concerning events leading up to the termination hearing, as well as by the psychological evaluation of Respondent’s parenting capacity.

Disregarding any findings challenged by Respondent on the premise they either were based upon statements of the children’s mother or findings of fact made in prior orders, ample additional and unchallenged findings, which are supported by clear, cogent and convincing evidence, sustain the court’s conclusion of law that Respondent neglected the children and the neglect is likely to be repeated. *Id.* These findings reflect Respondent’s acknowledgement in his psychological evaluation that he and the children’s mother have engaged in frequent and repeated episodes of domestic violence in the presence of the children. These episodes include the parents throwing objects, stabbing, punching, and assault with a weapon. Respondent also acknowledged in his psychological evaluation that exposure to such domestic violence is potentially damaging to the children.

The psychologist opined domestic violence would continue between Respondent and the children's mother, if they remained together, and stated that he "would not rely on the report of either of them that they have ceased a relationship" because "they had repeatedly each made such statements without ceasing the relationship." The psychologist also testified he had concerns about Respondent "because of his willingness to remain in that pathological relationship that was potentially damaging to the children" and his "acknowledged lying to the Department of Social Services about his ongoing relationship with [children's mother]."

Despite having awareness of potential harms to the children, Respondent continued to live with the mother after the episodes of domestic violence. Through his failure to secure stable housing, his failure to attend individual or marital counseling regarding his relationship, and his continued pursuit of a relationship with the children's mother, Respondent failed to provide a safe environment for E.D. and M.D. *See In re Davis*, 116 N.C. App. 409, 411-414, 448 S.E.2d 303, 304-306 (1994) (affirming trial court's finding of neglect where respondent failed to resolve marital conflicts, did not secure stable housing, and did not attend counseling).

We hold the trial court properly determined Respondent's parental rights should be terminated based on grounds of neglect. N.C. Gen. Stat. § 7B-1111(a)(1).

V. Remaining Grounds for Termination

One valid ground is sufficient to terminate parental rights. In light of our holding, it is unnecessary for us to address the remaining ground found by the court to exist under N.C. Gen. Stat. §7B-1111(2). *In re P.L.P.*, 173 N.C. App. 1, 9, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

VI. Best Interests of the Children

Respondent next contends the court abused its discretion by concluding termination of his parental rights was in the juveniles' best interests.

After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:

- (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). The court is required to make written findings of fact regarding only those factors which are relevant. *In re D.H.*, ___ N.C. App. ___, ___, 753 S.E.2d 732, 735 (2014). “[F]indings of fact made by the trial court . . . are conclusive on appeal if there is evidence to support them.” *In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007) (quoting *Hunt v. Hunt*, 85 N.C. App. 484, 488, 355 S.E.2d 519, 521 (1987)).

The court made the following findings of fact with regard to the children’s best interests:

51. Mr. and Mrs. [B.] are the current foster parents for [E.D.] and [M.D.]. [M.D.] has lived in their home since April 2014 and [E.D.] has lived in their home since August 31, 2014. Mr. and Mrs. [B.] love the children and want to adopt them if the parental rights of [respondent] are terminated. [E.D.] and [M.D.] call Mr. and Mrs. [B.] “Mommy” and “Daddy.” Mr. and Mrs. [B.] are willing to allow [children’s mother] and [Respondent] to continue to have a relationship with [E.D.] and [M.D.] as appropriate should they be allowed to adopt the children.

52. [E.D.] is 21 months old. He has been in the custody of the Forsyth County Department of Social Services for the past 20 months.

53. The likelihood of Adoption for [E.D.] is excellent.

54. The permanent plan adopted by the Juvenile Court for [E.D.] is Adoption. The termination of the parental rights of [Respondent] will aid in the permanent plan of Adoption. The mother of the child has relinquished her parental rights and [Respondent] is not interested in relinquishing his parental rights.

55. There is a strong bond between [E.D.] and [Respondent].

56. Currently [E.D.] is in a safe, stable and appropriate environment. All of his needs are being met. [E.D.] has been observed in his current foster home. He appears to be happy and thriving. [E.D.] shows close attachment to his foster parents. The child's foster parents are interested in adopting [E.D.] should he become free for adoption. [E.D.] is also living with his brother [M.D.] in this home.

57. [E.D.'s] only special need is his diagnosis of asthma which is well controlled at this time.

58. It is in the best interest of [E.D.] that the parental rights of [Respondent] be terminated.

The court made identical findings with regard to M.D., but modified to reflect his age and lack of a special need.

Although he acknowledges the court made the findings of fact required by N.C. Gen. Stat. § 7B-1110 and acknowledges these findings are supported by evidence, Respondent argues the court denied him due process by impermissibly considering photo albums, which were not admitted into evidence and were not shown to Respondent's counsel. Nothing in the court's findings of fact suggests the court considered any photographs in making its determination.

"In a bench trial, it is presumed that the judge disregarded any incompetent evidence." *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). Additionally,

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the determination of whether the evidence is more probative than prejudicial under Rule 403 of the North Carolina Rules of Evidence rests within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). Ample evidence *aliunde* supports the findings. Respondent has failed to show the court abused its discretion.

VII. Conclusion

The trial court's findings of fact on neglect are supported by clear, cogent and convincing evidence. These findings of fact support the trial court's conclusion of law to terminate Respondent's parental rights. The trial court did not err in terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1).

The trial court did not abuse its discretion when it ruled that termination of Respondent's parental rights was in the best interests of the juveniles. The trial court's order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge STEPHENS concur.

Report per Rule 30(e).