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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-383

Filed: 6 December 2016

Greene County, Nos. 14 JT 01-02

IN THE MATTER OF: J.T.O. and J.Q.O.

Appeal by respondent-father from orders entered 25 January 2016 by Judge R. Les Turner in Greene County District Court. Heard in the Court of Appeals 24 October 2016.

Baddour, Parker, Hine & Hale, P.C., by Helen S. Baddour, for petitioner-appellee Greene County Department of Social Services.

J. Thomas Diepenbrock for respondent-appellant father.

Duke Energy Corporation, by Michelle Spak, for guardian ad litem.

ELMORE, Judge.

Respondent-father appeals from the trial court's orders terminating his parental rights to J.T.O. ("Joseph") and J.Q.O. ("June")[1] on the ground of neglect. After careful review, we vacate and remand.

I. Background

Respondent-father and Quanisha are the parents of Joseph and June, and were the parents of A.O. ("Amy"), until her untimely death. After Greene County Sheriff's

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[1] Pseudonyms are used to protect the minors' identity and for ease of reading.

Department notified the Greene County Department of Social Services ("DSS") that one-year-old Amy tragically had been shot and killed by her two-year-old brother, Joseph, DSS took custody of Joseph and June and filed petitions alleging that they were neglected because they "d[id] not receive proper care, supervision, or discipline" and "live[d] in an environment injurious to the[ir] welfare."

According to the petitions, the firearm used to shoot Amy belonged to respondent-father and the family gave conflicting accounts of the incident. The parents apparently told the sheriff's department that the rifle went off accidentally but told DSS that Joseph picked up the rifle and shot Amy. The parents also gave conflicting reports as to whether they witnessed the incident. Respondent-father was arrested in connection with the shooting, charged with involuntary manslaughter and possession of a firearm by a felon, and incarcerated at the Greene County Jail.

The petition further alleged that at the time of the incident, the family was residing with the children's paternal grandparents, who lacked adequate sleeping space for the family, and that the family had moved in with the grandparents because the family's home lacked utilities. The grandfather was alleged to have unlocked weapons in the home, although he stated that he alone knew where they were. According to the petitions, the children were dirty and had a foul odor to them, and the parents did not have an adequate amount of formula for June.

After a 17 March 2014 hearing, the trial court entered an order on 29 April 2014 adjudicating the children as neglected based on the mother's stipulation, although the mother did not admit to any specific allegation contained in the petition. The court maintained custody of the children with DSS and ordered respondent-father to comply with various case plan directives upon his release from incarceration. The trial court did not give respondent-father visitation with the juveniles due to his incarceration. After a 30 June 2014 hearing, the trial court entered an order on 7 August 2014 ordering, *inter alia*, that "[respondent-father] shall have no contact with the juvenile[s] while he is incarcerated." After a permanency planning hearing on 6 October 2014, the trial court entered orders ceasing reunification efforts and changing the permanent plan for the juveniles to adoption.

On 30 January 2015, DSS filed petitions to terminate respondent-father's parental rights to the juveniles, alleging neglect as the sole ground for termination. *See* N.C. Gen. Stat. § 7B-1111(a)(1). On 27 April 2015, respondent-father pleaded guilty to involuntary manslaughter, and the trial court sentenced him to a term of 15 to 27 months of imprisonment. Following his conviction, respondent-father was transferred from Greene County to a Department of Public Safety prison. Due to credit for pretrial confinement, respondent-father was released from prison on or about 29 July 2015.

The termination hearing for both juveniles was held on 31 August 2015 and was recessed until 21 September 2015 for the limited purpose of closing arguments.[2] After the hearings, the trial court entered orders on 25 January 2016 terminating respondent-father's parental rights to Joseph and June based upon grounds of neglect. Respondent-father appeals.[3]

II. Analysis

Appellate review of a termination order is limited to determining "(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 Pittman*, 149 N.C. App. 756, 763–64, 561 S.E.2d 560, 566 (2002) (citation and quotation marks omitted). " 'If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.' " *In re C.J.H.,* __ N.C. App. __, __, 772 S.E.2d 82, 86 (2015) (quoting *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009)). We review *de novo* whether a trial court's findings support its conclusion that one of the enumerated grounds exist to terminate parental rights. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam,* 363 N.C. 368, 677 S.E.2d 455 (2009). However, when the findings do not support the trial court's conclusions but the evidence

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[2] Although the transcript indicates that the termination hearing commenced on two dates, the trial court stopped taking evidence at the close of the 31 August 2015 hearing and prohibited the presentation of evidence on 21 September 2015.
[3] The mother's parental rights were also terminated, but she does not appeal.

presented did not preclude such findings, we have often vacated the order with instructions to the trial court to make further findings and conclusions. *See, e.g.*, *In re I.K.*, 227 N.C. App. 264, 276, 742 S.E.2d 588, 596 (2013); *In re F.G.J.,* 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009).

N.C. Gen. Stat. § 7B-1111(a)(1) (2015) provides that a trial court may terminate parental rights upon finding that "[t]he parent has . . . neglected the juvenile." A "neglected juvenile" is defined 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 . . . .

