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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-815

Filed 05 July 2023

Buncombe County, No. 19 JT 173

IN THE MATTER OF: Z.A.G.

Appeal by respondent-father from order entered 5 July 2022 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 7 June 2023.

*Suzanne Avett for petitioner-appellee Buncombe County DHHS.*

*Keith E. Karlsson for Guardian ad Litem.*

*Robert W. Ewing for respondent-appellant father.*

DILLON, Judge.

Respondent is the father of minor child Z.A.G. (“Zoe”)<sup>1</sup>. He asks that the 5 July 2022 order terminating his parental rights to Zoe on grounds of neglect, dependency, and willful abandonment be reversed. After careful consideration, we affirm.

I. Background

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<sup>1</sup> Pseudonym is used to protect the juvenile’s identity and for ease of reading.

Zoe lived with her mother (“Mother”), who had a history of psychiatric hospitalizations. Respondent, Zoe’s father (“Father”), was incarcerated.

On 20 November 2019, the trial court adjudicated Zoe a neglected and dependent juvenile and granted nonsecure custody of Zoe to the Buncombe County Department of Health and Human Services (“DHHS”) because (1) she had bruising which did not line up with Mother’s explanations, (2) Mother falsely claimed to seek medical attention for her, and (3) Mother could not provide DHHS with a suitable alternative childcare arrangement.

The next month, in December 2019, Father was confirmed to be Zoe’s father through DNA testing. Two months later, in February 2020, Father filed a letter with the trial court stating he intended never to relinquish his parental rights to Zoe and he had two alternative placements for Zoe. Father has been incarcerated for much, but not all, of Zoe’s life. He is currently incarcerated for “Using a Minor to Engage in Sexually Explicit Conduct for the Purpose of Producing a Visual Depiction of Such Conduct”. He has never met Zoe.

In May 2020, after a hearing on the matter, the trial court ordered Father to (1) contact DSS within 24 hours upon release from jail; (2) complete a Comprehensive Clinical Assessment (“CCA”) and follow all recommendations; and (3) complete the Strong Father’s parenting classes and demonstrate skills learned. The court also established adoption as Zoe’s primary permanent plan and continued its order prohibiting visitation between Father and Zoe.

Three months later, in August 2020, Father filed a second letter with the trial court requesting that his older daughter or her mother be considered as placement providers for Zoe.

Later that month, the trial court held its second permanency planning review hearing and noted that Father had pleaded guilty to the federal offense of sexual exploitation of a minor. The trial court maintained adoption as Zoe's permanent plan and its order not allowing visitation between Father and Zoe.

On 29 January 2021, DHHS petitioned the trial court for the termination of Father's parental rights to Zoe on several grounds.

In July 2022, after a hearing on the matter, the trial court granted DHHS's amended petition to terminate Father's parental rights to Zoe based on grounds of neglect, dependency, and willful abandonment. Father appeals.

## II. Standard of Review

The Juvenile Code “provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage.” *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796 (2020). “At the adjudicatory stage, the petitioner bears the burden of proving by ‘clear, cogent, and convincing evidence’ the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes.” *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019). We review a trial court's adjudication “to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of

law.” *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

### III. Analysis

On appeal, Father essentially argues that the three grounds in support of the trial court’s petition to terminate his parental rights to Zoe (neglect, dependency, and willful abandonment) were not supported by clear, cogent, and convincing evidence during the adjudicatory stage.

For the reasoning below, we hold that there was sufficient evidence to support the trial court’s determination that Father willfully abandoned Zoe. Accordingly, as “there is sufficient evidence to support one ground for termination of [Father’s] parental rights, [we] need not address the [other grounds].” *In re D.W.P.*, 373 N.C. 327, 340, 838 S.E.2d 396, 406 (2020).

The trial court may terminate parental rights if the parent has willfully abandoned a juvenile for at least six consecutive months immediately preceding the filing of the petition. N.C. Gen. Stat. § 7B-1111(a)(7) (2021). “Abandonment 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 B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020). “[A]bandonment is evident when a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lead support and maintenance[.]” *In re M.S.A.*, 377 N.C. 343, 346, 856 S.E.2d 811, 814 (2021) (internal marks and citation omitted).

