IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1056

Filed: 3 April 2018

Mecklenburg County, Nos. 15 JT 256-58

IN THE MATTER OF: J.A.K., H.K.K., J.B.K., Minor Children.

Appeal by Respondent-Father from order entered 29 June 2017 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 8 March 2018.

Associate County Attorney Marc S. Gentile for Mecklenburg County Department of Social Services, Division of Youth and Family Services, Petitioner-Appellee.

Anné C. Wright for Respondent-Appellant Father.

Lee F. Taylor for Guardian ad Litem, Appellee.

McGEE, Chief Judge.

Respondent-Father appeals from order terminating his parental rights to J.A.K., H.K.K., and J.B.K. (together, "the children"). After careful review, we affirm.

I. Factual and Procedural Background

Respondent-Father ("Respondent") and Respondent-Mother ("mother") (together, the "parents") are the biological parents of the children, and lived together with the children at a residence in Mecklenburg County (the "home") when one or

both of the parents were not incarcerated. Mecklenburg County Department of Social Services ("DSS"), Division of Youth and Family Services ("YFS"), first became involved with Respondent's family in 2002, due to allegations of "inappropriate supervision, substance abuse, and domestic violence in the presence of the children." In April 2014, YFS received a referral concerning domestic violence, specifically: (1) Respondent had been arrested on domestic violence charges; (2) "the parents were alleged to be using drugs and staying up all night in the home with the children present[;]" (3) "[p]rescription drugs and two weapons had been seized from the home during prior law enforcement investigations[;]" and (4) [t]he parents had criminal histories and were on probation at the time of the referral, with the mother on house arrest, and Respondent serving a sentence with weekend jail time. YFS recommended the parents seek "mental health assessments, anger management counseling, substance abuse assessment and treatment, and family counseling." The parents were informed that, should their injurious conduct continue, YFS would quickly investigate and petition for appropriate action as needed.

YFS received another referral on 23 October 2014 – at a time both parents were in jail. Mother had been arrested on drug related charges and possession of stolen goods. Respondent had been arrested on charges of felony larceny, breaking and entering, and child abuse. Police officers reported that, when they arrived at the home to arrest Respondent, he had refused to open the door and the officers had to

"force entry into the house while the children were inside crying." At the time of the forced entry, Respondent was reported to have been hiding in the bathroom. Controlled substances were seized from the home, including drugs that were found in the kitchen.

In response to the 23 October 2014 referral, "the parents agreed to complete substance abuse assessments and follow any recommendations; complete mental health assessments and follow any recommendation; allow the children to stay with their paternal grandmother . . . after their release from jail; and have no unsupervised contact with the children." The matter was transferred to YFS for Family In-Home ("FIH") services in order to provide the parents with the "opportunity to follow through with their promises to engage in services."

YFS first met with the parents regarding FIH services on 3 November 2014. "The parents were advised that a service agreement would be developed to reflect the parents' pledge to address" the inappropriate and dangerous behaviors underlying YFS involvement with the children. Because of an ongoing inability to schedule Child Family Team ("CFT") meetings with the parents, YFS was unable to put together a CFT to assist in case planning. The parents agreed to their case plans and were advised that, if they failed to complete the agreed-upon case plans or violated any parts of the agreements, YFS would file a petition for legal custody.

The children received mental health assessments on 4 December 2014. All three children were diagnosed with "adjustment disorder with anxiety and depression related to trauma over the April 2014 police incident in the home [which had included domestic violence and drug use in the presence of the children]: and concerns regarding instability in their living arrangements and their parents' well-being."

The parents separated 29 January 2015. YFS met with Respondent on 29 January 2015 to review his case plan, which he agreed upon and signed. YFS received a new referral on the open FIH case on 24 April 2015, while the children were in the custody of their paternal grandmother ("the grandmother"). YFS alleged the grandmother had allowed the children to make unsupervised visits, including overnight visits, with the mother – whose house was on the same street as the grandmother's home. The report alleged the grandmother and Respondent's brother — in front of the children — were physically abusive to a disabled man who was living in the grandmother's home. The report further alleged the grandmother was using the disabled man's social security benefits for her own purposes and that Respondent's brother used illegal drugs, "drinks alcohol and fights both verbally and physically with the [] grandmother, sometimes in the presence of the children."

