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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-576

Filed: 20 December 2016

Wake County, No. 15 JT 11

IN THE MATTER OF: T.J.T.

Appeal by respondent-father from order entered 7 March 2016 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 5 December 2016.

*Office of the Wake County Attorney, by Robert A. Askew and Jennifer M. Jones, for petitioner-appellee Wake County Human Services.*

*David A. Perez for respondent-appellant father.*

*Winston & Strawn LLP, by Jason E. Bennett and William C. Petraglia, for guardian ad litem.*

BRYANT, Judge.

Where the trial court's finding of neglect is supported by the evidence, we affirm the trial court's order terminating respondent-father's parental rights on the ground of neglect.

In January 2015, a few days after the birth of T.J.T. ("Teresa"),<sup>1</sup> Wake County Human Services ("WCHS") took Teresa into nonsecure custody and filed a juvenile

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

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petition alleging that she was neglected. According to the petition, both Teresa and her mother tested positive for cocaine, and the mother acknowledged using cocaine and alcohol throughout her pregnancy. Additionally, WCHS alleged that the mother did not receive prenatal care, was homeless and unemployed, and had three other children who were no longer in her custody. The mother was married at the time of Teresa's birth, but claimed that she had not been in a romantic relationship with her husband since 1999 or 2000 and that he was not Teresa's father. The mother claimed that respondent-father was likely Teresa's biological father, but acknowledged that there were other possible fathers.

In an order entered on 20 April 2015, the trial court adjudicated Teresa neglected. Paternity still had not been established at the time of the order, but respondent-father acknowledged the possibility that he was Teresa's biological father. In the order, the trial court found that respondent-father and the mother had been romantically involved and that respondent-father's mother provided care for one of the mother's older children. The court also found that respondent-father was not able to provide proper care and supervision for Teresa. In the dispositional portion of the order, the trial court ordered respondent-father to submit to genetic marker testing. If he was proven to be Teresa's father, respondent-father was further required to establish paternity and enter into and comply with a case plan. The trial court also gave respondent-father one hour of supervised visitation with Teresa every other week.

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On 23 June 2015, WCHS filed a motion to terminate respondent-father's parental rights to Teresa, alleging the following grounds for termination: (1) neglect; (2) willful abandonment; and (3) failure to legitimate. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (5), (7) (2015). At the time of the filing of the motion, respondent-father still had not submitted to genetic marker testing as ordered by the trial court. He eventually submitted to such testing, which confirmed that he was Teresa's biological father. Respondent-father was notified of the results on 1 October 2015. Following a hearing, the trial court entered an order on 7 March 2016 terminating respondent-father's parental rights based upon neglect. The trial court also concluded that it was in Teresa's best interest to terminate respondent-father's parental rights. Respondent-father appeals.<sup>2</sup>

On appeal, respondent-father argues that the trial court erred in terminating his parental rights based upon neglect pursuant to N.C. Gen. Stat. § 7B-1111(a) (2015). 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).

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<sup>2</sup> The trial court also terminated the mother's parental rights, but she does not appeal.

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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.” *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted); *see also 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.*”).

However, “[w]here, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect.” *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citation omitted). Because the determinative factor is the parent’s ability to care for the child at the time of the hearing, “requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination

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of parental rights impossible.” *Id.* (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.” *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 (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).

The following findings of fact address this ground for termination:

4. The matter was noticed for hearing January 21, 2016 at 9:00 a.m. The Court waited for the parents to appear until 9:45 a.m.
5. [Respondent-father] appeared at 11:02 a.m. and the grounds phase of the hearing had concluded. [Respondent-father] requested that evidence on grounds be reopened and that the matter be continued to a later date.
6. [Respondent-father] acknowledged that he was properly made aware of the date, time and place of the hearing. He stated that at 8:30 a.m. on the morning of the hearing his mother became ill and that he had to take her to the hospital and that he did not leave Rex Hospital in Raleigh, North Carolina until 9:45 a.m. and that he got gas for his

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car and got something to eat prior to coming to Court. The Court does not find this explanation credible.