N.C. Gen. Stat. § 7B-101(15) (2015). Additionally, "[n]eglect . . . 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), *aff'd per curiam*, __ N.C. __, __ S.E.2d __ (Sept. 23, 2016) (No. 54A16).

Generally, "[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); *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) ("The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding." (emphasis omitted)). However, "the trial court must employ

a different kind of analysis to determine whether the evidence supports a finding of neglect" when "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing." *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001). Under such circumstances, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *Ballard*, 311 N.C. at 713–14, 319 S.E.2d at 231. However, the prior adjudication of neglect, standing alone, does not support termination based on neglect: "The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. "Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of [the] children." *In re J.H.K.*, 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011) (citation and internal quotation marks omitted).

Here, the trial court made the following pertinent findings:[4]

> 7. That both parents have neglected the juvenile in that the juvenile has been before this Court for more than one year and neither parent has taken action on the case plan nor have they complied with previous orders of the Court.
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> 8. That there is no evidence that the father of the juvenile has even started on what was ordered for him to

[4] The trial court entered a separate order for each juvenile, but the findings of fact in each order are nearly identical. Thus, we have quoted only the order pertaining to Joseph.

> complete.
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> 9. That when the father was incarcerated, his parents or other family members would send $200.00 to $300.00 to him each month, but he did not send any funds for the use and benefit of the juvenile, nor did he send cards to the juvenile.
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> . . . .
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> 12. That the grandmother of the juvenile has provided some toys for the juvenile.
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> . . . .
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> 18. That the grounds exist to terminate the parental rights of both parents in that they have neglected the juvenile and it appears based on their failure to follow orders of the Court that they would continue to neglect the juvenile.

Respondent-father argues that "[t]he findings that [respondent-father] has taken no action on the case plan, and that he has not even started on what was ordered for him to complete are not supported by clear and convincing evidence." We agree.

Since entry of the order adjudicating the children neglected, the trial court ordered respondent-father to comply with the following case plan directives:

> That [respondent-father] . . . when released from incarceration, shall:
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> a. Obtain and maintain stable housing;
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> b. Obtain and maintain suitable employment;

c. Complete a parenting class approved by [DSS] and follow all recommendations;

d. Obtain a full non self reporting mental health assessment and follow all recommendations; and

e. Be subject to random drug screens.

During the termination hearing, respondent-father presented evidence that he undertook three of the court's directives since he was released from prison. First, respondent-father testified that prior to his incarceration, he was employed at a solar panel installation company for over a year and that after he was released from prison, he contacted his former supervisor in an attempt to get his old job back. Respondent-father explained that his employer was out-of-town on a job, however, and due to respondent-father's post-supervision release, he was unable to travel to fill out necessary paperwork. But respondent-father testified that his former supervisor stated that once he completes the paperwork, "[he] will start back to work." Respondent-father also testified that he applied for one other job. Second, respondent-father testified that upon release from prison, he moved into his cousin's three-bedroom house, which would provide separate rooms for the children. A DSS social worker visited this home and testified that it was appropriate, but that it had been deemed unsuitable because respondent-father's cousin would not agree to prohibit respondent-father's father from visiting. Third, respondent-father testified that he was subjected to drug screening as part of the conditions of post-release

supervision. At the termination hearing, respondent-father was given a drug test, which was negative.

Although it was certainly within the court's discretion to discredit respondent-father's testimony regarding his attempt to obtain employment or his prospective employment, or to find his housing unsuitable, his testimony does constitute *some* evidence that he started on his case plan. Therefore, neither the finding that "there is *no evidence* that [respondent-father] *even started* on what was ordered for him to complete" nor the finding that "neither parent has taken action on the case plan" are supported by clear, cogent, and convincing evidence.

Without these findings, all that remains are findings that respondent-father did not send money or cards to his children while in prison and that his mother provided them toys. These findings are inadequate to support the court's conclusion that respondent-father neglected his children and was likely to neglect them in the future. The children were originally adjudicated neglected due to their physical condition, the family's unsuitable housing, and the family's lack of firearm safety, which led to the tragic death of one child. Although the events concerning the original adjudication of neglect are troublesome, respondent-father's failures to send money or cards to his children have no bearing on whether the neglect originally adjudicated would continue in the future.

Respondent-father also challenges the trial court's conclusion that he neglected his children and future neglect was probable because he was incarcerated for most of the life of the case.

" 'Incarceration alone . . . does not negate a [parent's] neglect of his [or her] child. . . . Although [an incarcerated parent's] options for showing affection are greatly limited, [he or she] will not be excused from showing interest in [the] child's welfare *by whatever means available*.' " *In re Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003) (citations omitted) (emphasis added). However, "a parent's imprisonment is relevant to the trial court's determination of whether a statutory ground for termination exists," *In re N.T.U.*, 234 N.C. App. 722, 735, 760 S.E.2d 49, 58, *disc. review denied*, __ N.C. __, 763 S.E.2d 517 (2014), particularly to the extent incarceration affects "whatever means [are] available" for a parent to show interest in the child.