YFS filed a juvenile petition on 18 May 2015 alleging the children were neglected and dependent as defined in N.C. Gen. Stat. § 7B-101(15) and (9), and requesting the trial court to "determine whether the allegations are true and whether

the [children were] in need of the care, protection, or supervision of the State." In the petition, YFS indicated that the children's elementary school counselor (the "foster mother") had "expressed interest . . . in providing placement for all three children in her home[,]" which she shared with her husband. The trial court entered a non-secure custody order on 18 May 2015 granting temporary custody of the children to YFS. The children were placed with the foster mother.

At the time of the 2 September 2015 adjudication hearing, Respondent was incarcerated for probation violations, and the mother was also incarcerated. The trial court found in its 29 September 2015 adjudication order that

> [t]he children are doing well in placement. [J.B.K.] is trying out for football as a Seventh grader . . .; he is applying himself to his school work. The children miss their parents. [J.A.K.] and [H.K.K.] continue at . . . Elementary [School]. [J.A.K.] has shown some speech difficulty but is doing well with reading. [H.K.K.] becomes angry at times and will not talk about why. [H.K.K.'s] IPA recommended that he receive therapy. . . . . The [foster mother and her husband] were given a house to live in in York, SC. They are currently residing there with the children and CMS schools is allowing the children to continue at their assigned CMS schools.

Placement was continued with the foster mother. The trial court continued the disposition hearing and entered a separate order on 16 November 2015. The trial court ordered the children to remain in YFS custody, and implemented a permanent plan of reunification with a concurrent plan of legal guardianship. At the time of the disposition, the parents were incarcerated. Respondent had a projected release date

of December 2017, and the mother had a projected release date of December 2015. YFS filed a motion on 2 November 2016 to terminate Respondent's parental rights to the children, based on the following grounds: (1) neglect, (2) willful failure to make reasonable progress towards correcting the conditions that led to removal, (3) failure to pay a reasonable portion of the cost of care for the children, and (4) dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3), (6) (2017). Following a hearing, the trial court entered an order on 29 June 2017 terminating Respondent's parental rights to the children, based upon all four grounds alleged by YFS. The trial court also concluded that termination was in the children's best interests. Respondent appeals. The trial court also terminated mother's parental rights, but she does not appeal.

II. Standard of Review

The standard of review for appeals from an order terminating parental rights is well-established:

> "A termination of parental rights proceeding is a two-stage process." The trial court first examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B–1111 to warrant termination of parental rights. The trial court's findings must be supported by clear, cogent, and convincing evidence. If the trial court determines that any one of the grounds for termination listed in § 7B–1111 exists, the trial court may then terminate parental rights consistent with the best interests of the child. The trial court's decision to terminate parental rights is discretionary, and "this Court 'should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law.'"

In re T.D.P., 164 N.C. App. 287, 288, 595 S.E.2d 735, 736–37 (2004) (citations omitted).

III. Analysis

Respondent argues, *inter alia*, that "[t]he trial court erred in terminating [Respondent's] parental rights for failure to pay a reasonable portion of the cost of his children's care because his failure to do so was not willful." We disagree.

In his brief, Respondent acknowledges that "[i]t is undisputed that [Respondent] made some amount of money while he was in prison and that he did not pay any [of] these funds towards the cost of his children's care." However, Respondent contends that his failure to pay any amount towards the cost of the children's care "was not willful because [Respondent] asked the foster mother about sending her money for the children and the foster mother advised that she didn't need anything." Even if true, Respondent's argument is unavailing. A permanency planning supervisor for YFS testified that YFS had paid costs for support of the children "in the amount of $4,264.52 per child." N.C.G.S. § 7B-1111 states:

> The [trial] court may terminate the parental rights upon a finding of one or more of the following:
>
> . . . .
>
> (3) The [children have] been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next

> preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3). "As [our Supreme Court] stated in *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981), 'cost of care' refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984). Therefore, whether the foster mother indicated she did not need anything from Respondent is immaterial in this analysis. It was DSS, through YFS, that needed reimbursement for the money it was expending to fund the children's stay in foster care. *Id*.

