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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-128

Filed: 6 September 2016

Wake County, No. 14 JA 134

IN THE MATTER OF: Z.B.

Appeal by respondent from order entered 13 October 2015 by Judge Monica Bousman in Wake County District Court. Heard in the Court of Appeals 15 August 2016.

Office of the Wake County Attorney, by Jennifer M. Jones, for Wake County Human Services, petitioner-appellee.

Jeffrey William Gillette for respondent-appellant.

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

DAVIS, Judge.

J.B. ("Respondent"), the father of "Zach,"[1] appeals from the trial court's order adjudicating Zach as a neglected juvenile, keeping him in the custody of Wake County Human Services ("WCHS"), and ceasing reunification efforts. On appeal, Respondent

[1] Pseudonyms and initials are used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C.R. App. P. 3.1(b).

argues that the trial court (1) erred during the adjudication stage by finding Zach to be a neglected juvenile; and (2) abused its discretion during the disposition stage by ceasing reunification efforts with Respondent. After careful review, we affirm.

Factual Background

Zach was born out of wedlock in August 2013. From October 2013 until June 2014, he resided with A.S., a friend of his mother's, while his mother was incarcerated. A.S. left Zach in the care of another person on 30 May 2014. Zach came to the attention of WCHS after that caretaker brought him to a hospital because he was having difficulty breathing. Zach was diagnosed with a nose infection that had gone untreated for a significant period of time. He weighed only seventeen pounds at the age of ten months and appeared undernourished.

Hospital staff was unable to verify the child's proper legal custodians. WCHS investigated the matter and learned the identities of Zach's mother and A.S. A social worker ultimately contacted Zach's mother in Decatur, Georgia, where she had recently been released from jail after serving a sentence on a conviction of solicitation. She was on probation and unable to leave Georgia without the permission of her probation officer.

On 4 June 2014, WCHS filed a juvenile petition (the "Initial Petition"), which resulted in an adjudication on 8 July 2014 that Zach was a neglected and dependent

juvenile.[2] Custody was awarded to WCHS along with the authority to place Zach in a foster home while WCHS "continu[ed] to make reasonable efforts to eliminate the need for placement of [Zach] outside the home."

During a 13 October 2014 permanency planning hearing held in connection with the Initial Petition, Respondent was first identified as possibly being the father of Zach.[3] At the time, Respondent was serving a 20-33 month sentence for a probation violation in connection with a felony conviction for possession of a stolen motor vehicle. On 28 October 2014, the trial court ordered WCHS to cease reunification efforts with Zach's mother and any of the men believed to potentially be Zach's father, including Respondent.

On 13 November 2014, WCHS moved to terminate the parental rights of Zach's mother and any men who might be Zach's father. Respondent was served with that motion. After a hearing on 3 February 2015, the trial court terminated the parental rights of Zach's mother but continued the case with respect to Respondent in order to allow for genetic testing to determine the question of paternity. That same month, genetic testing confirmed that Respondent was indeed Zach's father. Respondent

[2] This adjudication was made in a consent order signed by Zach's mother and C.W., who she believed to be Zach's father at the time.

[3] At the time of that hearing, an additional man, C.H., had also been identified as a possible father of Zach, while C.W. (the man who Zach's mother had originally asserted was the father) had been excluded by genetic testing.

received oral notice of this confirmation in late February from his prison case manager.

Because of a potential jurisdictional problem relating to the Initial Petition, on 1 May 2015 WCHS voluntarily dismissed that petition and filed a new petition (the "Second Petition"), once again requesting that Zach be adjudicated neglected and dependent.[4] Respondent was served with this petition.

On 16 July 2015, an adjudication hearing was held in Wake County District Court before the Honorable Monica Bousman, and a disposition hearing took place on 14 August 2015. On 13 October 2015, the trial court entered an order adjudicating Zach to be a neglected juvenile, establishing a permanent plan of adoption, ordering that WCHS cease reunification efforts, and setting forth requirements with which Respondent would need to comply in order to gain custody of Zach. Respondent filed a timely notice of appeal from the order.[5]

Analysis

A proceeding to adjudicate a juvenile neglected, abused, or dependent involves a two-stage process: the adjudication stage and the disposition stage. *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004).

I. Adjudication of Neglect

[4] The order stemming from the Initial Petition that terminated Zach's mother's parental rights was set aside by the trial court pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure.

[5] Zach's mother is not a party to this appeal.

