

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1188

Filed: 6 June 2017

Gaston County, No. 15 JT 208

IN THE MATTER OF: D.L.M.

Appeal by respondent-parents from order entered 6 September 2016 by Judge James A. Jackson in Gaston County District Court. Heard in the Court of Appeals 3 May 2017.

Wyrick Robbins Yates & Ponton, LLP, by Tobias S. Hampson, for petitioner-appellee.

J. Thomas Diepenbrock for respondent-appellant mother.

Rebekah W. Davis for respondent-appellant father.

ELMORE, Judge.

Respondents appeal from an order terminating their parental rights to D.L.M. (“David”).¹ We vacate and remand.

I. Background

¹ A pseudonym is used to protect the minor’s identity.

Respondent-mother and respondent-father were never married and are the biological parents of David, who was born in August 2012 in Spartanburg, South Carolina. Petitioner is respondent-mother's adoptive mother who was given custody of David a few months after his birth.

A few days after David's birth, respondents took David on a bus trip to Wyoming, where respondent-father's parents lived. When respondents arrived in Wyoming, they learned that respondent-father's parents were unable to house them, and respondents and David went to stay at a homeless shelter. Respondents later stole a vehicle and set off with David to return to South Carolina.

In January 2013, respondents were arrested in Roane County, Tennessee, related to their theft of the vehicle. David was placed in the custody of the State of Tennessee Child Protective Services. After her arrest, respondent-mother gave the Tennessee officials the contact information of petitioner, who was given custody of David in February 2013. David came to live with petitioner at her home in Lake Wylie, South Carolina. On 19 March 2013, a Tennessee court adjudicated David to be neglected and dependent, released jurisdiction "to the state of the minor child's residence," and closed the case.

Sometime after 13 February 2013, respondents were extradited to Wyoming, where they both were periodically imprisoned and were imprisoned at the time of the termination hearing. In March 2014, petitioner moved with David to Gastonia, North

Carolina. On 2 July 2015, petitioner filed petitions to terminate respondents' parental rights to David. Following a hearing, the trial court entered an order on 6 September 2016 terminating respondent-mother's parental rights on the ground of abandonment and terminating respondent-father's parental rights on the grounds of neglect and abandonment. See N.C. Gen. Stat. § 7B-1111(a)(1), (7). Respondent-father gave notice of appeal on 20 September 2016. Respondent-mother gave notice of appeal on 14 October 2016.

II. Respondent-Mother's Appeal

As an initial matter, recognizing that her notice of appeal was untimely, respondent-mother has filed a petition for writ of certiorari as an alternate basis for review of her appeal. See N.C. Gen. Stat. § 7B-1001(b) (2015). In our discretion, we allow her petition for writ of certiorari.

A. Insufficient Findings of Fact

Respondent-mother asserts that the trial court's findings of fact do not support its conclusion of law that she willfully abandoned David under N.C. Gen. Stat. § 7B-1111(a)(7). We agree.

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). "If the trial court's findings of fact are supported

by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.” *In re C.J.H.*, __ N.C. App. __, __, 772 S.E.2d 82, 88 (2015) (citation and quotation marks omitted). “However, the trial court’s conclusions of law are fully reviewable *de novo* by the appellate court.” *Id.* at __, 772 S.E.2d at 88 (citation, quotation marks, and alteration omitted).

In its order terminating respondent-mother’s parental rights, the trial court concluded that “grounds exist to justify the termination of the parental rights of the Respondent[-mother] pursuant to NCGS 7B-1111(a) that the Respondent[-mother] has willfully abandoned the minor child in the six month period next immediately preceding the filing of this Petition.”² This conclusion refers to N.C. Gen. Stat. § 7B-1111(a)(7) (2015), which permits a trial court to terminate parental rights when “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]”

“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 Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). “Abandonment has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). “It has been held that if a parent withholds his

² Although this statement was labeled a finding of fact, it is actually a conclusion of law and, thus, we review it as such. *In re B.W.*, 190 N.C. App. 328, 335, 665 S.E.2d 462, 467 (2008).

presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Id.* at 501, 126 S.E.2d at 608.

“Although the trial court may consider a parent’s conduct outside the six-month window in evaluating a parent’s credibility and intentions, the ‘determinative’ period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition.” *In re D.M.O.*, __ N.C. App. __, __, 794 S.E.2d 858, 861 (2016) (internal citations, quotation marks, and alterations omitted). Here, the determinative six-month period was between 2 January and 2 July 2015.

The trial court made the following findings of fact relevant to its conclusion that respondent-mother willfully abandoned David:

13. Sometime after February 13, 2013 the Respondent[-mother] was extradited to Wyoming. The Court finds that the Respondent[-mother], at the time of extradition knew the physical address, email address and cell phone number of the Petitioner. The Court further finds that once the Respondent[-mother] arrived in Wyoming (the date is unclear), she was released from custody in Wyoming and was placed on probation.

14. That the Respondent[-mother] had probation revoked, spent time in Campbell County Jail, and subsequently resided in a halfway house in Wyoming before beginning her prison sentence.

....