Respondent argues this Court's decision in *In re J.K.C.*, 218 N.C. App. 22, 721 S.E.2d 264 (2012), supports his argument that his failure to pay anything toward the cost of the children's care was not willful. However, the facts in *J.K.C.* are distinguishable in relevant ways. In *J.K.C.*, this Court held:

> Even though the trial court's finding of fact 21 states that respondent had "not paid anything toward the care of the children since his incarceration[,]" it further states that respondent had *written* to []*DSS* about providing support but "*was informed that it could not be arranged* at this time" as "he was earning less than minimum wage, [and] the agency could not establish a child support case." Therefore, respondent's failure to pay was not based on "stubborn resistance[,]" but on []DSS' inability to receive any support from him at that time. Accordingly, the trial court correctly did not terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B–1111(a)(3).

Id. at, 31–32, 721 S.E.2d at 271 (citation omitted) (emphasis added). In the present case, Respondent alleges he contacted the foster mother, asking if she needed any help. However, in *J.K.C.*, the trial court found as fact that the respondent wrote to DSS offering to contribute to the children's care. *Id.* at 32, 721 S.E.2d at 271. In the present case, Respondent does not argue that he contacted DSS, through YFS or otherwise, and offered to contribute toward the *costs DSS was incurring* for the children's care. Further, Respondent bases his entire argument solely on *his own testimony* at the termination hearing. There is no finding of fact in which the trial court included Respondent's testimony, much less a finding in which it adopted his testimony as fact.

Respondent does not argue in his brief that he was ignorant of his duty to pay YFS towards the costs of care for the children, and he has abandoned any such argument. *State v. Roberts*, 237 N.C. App. 551, 565 n. 4, 767 S.E.2d 543, 553-54 n. 4 (2014). However, we note: "'Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.'" *T.D.P.*, 164 N.C. App. at 289, 595 S.E.2d at 737 (citation omitted).

By failing to include an argument in his brief, Respondent has also abandoned any argument that he was unable to contribute anything toward the costs of the

children's care due to his imprisonment. *Roberts*, 237 N.C. App. at 565 n. 4, 767 S.E.2d at 553-54 n. 4. Though Respondent was incarcerated during the relevant six month period of 2 May 2016 to 2 November 2016, Department of Public Safety ("DPS") records indicate that for each of those six months Respondent (1) had DPS jobs, (2) was earning money from those jobs, and (3) was also receiving money from family members to supplement those earnings. This Court has stated on similar facts:

> Although respondent admits that he has worked continuously while incarcerated, he also contends that because his wages ranged from only $.40 to $1.00 per day, it is unreasonable to require him to pay a portion of T.D.P.'s foster care. In support of this assertion, respondent cites *In re Clark*, where this Court stated that "[i]n determining what constitutes a 'reasonable portion' of the cost of care for a child, the parent's ability to pay is the controlling characteristic[,] [and] [a] parent is required to pay that portion of the cost of foster care . . . that is fair, just and equitable based upon the parent's ability or means to pay." While the foregoing quotations are correct statements of law, they fail to encompass our holding in *Clark* or the law of this state regarding termination of parental rights pursuant to N.C. Gen. Stat. § 7B–1111(a)(3).
>
> *In Clark*, as in the instant case, it was "undisputed that respondent . . . paid nothing to DSS for [his daughter's] care." . . . .
>
> In the instant case, there was clear and convincing evidence that respondent had an ability to pay an amount greater than zero. As discussed above, the trial court noted that although respondent's wages were meager, he was nevertheless being paid for his work in the prison kitchen. Respondent therefore had an ability to pay some portion of the costs of T.D.P.'s foster care.

> Although "'[w]hat is within a parent's 'ability' to pay or what is within the 'means' of a parent to pay is a difficult standard which requires great flexibility in its application,'" the requirement of § 7B–1111(a)(3) "'applies irrespective of the parent's wealth or poverty.'" "The parents' economic status is merely a factor used to determine their ability to pay such costs, but *their ability to pay* is the controlling characteristic of what is a reasonable amount for them to pay." Thus, *because the trial court in the instant case correctly found that respondent was able to pay some amount greater than zero during the relevant time period, we hold that sufficient grounds existed for termination of respondent's parental rights under N.C. Gen. Stat. § 7B–1111(a)(3).*

T.D.P., 164 N.C. App. at 289–91, 595 S.E.2d at 737–38 (citations omitted) (second emphasis added).