We review the trial court's order adjudicating Zach to be neglected in order to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact. *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, __ N.C. App. __, __, 781 S.E.2d 685, 689 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Moreover, "[t]he trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, [the trial judge] alone determines which inferences to draw and which to reject." *Id.* (citation and quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 7B-101, a juvenile is neglected if he "does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . ." N.C. Gen. Stat. § 7B-101(15) (2015). "[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 C.L.S.*, __ N.C. App __, __, 781 S.E.2d 680, 682 (2016) (citation and quotation marks omitted). "A parent's incarceration may be relevant to whether his child is neglected; however,

incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007) (citation, quotation marks, and brackets omitted). "[W]hile 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." *C.L.S.*, __ N.C. App at __, 781 S.E.2d at 682 (citation, quotation marks, and brackets omitted).

Here, Respondent argues that Zach could not have been a neglected juvenile because he was "in a safe environment receiving proper care, supervision and discipline" at the time of the hearing and "the trial court could point to no affirmative acts of neglect on the part of [Respondent]." However, Zach was being properly cared for at the time of the hearing only because he had been placed in a foster home due to a prior order — stemming from the Initial Petition — adjudicating him as a neglected juvenile. It is undisputed that Zach's mother had abandoned him and left him in the care of inappropriate caretakers. Given that Zach never actually lived with Respondent, the relevant question with regard to whether he neglected Zach is whether Respondent totally failed to provide Zach love, support, and affection. *See id.*

In support of its determination that Zach had been neglected by Respondent, the trial court made the following findings of fact:

20. [Respondent] acknowledged that he had sexual intercourse with the mother at least two times in November of 2012. He lost contact with her after those encounters. He knew as early as May 2013 that the mother was definitely pregnant when she told him she was pregnant and stated that he was the father. [Respondent's] Facebook posts from July 2013 indicate that he knew the mother was pregnant, but denied that the child was his, despite the mother's statements to him that he was the father in May 2013 and despite knowing that he had sexual intercourse with her at the time she may have conceived. . . . [Respondent] never offered substantial financial or emotional support to the mother or the child and continued to deny that the child was his until receiving results of genetic marker testing in February 2015.

21. Soon after learning that the mother was pregnant and being told that the child was his, he accompanied another woman that he impregnated to her ultrasound appointment. [Zach's mother], still pregnant with [Zach], discovered this and became upset. She then told [Respondent] that he was not [Zach]'s father in June 2013.

22. [Respondent] has been incarcerated numerous times since 2006 for multiple felony and misdemeanor convictions. He is currently serving a 20 – 33 month sentence for a probation violation for felony possession of a stolen motor vehicle. His projected release date is October 2015.

23. [Respondent] did not attend doctor appointments with the mother while she was pregnant but did provide some amount of food to the mother in May 2013 while she was pregnant.

24. [Respondent] was served with the first motion to terminate parental rights on November 17, 2014.

> The motion contained the name and contact information of . . . the former WCHS' [sic] attorney in this case. [Respondent] took no action to contact WCHS to receive information regarding the child.
>
> 25. [Respondent] submitted to genetic marker testing in January 2015. WCHS received results indicating that [Respondent] was indeed the child's father in February 2015. [Respondent] was verbally notified that he was the father in February 2015 by a prison official and received correspondence confirming this from WCHS in March 2015. Even after being notified that he was the child's biological father, [Respondent] did not contact WCHS before the filing of this petition on May 1, 2015 to make inquiries regarding the child's welfare or send card[s], letters, gifts or financial assistance to WCHS for the child.

Respondent's primary argument is that the trial court improperly held Respondent responsible for his lack of interest in Zach during the time period *before* Respondent received confirmation from genetic testing in February 2015 that Zach was indeed his child. However, Respondent has not shown that the trial court's findings are either unsupported by competent evidence or fail to support its legal conclusions. Instead, Respondent simply draws different inferences from the underlying facts. However, it is well established that the trial court possesses the authority to determine "the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, [the trial judge] alone determines which inferences to draw and which to

reject." *McCabe*, 157 N.C. App. at 679, 580 S.E.2d at 73 (citation and quotation marks omitted).