In the instant case, Father had never met Zoe since he had previously served

18 years in Federal Prison for a drug conspiracy conviction. Although Father expressed interest in regaining contact with Zoe since the filing of the termination petition, he continued to commit crimes against minors which inhibited him from being around her due to prolonged periods of incarceration. Father filed letters with the trial court regarding potential care options, but none were appropriate, and Father did not complete all programs required by the trial court. While Father claimed to send Zoe gifts, the social worker testified that he had not sent her anything prior to the petition being filed. These decisions demonstrated his lack of care and support for Zoe which resulted in Father's willful abandonment of her for at least six consecutive months immediately preceding the filing of this petition.

Therefore, we hold there was clear, cogent, and convincing evidence to support the conclusion that Father willfully abandoned Zoe.

In any event, assuming there was not sufficient evidence to support the trial court's determination that Father willfully abandoned Zoe, we hold that the evidence was sufficient to support Father neglected Zoe, as explained below.

A neglected juvenile is one "whose parent . . . does not provide proper care, supervision, or discipline." N.C.G.S. § 7B-101(15) (2021). "[I]n the absence of current neglect, the trial court may adjudicate neglect as a ground for termination based upon its consideration of any evidence of past neglect and its determination that there is a likelihood of future neglect if the child is returned to the parent." *In re J.S.*, 377 N.C. 73, 79, 855 S.E.2d 487, 489 (2021).

In the instant case, the trial court found that Father was incarcerated when Zoe was born and at the time of the termination hearing.

However, “[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017). While “respondent’s incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect[.]” it “may be relevant to the determination of whether parental rights should be terminated[.]” *In re K.N.*, 373 N.C. 274, 282-83, 837 S.E.2d 861, 867-868 (2020). “[T]he extent to which a parent’s incarceration . . . support a finding of neglect depends upon an analysis of the relevant facts and circumstances, *including the length of the parent’s incarceration.*” *Id.* at 283, 837 S.E.2d at 867-68 (emphasis added).

Here, the trial court found that Father had been “imprisoned for a term of 228 months” and that “the minor child will be 18 before the respondent father is released from Federal Prison.”

A “lengthy incarceration implicates a future likelihood of neglect, as respondent cannot provide ‘proper care, supervision, or discipline’ while he is incarcerated, N.C. Gen. Stat. § 7B-101(15) (2021), and while not the only factor, is a relevant and necessary consideration in the trial court’s finding of neglect.” *In re J.S.*, 377 N.C. 73, 80, 855 S.E.2d 487, 493 (2021).

Since Father will be incarcerated for the entirety of Zoe’s life as a minor, he will never be able to provide proper care, supervision, or discipline to Zoe. While his

incarceration cannot be the only basis for a determination that he is likely to neglect Zoe in the future, it is a relevant factor in this consideration:

[W]hile a lengthy period of incarceration (or in this case, probation) cannot be the sole basis for a determination that future neglect is likely, it is a highly relevant factor. So long as other factors which also implicate a likelihood of future neglect are present, the trial court was permitted to use respondent's inability to connect [the child] for the rest of his childhood to reach its determination that neglect existed as a ground for termination.

*In re J.B.*, 379 N.C. 233, 240, 864 S.E.2d 285, 290-91 (2021).

Here, the trial court made additional findings that Father was likely to neglect Zoe in the future including Father's lack of contact with Zoe. The trial court found:

54. The respondent father has never met the minor child.

55. Prior to January 28, 2021, the respondent father did not send any gifts, cards, or any form of support to the minor child. The respondent father has failed to avail himself of any opportunity to be engaged in the life of the minor child due to his own choices.

56. The respondent father has withheld the love and affection that is essential in the parent-child relationship.

64. There is a high likelihood of a repetition of the neglect if the minor child was returned to the care and control of the respondent father as the respondent father has withheld the love and affection that is essential in the parent-child relationship, has not availed himself to any opportunity to be engaged in the life of the minor child, has participated in a pattern of behavior that caused him to be unable to parent his children.

Father's paternity was established on 9 December 2019; however, Father had no contact whatsoever with Zoe in the over two years prior to the filing of the amended

termination of parental rights petition.

In *J.S.*, the court found that eight months of no phone calls following respondent's sentencing was a relevant factor to the future likelihood of neglect. *See In re J.S.*, 377 N.C. at 80, 855 S.E.2d at 493.