In the present case, the trial court made the following uncontested finding of fact:

> 24. Respondent [] has been employed for the majority of the time that he has been incarcerated in the DPS. He has been earning several dollars per week and during his two years in prison had several deposits made to his account by others. The non-work deposits totaled at least several hundred dollars. DPS would not have made continuous deposits into his bank accounts if he were not working. He had the capacity to pay a sum greater than zero towards the cost of care for the children. During the six-month period that preceded the filing of the TPR motion, he did not pay any monies towards the cost of care for any of the children.

This uncontested finding of fact is binding on appeal, *In re M.D., N.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009), and supports the trial court's ninth conclusion of law:

> Per N.C. Gen. Stat. § 7B-1111(a)(3), [Respondent] [has] willfully failed, for a continuous period of six months next preceding the filing of the TPR motion, to pay a reasonable portion of the cost of care for the [children] although physically and financially able to do so as more specifically alleged in paragraphs above.

The trial court did not err in terminating Respondent's parental rights based upon N.C.G.S. § 7B-1111(a)(3). *T.D.P.*, 164 N.C. App. at 289–91, 595 S.E.2d at 737–38; *In re Bradley*, 57 N.C. App. 475, 478–79, 291 S.E.2d 800, 802–03 (1982). Because we affirm termination of Respondent's parental rights on this ground, we need not address his arguments concerning the other grounds upon which termination was based. *T.D.P.*, 164 N.C. App. at 290-91, 595 S.E.2d at 738.

Respondent does not contest the trial court's ruling that termination of his parental rights was in the best interests of the children, so that ruling stands. Assuming, *arguendo*, Respondent had contested the best interests determination, we hold that substantial evidence supported the relevant findings of fact, which in turn supported the relevant conclusion of law and ultimate disposition. We therefore affirm the 29 June 2017 order terminating Respondent's parental rights to the children.

IV. Appellate Advocacy

This Court finds itself obligated to raise and address a troubling issue *sua sponte*. In one of Respondent's arguments not addressed in this opinion, Respondent correctly identified a portion of a finding of fact that was not supported by the evidence before the trial court. Specifically, Respondent attended Narcotics Anonymous ("NA") and Alcoholics Anonymous ("AA") meetings while in prison during the time periods relevant to YFS's petition to terminate his parental rights. Page 330 of the record on appeal in this matter (the "record") is a printout of Respondent's Offender Information Screen ("OIS"), which is a summary of various information relating to Respondent's conduct while incarcerated, including information relating to programs in which Respondent had participated – relevantly NA and AA – and the dates that he had been assigned to begin participation in these programs. This OIS indicates eleven separate dates on which Respondent was assigned to begin attending, or resume attending, NA or AA meetings. Record pages 336 through 356 include detailed information about Respondent's participation in the programs listed on his OIS. For example, the OIS indicates Respondent was assigned to resume attending NA meetings on 22 September 2016. Page 342 of the record includes detailed information concerning that 22 September 2016 assignment, and clearly indicates that between 22 September and 25 December 2016, Respondent attended

nine NA meetings. A review of the record indicates that, between 16 August 2015 and 19 March 2017, Respondent attended fifty-four NA or AA meetings.[1]

The trial court included the following in finding of fact eighteen of its termination order: "[Respondent] . . . attended 11 NA/AA meetings over the preceding two years[.]" This finding is not supported by the evidence presented at the termination hearing. It is clear to this Court that the trial court misunderstood the entries on Respondent's OIS indicating Respondent had been "assigned" to attend NA or AA meetings on eleven separate occasions to mean that Respondent had only attended eleven NA or AA meetings in total. Unfortunately, based on this erroneous understanding, the trial court also found as fact that "[Respondent's] testimony regarding his having attended more than the 11 NA/AA meetings that were documented in the DPS records was not credible and was not accepted by the [c]ourt." Although this error is not relevant to our analysis concerning N.C.G.S. § 7B-1111(a)(3), it had some relevance in Respondent's other arguments.