Here, the findings show that Respondent acknowledged having sexual intercourse with Zach's mother on two occasions in November 2012 and that Zach's mother notified Respondent in May 2013 that she was pregnant with his child. However, Respondent did not accompany Zach's mother to doctor's appointments, provide any substantial financial or emotional support to Zach's mother, or take any interest in Zach's well-being or welfare before or after his birth in August 2013. Although Respondent had been told — incorrectly — by Zach's mother in June 2013 that he was not the father, Respondent was placed on notice in November 2014 that the paternity question remained ongoing when he was served with the initial motion to terminate parental rights and identified as a possible father. He did not file a response to that motion or otherwise take initiative to assert paternity of the child or contact WCHS to receive information about Zach. Even after he was notified in February 2015 of the paternity test showing him to be the father, Respondent did not contact WCHS to inquire into the child's welfare. Nor did he send cards, letters, or gifts to Zach or offer financial assistance for his care.

This Court has held that a similar lack of involvement is sufficient to support an adjudication of neglect. *See, e.g.*, *In re P.L.P.*, 173 N.C. App. 1, 10-11, 618 S.E.2d 241, 247 (2005) (incarcerated father "(1) could have written but did not do so; (2) made

no efforts to provide anything for the minor child; (3) has not provided any love, nurturing or support for the minor child; and (4) would continue to neglect the minor child if the child was placed in his care" (quotation marks and brackets omitted)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006); *In re Bradshaw*, 160 N.C. App. 677, 682, 587 S.E.2d 83, 86 (2003) (incarcerated father "neither provided support for the minor child nor sought any personal contact with or attempted to convey love and affection for the minor child").

In sum, the trial court's findings support its conclusion that by virtue of his disinterest in Zach's welfare and his failure to show Zach love, support, and affection, Respondent did not provide for the proper care, supervision, and discipline of Zach. Accordingly, we overrule Respondent's argument that the trial court erred in adjudicating Zach to be neglected by Respondent.

II. Disposition

Respondent next contends that the trial court abused its discretion at the disposition stage by ceasing reunification efforts and ordering a permanent plan of adoption. Following an adjudication of neglect, the trial court must enter an appropriate disposition based on the juvenile's best interests. *See* N.C. Gen. Stat. § 7B-903(a) (2015); *see also In re Dexter*, 147 N.C. App. 110, 114, 553 S.E.2d 922, 924 (2001). We review a disposition order "that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based

upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.*, 227 N.C. App. 518, 520-21, 742 S.E.2d 629, 631-32 (2013) (internal citations and quotation marks omitted).

Under the pertinent statutory provision in effect at the time the trial court held its disposition hearing and rendered its decision, the trial court's disposition order was required to "contain specific findings as to whether a county department of social services has made reasonable efforts to either prevent the need for placement or eliminate the need for placement of the juvenile[.]" N.C. Gen. Stat. § 7B-507(a)(2) (2013). The trial court was authorized, however, to "direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that . . . [s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe permanent home within a reasonable period of time[.]"[6] N.C. Gen. Stat. § 7B-507(b)(1) (2013).

[6] In 2015, the Legislature mandated new findings that must be made by a trial court before ceasing efforts toward reunification of a juvenile and his parents. *See* 2015 N.C. Sess. Laws 236, 240, 247, ch. 136, §§ 7, 14 (codified at N.C. Gen. Stat. § 7B-906.2 (2015)); 2015 N.C. Sess. Laws 166, 182-

Here, in addition to the evidence relevant to adjudication discussed above, which the trial court incorporated by reference into its findings regarding disposition, the court also made the following findings pertaining to Respondent that are relevant to disposition:

> 29. Wake County Human Services has made reasonable efforts under the circumstances aimed to prevent and eliminate the need for placement outside the care of both parents. Those efforts include:
>
> a. Contact with both the mother and [Respondent].
> b. Face-to-face visit with [Respondent] at the Lumberton Correctional Institution and provision of Out of Home Family Services Agreement.
> c. Referral of services for mother in the state of Georgia.
> d. Contact with the mother's local department of social services in Georgia.
> e. Relative visits.
> f. Repeated efforts to have the mother return to North Carolina.
> g. Genetic marker testing to eliminate/confirm paternity.
> h. Attempts to locate relatives for possible placement.

