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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-488

Filed: 20 December 2016

Hoke County, No. 13 JT 46

IN THE MATTER OF: K.A.E.

Appeal by respondent-father from order entered 22 February 2016 by Judge Regina Joe in Hoke County District Court. Heard in the Court of Appeals 5 December 2016.

No brief filed for petitioner-appellee mother.

Mercedes O. Chut for respondent-appellant father.

BRYANT, Judge.

Where the trial court erred in terminating respondent-father's parental rights based upon the grounds of neglect, willful abandonment, and dependency, we reverse the order of the trial court.

Petitioner-mother ("petitioner") and respondent-father ("respondent") have one child together, K.A.E. ("Katie"),¹ who was born in September 2001. They lived in New York at the time. The two never married, but were in a romantic relationship on and off for several years and lived together for a few months after Katie's birth. When

¹ A pseudonym is used to protect the identity of the juvenile and for ease of reading.

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Katie was young, respondent's involvement in her life was very uneven and non-existent at times. At one point in 2002, petitioner took out a domestic violence protective order against him. In either 2005 or 2008,² respondent began serving a sentence in federal prison for what he described as "discharging a firearm." After respondent was released from prison, however, his contact with Katie became more regular.

In 2008, petitioner and Katie moved to North Carolina. Petitioner made sure that Katie stayed in contact with her father despite the move. Katie sent her father photos and cards, and talked to him on the telephone. He in turn sent her photos, gifts, and money orders on occasion. In summer 2013, however, petitioner attempted to cut off respondent's contact with Katie after an incident in which respondent encouraged Katie to lie to petitioner. At the time, Katie was visiting family in New York, and also visited respondent's then-girlfriend. He asked Katie to hide this fact from petitioner and tell petitioner that she was visiting respondent's brother.

On 8 August 2013, petitioner filed a petition to terminate respondent's parental rights to Katie based upon the ground of neglect. *See* N.C. Gen. Stat. § 7B-1111(a)(1) (2015). The hearing was continued numerous times due to respondent's incarceration. Respondent was released from custody in February 2015, and the trial

² It is not clear when respondent began serving his sentence. Petitioner claims that respondent started his sentence in 2008 and was released in 2014. Respondent, however, claims that he was released in February 2015 and served a ten-year sentence.

court conducted a termination hearing on 23 November 2015. On 22 February 2016, the trial court entered an order terminating respondent's parental rights based upon the grounds of neglect, willful abandonment, and dependency. *See id.* § 7B-1111(a)(1), (6), (7). In the dispositional portion of the order, the trial court found that termination of respondent's parental rights was in the best interest of the juvenile. Respondent appeals.

On appeal, respondent challenges the trial court's grounds for termination of his parental rights. A trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. N.C. Gen. Stat. § 7B-1111(a). We review the trial court's order to determine "whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur . . ." *In re Oghenekevebe*, 123 N.C. App. 434, 435–36, 473 S.E.2d 393, 395 (1996) (citation omitted). In the instant case, the trial court terminated respondent-father's parental rights to his children based upon three grounds: neglect, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6)–(7). We address respondent's arguments as to each ground in turn.

I. Dependency

First, we address the trial court's conclusion that termination of respondent's parental rights was justified based upon the ground of dependency, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). This subsection provides for termination of parental rights if

the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

Id. § 7B-1111(a)(6). In determining whether a juvenile is dependent, the trial court is required to “address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.” *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Respondent argues that the trial court erred in terminating his parental rights based on dependency because: (1) petitioner failed to allege dependency as a ground for termination in her petition; and (2) the trial court failed to make sufficient findings to support the ground. Because we agree with respondent’s first argument, we need not address his second argument.

A petition must include “[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.” N.C. Gen. Stat.

§ 7B-1104(6) (2015). “While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue.” *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). Nonetheless, when a petitioner fails to allege a ground in the termination petition, the trial court may not use it as a ground for termination. *See In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50–51 (2009). Here, the petition is silent as to the ground of dependency. The petition neither references the pertinent statutory subsection, nor places respondent on notice that either his ability to provide care and supervision or the availability of alternative child care arrangements would be at issue at the termination hearing. Therefore, the trial court erred in using dependency as a ground for termination.

II. Willful Abandonment

Next, we address respondent’s challenges to the trial court’s conclusion that his parental rights should be terminated based on the ground of willful abandonment. Section 7B-1111(a)(7) provides that the trial court may terminate a parent’s rights upon a finding that “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion” N.C.G.S. § 7B-1111(a)(7). The willful abandonment under this subsection “implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re Young*, 346

N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). “The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation.” *Searle*, 82 N.C. App. at 275, 346 S.E.2d at 514 (citation omitted). “[T]he findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child.” *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53 (citation omitted).

Respondent argues that the trial court erred in terminating his parental rights based on abandonment because: (1) petitioner failed to allege abandonment as a ground for termination in her petition; and (2) neither the findings of fact nor the evidence are sufficient to support willful abandonment. We agree with respondent’s second argument, and for the foregoing reasons, conclude that the trial court erred in finding abandonment as a ground for termination.