7. [Respondent-father] did not contact his attorney or any other person to inform him of any such situation. [Respondent-father] did not have documentation of a hospital visit.

8. The motion to reopen evidence and to continue the matter was denied.

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17. That the circumstances which caused the child to be placed in foster care on January 8, 2015, were:

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-the mother stated that [respondent-father] could be the father but did not agree for the child to be placed with him. [Respondent-father] was not listed on the birth certificate of the child and recognized there were other possible fathers.

-the mother and [respondent-father] had previously been involved and [respondent-father's] mother had provided care for [the mother's older son].

-[Respondent-father] had a history of instability<sup>3</sup> and was not able to provide proper care and supervision at the time of the filing of the petition.

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18. That the child was adjudicated neglected by order

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<sup>3</sup> Regarding respondent-father's "instability," a foster care worker, Shauna Heavner, testified as follows: "My understanding was there was a history of domestic violence between the mother and the father and just concerns about his lifestyle. But that's the only thing that I'm aware of." Heavner was allowed to testify on this subject despite the fact that she was not the assessment worker, but because "she [could] actually speak to the agency's concerns because she was on that unit about what the concerns were of [respondent-father] and his instability."

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entered April 20, 2015.

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20. That the steps identified for [respondent-father] to take before the Court would consider [him] as a placement resource were:

-enter into [an] Out of Home Services Agreement and Visitation Agreement and abide by the terms of the Visitation Agreement and regularly visit the child

-obtain and maintain sufficient legal income to meet his needs and the needs of the child

-obtain and maintain appropriate housing to meet his needs and the needs of the child

-Complete Positive Parenting and demonstrate learned parenting skills

-maintain regular contact with the social worker at WCHS

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26. [Respondent-father] requested that genetic marker testing determine that he was the biological father of the child prior to visiting with the child or participating in services as the mother was known to him to be habitually engaged in prostitution.

27. Genetic marker testing was scheduled in February and March 2015 but the father did not attend these tests. The father contends that he is not at fault for missing these tests but he did not reschedule testing and as a result testing did not occur until September 2015 after the filing of the motion to terminate the father's parental rights was filed.

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28. [Respondent-father] made it clear that he did not wish to participate in services or a case plan prior to DNA testing confirming that he was her biological father.

29. WCHS provided assistance for the father to travel to visit with the child and to stay in a nearby hotel in Caldwell County, North Carolina as a result of the distance involved. The father agreed to drive to Caldwell County to visit but never did so.

30. The father reported that he was gainfully employed but did not provide documentation of income.

31. Genetic marker testing showed [respondent-father] to be the biological father of the child November 1, 2015 and he was provided those results.

32. After he was given the genetic marker test results [respondent-father] requested that social worker Kathy Battle come to the home he shares with his fiancé and her child. Social Worker Battle came to the home November 4, 2015. The home was appropriate and had sufficient space and the father indicated that he had lived in the home for a year. [Respondent-father] did not provide a copy of a lease or any other documentation to prove that he resides in the home. His fiancé appeared to be appropriate and supportive but did have some criminal history.

33. After being given proof that he was the biological father of the child [respondent-father] stated that he did want his daughter and asked for photographs. He did not provide gifts or cards for the child even after being proven to be the biological father of the child and did not visit the child.

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36. That there are facts sufficient to warrant a determination that grounds exist for the termination of parental rights, said grounds as follows:

a. That the parents neglected the child within the



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meaning of N.C.G.S. § 7B-101(15), and it is probable that there would be a repetition of the neglect if the child was returned to the care of the parents.

Of these findings, respondent-father challenges Findings of Fact Nos. 30, 32, and 36.<sup>4</sup> He does not challenge any of the remaining findings of fact quoted above. We therefore presume that the remaining quoted findings of fact are supported by competent evidence, and consequently, they are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009) (citations omitted).