17. From February 13, 2013 until March 2014 the Petitioner continued to reside at the same address in the

state of South Carolina. For extended periods of time between February 13, 2013 and March 2014, the Respondents were not incarcerated and neither parent sent any Christmas cards, gifts or any form of support to the Petitioner. Neither Respondent parent was involved in the medical needs of [the] juvenile.

18. The Petitioner has had the same cell phone number since 2007 and the same email address since 1994.

19. Prior to September 2014 the Respondent[-mother] would call on occasion and inquire about the minor child but never asked to speak to the juvenile.

....

21. Eventually both Respondents were placed back in the custody of the Wyoming Department of Correction for failing to abide with the conditions of their probationary sentences. Once the Petitioner . . . moved to North Carolina neither Respondent knew her physical address. Both Respondents knew Petitioner's cell number due to the fact that both Respondents had called the Petitioner in 2013.

....

24. After Petitioner gained custody of the child prior to the Petition being filed, the Court found that there were unspecified times when the Respondents were not in custody and during such times made no effort to establish contact or develop a relationship with the child.

25. Moreover, the Court finds, based on the deposition, the Respondent[-mother] did make some attempts to call the Petitioner on six (6) occasions while in the Wyoming Department of Corrections. The calls never went through. The Petitioner did not recognize the number and therefore did not answer the calls. After the call was disconnected, the Petitioner attempted to listen to the voice mail, but the

message did not have any information where the call originated from or from whom. The Petitioner attempted returned calls but the voice recorded message on the line indicated that the number was not a working number. The Petitioner did not answer the calls because the Respondent[-mother] had given out the Petitioner's cell phone number to Respondent[-mother's] friends who would call the Petitioner and request money.

26. However, but for the six (6) attempts since February 27, 2013, when the minor child was taken into custody by the Petitioner, the Respondent[-mother] made few attempts to contact the Petitioner to inquire as to the well-being of the child and sent no letters, gifts or things of value to the minor child.

27. The Court notes that the Respondent[-mother] was incarcerated for six (6) months before the filing of the Petition The Court considers the non-involvement prior to that time period to show a pattern of disinterest in providing for, caring, and helping support the minor child³

These findings do not specifically address respondent-mother's behavior within the determinative six-month period immediately preceding the filing of the petition as required to adjudicate willful abandonment. Finding 27 is the only finding that addresses the relevant six-month period and suggests the court may have erroneously believed it could not consider the determinative six-month period because respondent-mother was incarcerated. "Incarceration, standing alone, neither precludes nor requires a finding of willfulness on the issue of abandonment, and

³ Respondent-mother challenges findings of fact 24 and 26 as unsupported by the evidence. In light of our decision to vacate the trial court's order and remand for additional fact-finding, we decline to address these challenges.

despite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child.” *D.M.O.*, __ N.C. App. at __, 794 S.E.2d at 862 (citations, quotation marks, and alterations omitted). Because the findings do not specifically address respondent-mother’s behavior between 2 January and 2 July 2015, they are inadequate to support a conclusion that respondent-mother willfully abandoned David for at least six consecutive months immediately preceding the filing of the petition.

Furthermore, the court’s current evidentiary findings are inadequate to support its ultimate finding that respondent-mother’s abandonment of David was willful. Although the court found that respondent-mother “sent no letters, gifts or things of value to the minor child,” it also found that once petitioner “moved to North Carolina [in March 2014,] neither Respondent knew her physical address.” Although the trial court found that respondent-mother attempted to call petitioner six times, it does not address whether these calls were made during the relevant six-month time period, nor does it find whether, in light of respondent-mother’s incarceration, she could have been expected to make more attempts to contact petitioner and David. “[T]he circumstances attendant to a parent’s incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited.” *D.M.O.*, __ N.C. App. at __,

794 S.E.2d at 862–63. Although we express no opinion as to whether the evidence introduced at the hearing could support a finding that respondent-mother willfully abandoned David within the relevant six-month time period, the trial court’s current findings are inadequate to support its conclusion that grounds existed to terminate respondent-mother’s parental rights under N.C. Gen. Stat. § 7B-1111(a)(7).

Accordingly, we vacate the termination order as to respondent-mother and remand to the trial court for further findings related to respondent-mother’s conduct during the relevant six-month period and whether her abandonment of David was willful.⁴ *See, e.g., In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009) (vacating a termination order and remanding for further fact-finding when “the trial court’s current findings [were] insufficient to permit this Court to review its decision under N.C. Gen. Stat. § 7B-1111(a)(2)”).

III. Respondent-Father’s Appeal

⁴ The trial court further concluded “[t]hat the grounds exist for the termination of the parental rights of the Respondent[-mother] in that pursuant to NCGS 7B-1111(a) that the Respondent[-mother] has willfully neglected the minor child . . . in the six month period next immediately preceding the filing of this Petition.” We believe this conclusion is a reiteration of the court’s prior adjudication of abandonment, since it tracks the elements of willfulness and the relevant six-month time period under the ground of abandonment, *see* N.C. Gen. Stat. § 7B-1111(a)(7), and since the ground of abandonment is commonly defined in terms of willful neglect, *see Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. To the extent this conclusion purports separately to find grounds to terminate respondent-mother’s parental rights on the basis of neglect, it fails, because neglect must be found at the time of the termination hearing. *See In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (“A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding.”).