Here, despite repeatedly ordering respondent-father to complete his directives "when released from incarceration," only one month elapsed between his release and the termination hearing, but the case plan was first explained to respondent-father on 17 March 2014, more than seventeen months before the termination hearing. The trial court based its conclusion that future neglect was probable due to respondent-father's failure to comply with his case plan but failed to make findings addressing the extent to which he had the ability to perform parts of his case plan while

incarcerated and upon his release. For instance, while incarcerated respondent-father may have been able to inquire of friends and family whether he could reside with them after his release; contact former and prospective employers (or ready a list of those employers); or maintain regular contact with DSS regarding these and other post-incarceration responsibilities. Although respondent-father's social worker testified to respondent-father's "enthusiasm when he was incarcerated" about what steps he needed to take when he was released and that at each monthly visit "he would ask [her]," she also testified that she informed respondent-father it was extremely important to contact DSS upon his release and that he failed to do so.

Additionally, respondent-father while incarcerated may have participated in parenting classes or completed his mental health assessment or prepared a list of potential classes or providers to visit immediately upon his release. Although his social worker testified that she never provided him any specific information about DSS-approved parenting classes or how to obtain the required mental health assessment while he was incarcerated and that she never gave him this information after he was released because the plan had changed from reunification to adoption, respondent-father may have taken independent steps while in prison to acquire this information or contacted DSS upon his release.

Nonetheless, although the court failed to make appropriate findings or conclusions to support its ultimate conclusion that Joseph and June were neglected,

evidence was presented at the termination hearing that may have been sufficient for the trial court to conclude that respondent-father failed to provide his children with "contact, love or affection and that future neglect was probable . . . ." *In re D.J.D.*, 171 N.C. App. 230, 240, 615 S.E.2d 26, 33 (2005). However, "[i]t is the role of the trial court and not this Court to make findings of fact regarding the evidence." *F.G.J.*, 200 N.C. App. at 694–95, 684 S.E.2d at 754–55 (vacating and remanding for additional findings when the evidence presented may have supported findings underlying the trial court's conclusion but affirming on that basis would require us to "speculat[e] as to the trial court's rationale" (citation omitted)).

Here, the evidence presented at the termination hearing showed that respondent-father sent letters to DSS during his incarceration, but did not send any letters to his children. The evidence also showed that respondent-father did not send any gifts to his children, nor did he direct any of the $200.00 to $300.00, which he received monthly from his family for his use in jail, to his children. Respondent-father also made no attempt to contact DSS to arrange visitation or report his current living situation in the month after being released from prison, although he was informed of the importance of contacting DSS.

This evidence may support findings that respondent-father made no attempt to contact his children while he was incarcerated, did not give or attempt to give any gifts to his children, and did not direct any money towards his children while he was

incarcerated. *See In re A.J.M.P.*, 205 N.C. App. 144, 155, 695 S.E.2d 156, 162 (2010) (concluding that the fact that a father had "not written letters or sent gifts to the minor child throughout the term of his imprisonment" contributed to a finding of neglect). Other evidence may also support findings that respondent-father wrote DSS several times to inquire about his children; asked to see pictures of his children, inquired about their activities, and expressed interest in his children during monthly meetings with his social worker; was prohibited by court-order from contacting his children since 30 June 2014; was unable to send gifts while incarcerated but sent Christmas gifts through his mother; and was unable to earn wages while incarcerated or to send money from the $200.00 to $300.00 deposited monthly into his "canteen" account to another bank account.

Additionally, the evidence may support findings that respondent-father made no attempt to contact his children, failed to find a job, and failed to contact DSS in the month after his release, despite being informed that such action was extremely important. Other evidence may also support findings that respondent-father was unable to see his children until he finished the parenting course and mental health assessment, applied to two jobs in the month he was released, and that respondent-father and his mother left several messages with DSS that were not returned, although his social worker testified that she never received any voicemails after his release. However, without further fact-finding, we are unable to discern whether the

findings support the trial court's conclusions. In light of our disposition, we decline to address respondent's remaining challenges.

III. Conclusion

The two challenged findings are not supported by clear and convincing evidence. The remaining, binding findings do not currently support the trial court's conclusion that Joseph and June were neglected. However, because the evidence presented at the termination hearing may provide an adequate basis for the trial court's findings and conclusions to support this termination ground, we vacate the order and remand to the trial court for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 1111-7B(a)(1). *See, e.g.*, *F.G.J.*, 200 N.C. App. at 694, 684 S.E.2d at 754 (vacating and remanding for further fact-finding when "the trial court's current findings [were] insufficient to permit this Court to review its decision under N.C. Gen. Stat. § 7B-1111(a)(2)"). In its discretion, the trial court may receive additional evidence. *See In re D.R.B.,* 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007) (vacating and remanding for additional findings and conclusions to adjudicate whether grounds for termination existed and permitting the trial court in its discretion to receive additional evidence).

VACATED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).