83, ch. 264, § 34.(a) (codified at N.C. Gen. Stat. § 7B-901(c) (2015)). These new statutory provisions were made "effective October 1, 2015, and appl[y] to actions filed or pending on or after that date." *See* 2015 N.C. Sess. Laws at 250, ch. 136, § 18; 2015 N.C. Sess. Laws at 183, ch. 264, § 34.(b). The record shows that the trial court held its disposition and permanency planning hearing and rendered its decision orally on 14 August 2015. Although the court did not file its written order until 13 October 2015, we apply the pre-existing statutory requirements because the trial court held its hearing and rendered its decision before 1 October 2015. *See In re E.M.*, __ N.C. App __, __, __ S.E.2d __, __, slip op. at 12-13 (filed August 16, 2016) (No. COA16-30) (holding that applying new statute would be "nonsensical" as it would require this Court to hold that the "district court should have considered criteria listed in a statute which was not in effect at the time of the proceeding at which the court heard evidence . . .").

. . . .

33. In March 2015, the GAL contacted [Respondent] through his prison case manager by telephone. [Respondent] knew about the results of the genetic marker test and appeared concerned about whether he would be required to pay child support. He did not ask about how to contact the social worker and did not ask what could be done for the child. He did offer his mother as someone that might be interested in care for the child.

34. In June 2015, WCHS contacted [Respondent]'s case manager at the Lumberton Correctional Institution by telephone. The case manager indicated that several programs were available to [Respondent] in prison, including narcotics and alcoholics anonymous and a GED program. [Respondent] has been convicted of at least one drug offense and has served multiple prison sentences. He was ordered to complete DART, a residential substance abuse treatment program available through the North Carolina Prison System, as a result of a felony larceny conviction in 2008. The Court has no evidence regarding whether [Respondent] completed DART.

35. [Respondent] has worked on his GED at times during his incarceration, but by August 2015, his case manager indicated that he had not been consistently attending GED classes. [Respondent] did indicate that he signed up for NA/AA meetings two (2) days prior to the August 14, 2015 court hearing. He testified that he was considering applying for disability after his prison release since he had broken his ankle during his incarceration. The court did not observe [Respondent] to use crutches or cane during the times he was in court and showed no noticeable physical disability. His

other income plan is to resume tattoo work.

36. WCHS visited [Respondent] at Lumberton Correctional Facility on June 26, 2015. [Respondent] entered into an Out of Home Family Services Agreement and was told that he could attend Narcotics Anonymous meetings at the prison. [Respondent]'s anticipated release date is October 2015. During his conversation with social workers, [Respondent] identified his mother, [F.R.], and brother, [K.M.], as possible placements for the child. . . .

37. The prison case manager contacted the Guardian ad Litem in July 2015. The case manager indicated that [Respondent] had not participated in any programs or otherwise complied with any terms of his case plan. Instead, [Respondent] spent his time sleeping.

38. [Respondent] has attended no AA/NA meetings. The case manager called the GAL indicating her frustration regarding the father. The case manager told the GAL that [Respondent] shows no initiative or overall improvement.

39. [Respondent] has not sent cards, letters, gifts or any other correspondence for the child's benefit at any time prior to this hearing. He was provided with an address where he could send letters and cards to the child.

40. [Respondent] admitted that he was not going to "step up to the plate" until he got proof that the child was his. He never sought to get that proof even when he knew the mother was pregnant. He has not sought to put himself in a position to parent the child even after learning the results of the genetic marker test.

41. Although [Respondent] is incarcerated, he has

access to services that would help remedy the conditions that led to removal of the child. He has not taken advantage of those services.

42. [Respondent] has never met this child. He was not incarcerated again until after the child's birth. [Respondent] has two (2) other children, age five (5) and another child, born July 3, 2013 who is also age two (2). He admits that he is not raising either of these other children who live with their respective mothers.

43. If [Respondent] is released from incarceration in October, 2015, he will have nine (9) months of post-release supervision. He will need to establish stable housing, legal income, comply with the post-release supervision requirements, and refrain from further criminal activity. He will also need to comply with the other terms of his Out of Home Family Services Agreement.

44. It is not possible to place the child in the care of [Respondent] within the next six (6) months. Reunification efforts with [Respondent] are inconsistent with the child's health, safety and need for a safe, permanent home within a reasonable time.

45. Prior to filing the May 1, 2015 petition, [Respondent's] mother, [F.R.], indicated to both WCHS and the Guardian ad Litem that she wanted to be of "assistance" to her son or if she couldn't assist him, she wanted to be considered for possible placement. When first contacted regarding the child, however, [F.R.] expressed doubt that [Zach] was her grandson and appeared confused regarding the child's paternity. The GAL contacted [F.R.] by phone in early March 2015 but [F.R.] abruptly hung up. When the GAL called [F.R.] again, she indicated that a lot of women claim that [Respondent] is the

father of their child.