In support of his argument, respondent challenges the following findings of fact,³ which are the critical findings used by the trial court to support grounds for termination:

³ Respondent challenges a few other findings of fact. We find it unnecessary to address his challenges to those, because the critical findings listed above are not supported by the evidence.

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24. The Respondent abandoned the minor child to the care of Petitioner at birth.

...

35. The Petitioner has established grounds for termination of the parental rights of the Respondent:

a. That Respondent, as a natural parent of the juvenile, has willfully abandoned the juvenile for at least six (6) consecutive months immediately preceding the filing of this Petition for Termination of Parental Rights, pursuant to the provisions of N.C. Gen. Stat. §7B-1111(7);

....

c. The Respondent has had no meaningful contact with the minor child in more than two years.

d. Given the child's lack of contact with the Respondent, the minor child has no meaningful relationship with the Respondent.

e. The Respondent has sent no gifts or supplies for the minor child.

f. The Respondent has not provided any financial support for the minor child for more than six (6) months.

Respondent argues that these findings are not supported by the evidence and contradict other findings of fact, in which the trial court found that petitioner encouraged Katie to maintain a relationship with her father, that respondent had contact with Katie via e-mail, that he sent her money orders, and that he had two visits with Katie in 2008 and 2015.

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We agree with respondent's contentions. Because the petition was filed on 8 August 2013, the statutorily relevant six-month period was from 8 February 2013 to 8 August 2013. During this time, and for at least five years preceding this period, respondent was in federal prison. The testimony of petitioner, Katie, and respondent establishes that he maintained consistent contact with Katie while in prison. Petitioner herself testified that Katie talked to respondent on the telephone, that Katie received gifts and money orders from her father, and that he sent Katie photos, letters, and cards in the mail. Katie confirmed that she communicated with her father while he was in prison via telephone, e-mail, and mail. She spoke to him one to two times per month, and more often via e-mail. She also confirmed that respondent sent her birthday gifts while in prison.

Thus, the evidence shows that respondent maintained consistent contact with Katie via mail, e-mail, and telephone while he was in prison. Neither the findings of fact nor the evidence offers much specificity as to the dates involved, but the testimony of respondent, Katie, and petitioner suggests that he maintained contact with Katie for the duration of his time in prison, which necessarily includes the statutorily relevant time period. Furthermore, there simply is no evidence that respondent's consistent contact with Katie abruptly stopped between February and August 2013. Indeed, several e-mails between respondent and Katie were introduced into evidence at the hearing, and all had dates that fell within the relevant time

period. We have repeatedly held that a parent's incarceration may be relevant to determining whether grounds for termination exist, but "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 omitted). Given that respondent was in federal prison during the relevant time period, his regular contact with Katie via telephone, e-mail, and mail was sufficient to demonstrate that he desired to maintain custody of Katie.

Furthermore, the facts in the instant case are distinguishable from cases in which this Court has upheld terminations of parental rights based on abandonment. *See, e.g., In re C.J.H.*, ___ N.C. App. ___, ___, 772 S.E.2d 82, 92 (2015) (affirming termination based on abandonment where the respondent "did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile," despite making a last minute child support payment); *In re B.S.O.*, 234 N.C. App. 706, 710–13, 760 S.E.2d 59, 64–65 (2014) (affirming termination based on abandonment where, during the relevant six-month period, the respondent made no effort to stay in contact with his children or their caretakers, provided nothing for their support, and made only a single phone call to his children).

Lastly, it appears that between June and August 2013, respondent attempted to initiate a *pro se* action for custody of or visitation with Katie. While respondent's

efforts were wholly ineffective, his attempt to file such an action is further evidence that he did not forego all parental duties and relinquish all parental claims to Katie. *In re D.T.L.*, 219 N.C. App. 219, 222, 722 S.E.2d 516, 518 (2012) (holding that the trial court's finding of willful abandonment was not supported by the evidence where the respondent was under a no-contact order and filed a civil custody action during the six-month period, which showed he did not intend to forego all parental duties). Accordingly, we conclude that the trial court's findings of fact are not supported by the evidence.

Because we have determined that willful abandonment was not supported by the evidence of record, we need not address respondent's argument as to whether this ground was properly alleged in the petition.

III. Neglect

Finally, we address the trial court's finding of neglect as a ground for termination. Our juvenile code provides for termination based upon a finding that "[t]he parent has . . . neglected the juvenile" within the meaning of N.C. Gen. Stat. § 7B-101. N.C.G.S. § 7B-1111(a)(1). Neglect, in turn, is defined as follows:

Neglected juvenile. – 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) (2015). Generally, “[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.” *Young*, 346 N.C. at 248, 485 S.E.2d at 615 (citation omitted).