Respondent-father also contends the trial court erred in finding grounds existed under N.C. Gen. Stat. § 7B-1111(a) to terminate his parental rights. We agree.

A. Neglect

The trial court first concluded that “the grounds exist to terminate the parental rights of the Respondent[-father] pursuant to NCGS 7B-1111(a) that the Respondent[-father] has willfully neglected the minor child . . . in that the juvenile is neglected as defined in GS 7B-101.”

N.C. Gen. Stat. § 7B-1111(a)(1) permits a trial court to terminate parental rights upon finding that “[t]he parent has . . . neglected the juvenile.” A “neglected juvenile” is defined, in relevant part, as one “who does not receive proper care, supervision, or discipline from the juvenile’s parent . . . 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” N.C. Gen. Stat. § 7B-101(15) (2015).

Although prior adjudications of neglect may be considered by the trial court, a petitioner alleging that a parent’s rights should be terminated on grounds of neglect normally must prove that neglect exists at the time of the termination hearing. *Young*, 346 N.C. at 248, 485 S.E.2d at 615. However, where a child has not been in a parent’s custody for a significant time period, the trial court must employ a different

analysis to decide whether the evidence supports a finding of neglect. *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002). In such cases, a petitioner must demonstrate that there exists a probability of a repetition of neglect. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). Thus, the trial court must consider evidence of changed circumstances in light of any history of neglect by the parent and probability of the repetition of neglect. *Id.* at 715, 319 S.E.2d at 232. Termination of parental rights for neglect may not be based solely on past conditions that no longer exist. *Id.* at 715, 319 S.E.2d at 232.

In *In re L.L.O.*, __ N.C. App. __, __ S.E.2d __ (Apr. 4, 2017) (No. COA16-1098), the juvenile had not been in the custody of the parent for a significant period of time prior to the termination hearing after having previously been adjudicated neglected. *L.L.O.*, slip op. at 4. This Court held that the ground of neglect was unsupported by necessary findings of fact where the order “contain[ed] no finding of a probability of a repetition of the neglect, which led to [the juvenile’s] removal from Respondents’ care.” *L.L.O.*, slip op. at 11. Because “the record contain[ed] evidence, which could support, although not compel, a finding of neglect,” we vacated that portion of the order and remanded for further factual findings. *Id.* (citing *D.M.O.*, __ N.C. App. at __, 794 S.E.2d at 866 (“Without further fact-finding, we cannot determine whether the court’s conclusions are supported by its findings.”)).

Here, David had previously been adjudicated neglected by the Tennessee court and has not been in respondents' custody for a significant period of time prior to the termination hearing. However, the court did not find that there was a probability of repetition of neglect if David were returned to respondent-father. As in *L.L.O.*, because "the record contains evidence, which could support, although not compel, a finding of neglect," we vacate this portion of the order and remand for further factual findings. *Id.*

B. Abandonment

The trial court also found that grounds existed to terminate respondent-father's parental rights on the basis of abandonment. However, the court never found and concluded that respondent-father's abandonment of David was willful. Abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) cannot be adjudicated unless the petitioner demonstrates by clear and convincing evidence—and the trial court finds—that the respondent's abandonment of the minor was willful. *See In re T.M.H.*, 186 N.C. App. 451, 455, 652 S.E.2d 1, 3, *disc. rev. denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

In *T.M.H.*, this Court vacated a termination order that did not contain a finding that the respondent's abandonment of the juvenile was willful and remanded to the trial court "with instructions to make appropriate findings as to the willfulness of [the respondent's] conduct" *Id.* at 455–56, 652 S.E.2d at 3. Here, similarly,

the court made no finding that respondent-father abandoned David willfully. Although the evidence introduced at the hearing may support such an ultimate finding, “[w]ithout further fact-finding, we cannot determine whether the court’s conclusions are supported by its findings.” *D.M.O.*, __ N.C. App. at __, 794 S.E.2d at 866. Accordingly, as in *T.M.H.*, we remand the matter to the trial court with instructions to make appropriate findings as to the willfulness of respondent-father’s conduct. 186 N.C. App. at 456, 652 S.E.2d at 3.

IV. Conclusion

The trial court failed to enter adequate findings of fact to demonstrate that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(7) to terminate respondent-mother’s parental rights or that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1) and -1111(a)(7) to terminate respondent-father’s parental rights. Because these findings are currently insufficient for meaningful appellate review, we vacate the order and remand to the trial court for further findings and conclusions to support the grounds upon which it relied to terminate respondents’ parental rights. “We leave to the discretion of the trial court whether to hear additional evidence.” *F.G.J.*, 200 N.C. App. at 694, 684 S.E.2d at 754. In light of our disposition, we decline to address respondents’ additional arguments.

VACATED AND REMANDED.

Judges HUNTER, JR. and ZACHARY concur.

IN RE D.L.M.

Opinion of the Court

Report per Rule 30(e).