46. [F.R.] was convicted of two counts of child abuse involving [Respondent] and his brother in 1995. WCHS determined that she was not an appropriate placement option due to her prior convictions and history with Wake County Child Protective Services.

47. [F.R.] is married to [J.G.]. [He] has three children, ages 9, 11 and 16. Their current residence consists of three small bedrooms and does not have room sufficient for this child.

48. In addition, WCHS could not approve [F.R.] as an appropriate care provider for the child due to her prior CPS history and criminal record. . . .

. . . .

51. WCHS attempted contact with [Respondent]'s brother [K.M.]. The social worker left two voicemail messages but received no response from him.

52. When [Zach] came into custody in June 2014, he was very fearful and afraid of others. He has been in the same foster home since June 2014. He has developed a strong bond with his foster family. . . .

53. It is in the best interests of the child that this Court adopt as its Order the plan proposed by Wake County Human Services to achieve a safe, permanent home for the child within a reasonable period of time, to wit: adoption.

The trial court concluded that "[WCHS] has made reasonable efforts to place the child in a safe home in a reasonable period of time[,]" that "[r]eunification efforts with [Respondent] would be inconsistent with the child's safety and need for a safe

home within a reasonable time," and that "[i]t is in the best interests of the child that adoption be named the permanent plan . . . ." The trial court then set forth specific requirements with which Respondent would have to comply if he desired to achieve reunification with Zach.

Respondent argues on appeal that the trial court made insufficient findings to support its conclusion that WCHS had "made reasonable efforts to place the child in a safe home in a reasonable period of time." The uncontested findings, however, belie this notion. The trial court's findings show that after Respondent was named as a potential father, WCHS attempted to contact him to confirm paternity and made arrangements for paternity testing. After paternity was confirmed, a WCHS social worker and Respondent had a face-to-face meeting at his prison unit on 26 June 2015, at which time Respondent entered into a family services agreement. As a part of developing the family services agreement, WCHS had contacted Respondent's case manager at the Lumberton Correctional Institution and learned what programs were available to assist Respondent in reunifying with Zach. WCHS also attempted to locate relatives for possible placement, although for the reasons described in the trial court's findings no suitable placement option was found. We conclude that these findings support the conclusion that WCHS made reasonable efforts at reunification.

Respondent also argues that the time period between the execution of Respondent's family services agreement and the disposition hearing was too short to

allow for a meaningful determination of Respondent's progress in meeting the goals set forth in the agreement. However, while this period of time was somewhat abbreviated, we cannot say on these facts that WCHS was required to give Respondent additional time to comply with the case plan. The record reflects that Respondent's prison case manager contacted the guardian *ad litem* in July 2015 after entry of the family services agreement and reported that Respondent had not participated in any programs or otherwise complied with the terms of the case plan, had not attended any Alcoholics Anonymous or Narcotics Anonymous meetings as required in the agreement, and had shown no initiative or overall improvement.

Finally, Respondent argues that the trial court's findings do not support its conclusion that "[r]eunification efforts with [Respondent] would be inconsistent with the child's safety and need for a safe home within a reasonable time." We disagree. In addition to all of the facts described above, the court also found that Respondent had two other children who live with their respective mothers, and he admitted that he was not raising them. It further found that Respondent had a history of multiple incarcerations since 2006 for felony and misdemeanor convictions, including the sentence for felony possession of a stolen motor vehicle that he was serving at the time of the hearing. Respondent's mother, who Respondent offered as a possible placement option, was not approved as an appropriate caregiver due to her prior convictions of child abuse and the fact that she had inadequate housing. The trial

court found that no other relative of Respondent was willing or able to care for the child. Respondent was scheduled to be released from prison in October 2015, after which he would undergo nine months of post-release supervision and be required to find housing and employment, refrain from criminal activity, and otherwise comply with the family services agreement.

We conclude that these findings support the trial court's conclusion that reunification efforts with Respondent would be inconsistent with the child's safety and need for a safe home within a reasonable period of time. Accordingly, we reject Respondent's arguments regarding the trial court's disposition order.

Conclusion

For the reasons stated above, we affirm the trial court's 13 October 2015 order.

AFFIRMED.

Judges STEPHENS and DIETZ concur.

Report per Rule 30(e).