However, where a child has not been in the custody of a parent for a significant amount of time, the trial court typically employs a different analysis. *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citation omitted). 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.” *In re Ballard*, 311 N.C. 708, 713–14, 319 S.E.2d 227, 231 (1984). “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 (citation omitted). Thus, a trial court may terminate parental rights based upon prior neglect of the juvenile only if “the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to her parents.” *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

Here, however, the trial court did not make any findings regarding the two-pronged analysis described in *Ballard* and subsequent cases. The only ultimate finding in the order is the finding that “[t]he Respondent’s lack of involvement with

or regard for the minor child constitutes neglect under N.C.G.S. 7B-1111(a)(1).” The order is devoid of any findings or conclusions that the juvenile would likely be neglected if returned to respondent’s custody. Therefore, it appears that the trial court’s finding of neglect was based on current neglect. Respondent argues that termination based on neglect was improper because (1) the trial court did not make any conclusions of law regarding neglect; and (2) the findings of fact and evidence are insufficient to establish current neglect as a ground for termination.

Respondent is correct in his assertion that the trial court failed to make a conclusion of law regarding neglect. However, we need not address whether this omission constitutes error. Even if we were to treat the trial court’s finding of fact regarding neglect as a conclusion of law, it still would not be supported by the evidence of record.

As noted in the previous section, none of the trial court’s ultimate findings of fact used to support its grounds for termination are supported by the evidence. In the previous section, we analyzed the evidence as it pertains to the statutorily relevant period pertaining to abandonment. The same evidence belies the trial court’s finding of neglect. In addition, because the trial court must determine whether neglect existed at the time of the termination hearing, post-petition evidence is also relevant to neglect. *See In re C.G.R.*, 216 N.C. App. 351, 363–64, 717 S.E.2d 50, 58 (2011). Here, respondent’s actions between the date of the petition and the date of the

hearing further undermine the trial court's finding of neglect. The evidence shows that since the filing of the petition, respondent continued to communicate with Katie and provided some financial support.

First, the evidence shows that respondent continued to communicate with Katie after he was released from prison. Petitioner admitted that in 2013, she attempted to cut off contact between respondent and Katie, but was unsuccessful. Katie testified that she rejected her father's recent attempts to contact her, but he continued to call her and send her text messages. The evidence further shows that respondent had one in-person visit with Katie after his release. In the summer of 2015, Katie visited maternal relatives in New York and also had a brief visit with her father, in which he took her shopping. Respondent testified that he was unable to travel to visit Katie due to his post-release supervision, but that he had requested additional visits. In his testimony, respondent recounted one recent attempt. Respondent testified that petitioner and Katie had originally planned to spend the Easter holiday in New York, and he therefore tried to arrange a visit with Katie. However, petitioner ultimately decided not to travel to New York for Easter, and his attempt was therefore thwarted and unsuccessful. Lastly, petitioner testified that at some point in 2015, respondent forwarded child support payments for Katie.

We find this case analogous to *In re C.W.*, 182 N.C. App. 214, 641 S.E.2d 725 (2007). In *C.W.*, the mother of the children at issue voluntarily placed them in a group

home to ensure that they had proper care, supervision, and discipline. *Id.* at 221, 641 S.E.2d at 730. The county Department of Social Services thereafter became involved with the children, located the respondent-father, and was successful in terminating his parental rights. *Id.* at 219, 221, 641 S.E.2d at 729–30. The respondent-father was incarcerated during the pendency of the case, and upon release, was prohibited from contacting the children until he received a psychological evaluation. *Id.* at 222, 641 S.E.2d at 731. He nonetheless consistently sent cards, letters, and money to the children, and tried to stay in contact with them. *Id.* at 221–22, 641 S.E.2d at 730–31. Based on the respondent-father’s impediments to visiting the children in-person and his attempts to remain in contact with them, this Court held that there was insufficient evidence to support neglect as a ground for termination. *Id.* at 225, 641 S.E.2d at 733; *see also In re G.B.R.*, 220 N.C. App. 309, 317, 725 S.E.2d 387, 392 (2012) (reversing termination based on neglect where the trial court’s findings focused on the father’s past incarceration and lacked “specific findings as to current conditions of neglect after respondent-father’s release, any changes in circumstances following his release, or how his current conditions or behavior show a probability of repetition of neglect” (citation omitted)). Respondent, like the father in *C.W.*, consistently tried to stay in communication with Katie. He also bought her gifts and sent her money when able. Additionally, he had one in-person visit with Katie and

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desired more, but was unable to travel under the terms of his post-supervision release. Based on the foregoing, the evidence is not sufficient to establish neglect.

In conclusion, we hold that the trial court erred in terminating respondent-father's parental rights based upon the grounds of neglect, willful abandonment, and dependency. We therefore reverse the trial court's order. Respondent additionally challenges the trial court's dispositional conclusion that termination of his parental rights was in Katie's best interest. However, because we have reversed the order based on the adjudicatory grounds, we need not address respondent's final argument on appeal. *See In re Anderson*, 151 N.C. App. 94, 99–100, 564 S.E.2d 599, 603 (2002).

REVERSED.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).