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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-511

Filed: 18 December 2018

Rockingham County, Nos. 16 JT 10-11

IN THE MATTER OF: B.A.S. and K.H.S.

Appeal by respondent from order entered 12 February 2018 by Judge Christopher A. Freeman in Rockingham County District Court. Heard in the Court of Appeals 29 November 2018.

*No brief for petitioner-appellee Rockingham County Department of Social Services.*

*Mercedes O. Chut for respondent-appellant father.*

*Ellis & Winters LLP, by James M. Weiss, for guardian ad litem.*

TYSON, Judge.

Respondent is the father of the juveniles B.A.S. and K.H.S. (“Benjamin” and “Katrina”) ages thirteen and eleven, respectively. N.C. R. App. P. 3.1(b) (pseudonyms used to protect the identity of the juveniles). Respondent appeals from an order terminating his parental rights. We affirm.

I. Factual Background

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Rockingham County Department of Social Services (“DSS”) received a report on 18 November 2015, asserting Benjamin and Katrina were being neglected due to their parents’ drug usage. The report further stated Respondent was violent, cursed in front of the juveniles, suffered from suicidal thoughts, and had threatened to commit suicide in the juveniles’ presence. The informant further alleged their mother “sleeps all the time” and she had failed to pick Benjamin and Katrina up after school.

The parents admitted to DSS that Respondent-father was drinking too much, but denied engaging in any other substance abuse or having issues with domestic violence between themselves. The parents entered into a case plan, but became uncooperative and failed to comply with or make progress toward their case plan.

DSS met with the parents to discuss the case on 9 February 2016. The mother refused to submit to a requested drug screen. Additionally, when the social worker suggested that the mother place Benjamin and Katrina with a safety resource, the mother became upset and threatened to punch the social worker in the face. Respondent agreed to submit to a drug screen, but after a few seconds he claimed inability to produce a urine specimen and abruptly left the meeting, while claiming he had to be at a job interview.

On 9 February 2016, DSS filed a juvenile petition alleging that Benjamin and Katrina were neglected and dependent juveniles. DSS alleged the parents were abusing substances while caring for the juveniles and engaging in “turbulent

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arguments” in front of the juveniles. DSS obtained nonsecure custody of the juveniles.

An adjudicatory hearing was held on 19 May 2016. The trial court found that Respondent “has an alcohol problem and he has anger issues when he is under the influence of alcohol.” The trial court further found the evidence did not support most of the substantive allegations and dismissed the petition.

Within two or three days after the juveniles returned to their home, the mother reported to DSS that upon the juveniles’ return home, Respondent’s “drinking increased and he became violently verbal towards her and the children.” The mother left the home with Benjamin and Katrina, and they began living in various places, staying with relatives and in motels.

At some point, the parents were arrested for assaulting the paternal grandmother. A social worker interviewed the mother while she was in jail, and she admitted to snorting Percocet and using Xanax. The mother also admitted she could not take care of her children and had no stable place to live upon her release from jail.

A social worker found Respondent at the paternal grandmother’s home on 17 June 2016, at which time he admitted living inside a shed behind her home. Respondent also admitted to the social worker that he drank alcohol and used

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Percocet on a daily basis, and could not provide care for Benjamin and Katrina because he did not have stable housing.

A social worker also interviewed Benjamin and Katrina, who both separately described Respondent as drinking alcohol and then cursing and yelling at their mother. DSS obtained nonsecure custody of the juveniles, and placed the children with their paternal grandparents.

At the adjudication hearing on the second juvenile petition, the parents did not contest the allegations in the petition and the court adjudicated Benjamin and Katrina to be neglected and dependent juveniles. At the disposition phase, the trial court ordered reunification as the primary permanent plan and that the children remain in the placement with their paternal grandparents.

The disposition order shows Respondent agreed to an Out of Home Family Services Agreement on 10 August 2016. The conditions of the agreement or case plan included: (1) attending a parenting program and demonstrating improved and capable parenting skills; (2) completing a psychological evaluation and cooperating with recommendations from that assessment; (3) participating in a substance abuse and mental health assessment and cooperating with all recommendations; (4) remaining drug free and submitting to random drug screens; (5) participating in a domestic violence/abuse trauma education program or domestic violence counseling; (6) participating in an anger management program; (7) refraining from criminal

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activity; (8) obtaining and maintaining safe and stable housing and employment; (9) paying child support and attending visitation with the children; and, (10) refraining from discussing adult situations with the children during visits.

On 20 June 2017, DSS filed its petition to terminate Respondent and the mother's parental rights. The trial court entered an order on 12 February 2018 concluding Respondent had: (1) neglected his children; (2) willfully left them in foster care for more than twelve months without showing reasonable progress in correcting the conditions that led to their removal; (3) failed to pay support for his children; and, (4) was incapable of providing proper care and supervision for the children such that they are dependent. *See* N.C. Gen. Stat. § 7B-1111 (a) (2017). The trial court also found grounds existed to terminate the mother's parental rights.