We raise this issue because attorneys for Appellees repeatedly refer to the trial court's clear error in finding Respondent had attended only eleven meetings as if that was an actual fact supported by substantial evidence. In their brief, Appellees state that Respondent "had attended just eleven AA/NA meetings in more than two years,

[1] The record includes some duplicate entries which we have discounted. Respondent states in his initial brief that he attended "at least forty" meetings, and in his reply brief that he had attended "at least forty-nine" meetings. The exact number of meetings attended is not relevant to our concerns.

(R p. 330)[.]" In response to Respondent's correct argument that the trial court erred in finding he had attended only eleven meetings, Appellees contend:

> In regards to findings of fact eighteen and nineteen, [Respondent] contested the [trial] court's finding that [Respondent] had attended only eleven NA/AA meetings while incarcerated. The [trial] court had sufficient evidence in the form of prison records to support this finding and the fact that [Respondent] testified it was more does not mean that this fact was not properly supported. The [c]ourt, for good reason, clearly did not find [Respondent's] testimony to be credible. (R pp.338, 342).

In an effort to support two additional findings by the trial court, Appellees again state that Respondent "attended just eleven AA/NA meetings in more than two years while incarcerated[,]" and: "In the more than two years that he had spent in prison he . . . had attended just eleven AA/NA [meetings.]"

Perhaps most troubling, while identifying evidence Appellees contend indicated Respondent's lack of credibility, Appellees include the following: "[Respondent's] testimony regarding his claimed defense is highly suspect and self-serving. He was not credible for several reasons. . . . . He claimed to attend well more than eleven AA/NA meetings, but the prison records *clearly show* that eleven meetings is indeed accurate. (R p. 330)." (Emphasis added).

Appellees proffer this demonstrably factually incorrect argument to this Court despite the fact the record clearly reveals it is incorrect. If, for some reason, Appellees failed to thoroughly review the record evidence before submitting their brief on

appeal, Respondent clearly stated and argued this issue, including directing Appellees to the relevant pages in the record: "DPS records admitted into evidence showed that [Respondent] attended at least forty (40) NA and AA meetings while in prison. (R pp 336-53)." Further, in response to Appellees' brief, Respondent filed a reply brief wherein his first "Rebuttal Argument" was: "[RESPONDENT] PARTICIPATED IN AT LEAST FORTY-NINE (49) NARCOTICS ANONYMOUS OR ALCOHOLICS ANONYMOUS MEETINGS WHILE INCARCERATED[.]" In his reply brief, Respondent directly challenges Appellees' misrepresentation of the evidence, including the associated page numbers from Appellees' brief. Respondent then included the individual dates for each meeting attended by him as supported by the evidence, including citation to the pages in the record where this evidence is located.

As attorneys, Appellees' counsel is also required to correct any representations they made that later were learned to have been false. *Hackos v. Smith*, 194 N.C. App. 532, 536, 669 S.E.2d 761, 764 (2008). "We note that pursuant to Rule 3.3(a)[,] a lawyer is prohibited from knowingly making a 'false statement of material fact or law' to a tribunal or failing to correct such a statement previously made to the tribunal by the lawyer. Revised Rules of Professional Conduct, Rule 3.3(a)(1) (2007)." *Id*. at 194 N.C. App. at 536, 669 S.E.2d at 764.

Appellees' counsel are naturally duty bound to "act with reasonable diligence" in representing their clients. Revised Rules of Professional Conduct, Rule 1.3(a)(1) (2017). However, that duty is superseded by the duty to refrain from making material misstatements of fact, and the duty to comport themselves in a manner that reflects positively on themselves and their profession. The issue before us did not involve a situation where the trial court made a decision when confronted with conflicting evidence – in this instance the trial court clearly erred. The fact that the trial court made an error in evaluating the evidence before it is no shield to counsel's conduct on appeal. We strongly advise that counsel remain vigilant in identifying and providing correct information in the future.

AFFIRMED.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).