In the instant case, the trial court found that Father (1) willfully engaged in criminal acts that caused physical separation from Zoe, and (2) failed to take any steps toward creating a relationship with her while incarcerated. During the relevant period, there was no evidence in the record of a no-contact order. However, the trial court ordered that Father have no visitation with Zoe. Even if Father believed there was a no-contact order, he failed to show interest in Zoe's welfare by other means available to him. There is also no evidence in the record that Father ever contacted his sister who had custody of Zoe or Zoe's foster parents who had earlier custody of Zoe to inquire about her health or well-being. He merely argues that he inquired about Zoe to the social worker. Similar to the respondent in *J.B.*:

[t]he prohibition against contact with [his child] did not forbid respondent from seeking information about [his child's] welfare through his family, or other means, but he failed to even attempt to find a way to learn about [his child's] wellbeing. Respondent's total inaction was properly considered by the trial court in adjudicating the existence of the neglect ground.

*See In re J.B.*, 379 N.C. at 241, 864 S.E.2d at 291.

Although there was no evidence that Father believed a no-contact order had been lifted, Father first initiated contact with Zoe through a friend of his and through



his sister in December 2021. Additionally, Father did not make significant progress in his case plan. Similar to the respondent in *J.S.*, “respondent’s lack of progress in his case plan” was a relevant factor demonstrating a future likelihood of neglect. *See In re J.S., supra.* Father also did not give his other children adequate care and attention while he was not incarcerated. The court in *J.S.* similarly cited “respondent’s lack of care and attention to the children when he was not incarcerated.” *See id.*

In addition to the trial court’s finding that Father would be incarcerated for a long time, it also found several other factors that indicated his likelihood of neglecting Zoe in the future and concluded that “pursuant to N.C.G.S. § 7B-1111(a)(1) the respondent father has neglected the minor child, as specified above. There is a high likelihood or a repetition of the neglect if the minor child was returned to the care and control of the respondent father.”

Therefore, the trial court’s conclusion that Zoe was neglected was supported by clear, cogent, and convincing evidence. Accordingly, we affirm termination of Father’s parental rights on the ground of neglect under section 7B-1111(a) of our General Statutes.

Further, we conclude there was sufficient evidence to support the trial court’s determination that Father did not have an appropriate alternative childcare arrangement, as explained below.

A trial court may terminate parental rights based on dependency when “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 the incapability will continue for the foreseeable future.” N.C. Gen. Stat. § 7B-1111(a)(6) (2021). A dependent juvenile is:

[a] juvenile in need of assistance of placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2021). The incapability “may be the result of substance abuse, intellectual disability, 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 child care arrangement.” N.C. Gen. Stat. § 7B-1111(a)(6) (2021). In determining whether a juvenile is dependent, “the trial court must 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 K.R.C.*, 374 N.C. 849, 859, 845 S.E.2d 56, 63 (2020).

In the case at bar, Zoe was placed with her maternal aunt and uncle, Kim and Michael Davis, because Mr. Davis reached out to DHHS and requested placement with Zoe. Father objected to this placement. While Father tried to enlist his adult daughter and her mother as potential care providers for Zoe, both were not suitable options, and his daughter withdrew her request. While Father argues he had a

suitable alternative childcare arrangement in his daughter Athena Graves, Ms. Graves had never met Zoe. Although Ms. Graves spoke with the social worker about the possibility, she never contacted her again after September 2021 to set up a visit and no home study was conducted of Ms. Grave's living situation. Additionally, no evidence was provided to show that she would be an appropriate childcare placement for Zoe as the record contains no information regarding her ability to support Zoe.

Because Father did not have appropriate alternative childcare arrangements, the trial court's conclusion that dependency grounds existed was supported by clear, cogent, and convincing evidence. Accordingly, we affirm termination of Father's parental rights on dependency grounds on this ground.

### III. Conclusion

Because there was clear, cogent, and convincing evidence to support at least one of the three grounds relied upon by the trial court to terminate Father's parental rights to Zoe, we affirm the trial court's order terminating these rights.

AFFIRMED.

Judges COLLINS and HAMPSON concur.

Report per Rule 30(e).