Respondent-father argues that Findings of Fact Nos. 30 and 32 are “misleading” because the trial court only required him to obtain and maintain income and appropriate housing, and did not require him to provide documentation of income or a lease. We are not persuaded. To begin, respondent-father does not challenge the evidentiary support for these findings of fact. Indeed, these findings are well supported by the testimony of two WCHS social workers. Therefore, the findings of fact are binding on appeal. *See id.* Furthermore, we reject respondent-father’s suggestion that these findings should be discounted because the trial court’s previous orders did not literally require respondent-father to provide documentation of income

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<sup>4</sup> Respondent-father also challenges Findings of Fact Nos. 34, 35, and 38. Because these findings are not necessary to sustain an adjudication of neglect, we need not address them. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240–41 (2006) (“[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.” (citation omitted)).

We also decline to expressly address respondent-father’s challenge to Finding of Fact No. 36, which is the trial court’s ultimate finding regarding neglect. For the reasons that follow in this opinion, the trial court’s ultimate finding is supported by the evidence.

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or a lease. The trial court ordered respondent-father to “obtain and maintain sufficient legal income” and to “obtain and maintain appropriate housing.” In order to demonstrate compliance with these two objectives, it was reasonable for the trial court to expect respondent-father to provide some documentation that his income was both legal and sufficient and that his housing was stable. Accordingly, we find no error in Findings of Fact Nos. 30 and 32.

Respondent-father also argues that the evidence does not support neglect as a ground for termination because the prior adjudication of neglect was based on the mother’s actions. We are not persuaded. While the mother’s harmful actions certainly gave rise to WCHS’s involvement in the case, they alone were not the sole reason for Teresa’s initial adjudication of neglect. Teresa was adjudicated neglected, in part, because she did not have a parent who could provide for her proper care and supervision. The trial court made a finding to this effect, and also found that respondent-father had a history of instability. Indeed, when Teresa was taken into WCHS custody, Teresa’s mother was insistent that respondent-father not have any contact with Teresa. Therefore, we are satisfied that the prior adjudication of neglect was based on the actions of both parents.

Lastly, respondent-father appears to argue that the evidence does not support a finding that he was likely to neglect Teresa in the future because: (1) he entered into a case plan after DNA testing established that he was Teresa’s father; (2) he received a parenting class referral; and (3) he made efforts to contact Teresa. Again,

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we are not persuaded. Respondent-father's actions are too little, too late. He made it well-known that he would not enter into a case plan or visit Teresa until he underwent genetic marker testing, but made minimal effort to undergo such testing. It appears that respondent-father missed two DNA tests due to logistical problems, but he made no effort to reschedule until September 2015.

Social worker Shauna Heavner, who was assigned to Teresa's case until July 2015, testified that she contacted respondent-father in February and March 2015, but had no contact with him after that point in time. She attempted to contact him in April to give him information regarding a scheduled paternity test, but he never returned her call. She also testified that respondent-father declined visitation, despite being given bus passes and a paid-for overnight hotel. His actions did not improve after the case was assigned to social worker Kathy Battle in July 2015. Ms. Battle indicated that respondent-father finally submitted to paternity testing in September 2015—nine months after the case began—and he was given the results on or about 1 October 2015. Respondent-father then entered into a case plan, but did not participate in any services. Even after paternity was established, respondent-father still failed to visit with Teresa and was unresponsive to WCHS's communications.

In addition to the foregoing, respondent-father's actions at the termination hearing itself demonstrate a likelihood of repetition of neglect. Respondent-father was aware of the hearing date and time, but arrived two hours late with an excuse

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that the trial court failed to find credible. Even if respondent-father's explanation was believed, he failed to contact his attorney regarding the tardiness. Respondent-father's actions evince a complete lack of interest in Teresa, and therefore support the trial court's finding of neglect. *See In re D.J.D.*, 171 N.C. App. 230, 240–41, 615 S.E.2d 26, 33 (2005) (holding the evidence supported a likelihood of future neglect where there was no evidence that the respondent attempted to show an interest in his children).

Based on the foregoing, we are satisfied that the trial court's finding of neglect is supported by the evidence. Accordingly, the trial court's order terminating respondent-father's parental rights on the ground of neglect is

AFFIRMED.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).