The trial court concluded termination was in the juveniles' best interests and terminated both parents' parental rights. Respondent appeals. The mother is not a party to this appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

III. Issue

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Respondent argues the trial court erred in concluding grounds existed to terminate his parental rights. He asserts the findings of fact do not support the court's conclusions.

IV. Standard of Review

“The standard of appellate review is whether the trial court’s findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law.” *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). We review the trial court’s conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff’d per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

V. Analysis

The trial court concluded grounds existed to terminate Respondent’s parental rights based upon neglect. *See* N.C. Gen. Stat. § 7B-1111(a)(1). 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; . . . or who has been placed for care or adoption in violation of law.

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N.C. Gen. Stat. § 7B-101(15) (2017). Generally, “[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child ‘at the time of the termination proceeding.’” *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)).

When, as here, “a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, ‘requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.’” *Id.* at 435, 621 S.E.2d at 242 (quoting *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003)). “In those circumstances, a trial court must find that grounds for termination exist upon a showing of a ‘history of neglect by the parent and the probability of a repetition of [future] neglect.’” *Id.* (citation omitted).

The trial court took judicial notice of the underlying proceeding in which Benjamin and Katrina were adjudicated neglected and dependent. The trial court further found as fact:

At the time of adjudication, [Respondent] was suffering from substance abuse issues, relationship discord with [the juveniles’ mother], as well as instability based on lack of housing, income and transportation. Specifically, at the time of the filing of the Juvenile Petition, [Respondent] was living in a shed in the backyard of his mother’s house, and the shed did not have working utilities. [Respondent] also suffered from alcoholism at this time and he abused opioid

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prescriptions. [Respondent] was not able to provide care to his two children because he did not have a stable place to live.

The trial court also found Respondent had failed to complete his case plan:

[Respondent] was not able to successfully complete a case plan in an effort to reunify with his children due to his poor life choices, which led to multiple incarcerations. Specifically, [Respondent] has been incarcerated on four separate occasions since the children entered care on June 17, 2016. [Respondent] was incarcerated for a month from September to October 2016; he was then incarcerated again in November 2016. In January 2017, [Respondent] was incarcerated a third time. On or about January 31, 2017, [Respondent] was incarcerated at the Gaston Correctional Institute until October 31, 2017 at which time he was transitioned to Dan River Prison Work Farm. He was then picked up at Dan River Prison Work Farm for pending charges in Rockingham County due to a DUI. [Respondent] is currently incarcerated in the Rockingham County jail for a DUI conviction with an anticipated release date of January 30, 2018. These poor life choices contributed to why the children were placed in foster care.

The trial court determined Respondent had not been able to “demonstrate stability,” due to his repeated incarcerations. The trial court further noted that, while incarcerated, Respondent wrote the children only one time. Benjamin and Katrina responded to his letter, but Respondent did not reply to their response. Respondent does not challenge or argue that these findings are unsupported by evidence, and they are binding upon appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).



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Respondent contends he made progress towards alleviating the conditions which led to the adjudication of neglect. Respondent further asserts his incarceration prevented him from completing his case plan and argues the mere fact of his incarceration cannot support termination of his parental rights. *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (“[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.”(citations omitted)).

The trial court’s determination that neglect exists to terminate Respondent’s parental rights is not based upon Respondent’s incarceration. Instead, it is Respondent’s choices and decisions and his criminal actions, which led to his repeated incarceration during the pendency of the case and demonstrated his continued neglect of his children. These factors, as well as his failure to maintain contact with Benjamin and Katrina, his history of instability due to alcohol and drug abuse, lack of employment and unstable housing, support the trial court’s determination that neglect would probably be repeated should Benjamin and Katrina be returned to his care. *See In re Bradshaw*, 160 N.C. App. 677, 682, 587 S.E.2d 83, 86 (2003) (affirming an order terminating parental rights based upon neglect where the trial court found that the incarcerated respondent “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 re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 909 (2001) (noting that the mother’s history of lawlessness and repeated incarcerations

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supported termination of her parental rights based on neglect). The trial court did not err by concluding grounds existed to terminate Respondent's parental rights for neglect under N.C. Gen. Stat. § 7B-1111(a)(1).

VI. Conclusion

The trial court's findings and conclusions that neglect existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) support the order of termination of Respondent's parental rights. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). The trial court made appropriate, unchallenged findings to determine termination of Respondent's parental rights was in the juveniles' best interests. *See* N.C. Gen. Stat. § 7B-1110(a) (2017). The trial court's order terminating Respondent's parental rights is affirmed. *It is so ordered.*

AFFIRMED.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).