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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1181

Filed: 5 July 2017

Burke County, No. 13 JT 109

IN THE MATTER OF: D.L.L.M.

Appeal by Respondent-Father from order entered 19 August 2016 by Judge Burford A. Cherry in District Court, Burke County District Court. Heard in the Court of Appeals 15 June 2017.

Chrystal Kay for Petitioner-Appellee Burke County Department of Social Services.

Elizabeth Spillman for Guardian ad Litem.

Leslie Rawls for Respondent-Appellant Father.

McGEE, Chief Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights as to his son, D.L.L.M. For the following reasons, we vacate in part and reverse and remand in part.

I. *Facts*

When D.L.L.M. was born on 2 June 2013, his mother was not married and his biological father was unknown. The Burke County Department of Social Services

(“DSS”) filed a juvenile petition on 22 August 2013 alleging that D.L.L.M. was a neglected juvenile. DSS obtained nonsecure custody of D.L.L.M. and continued D.L.L.M.’s placement with the mother’s cousin, Ms. H.¹

The mother stipulated to the allegations in the petition and the trial court entered an order on 13 December 2013 adjudicating D.L.L.M. as a neglected juvenile. DSS retained custody and continued D.L.L.M.’s placement with Ms. H., where he has remained for the entirety of the case. The trial court ceased reunification efforts with the mother on 24 July 2014. The mother relinquished her parental rights specifically to Ms. H. on 26 March 2015, and did not revoke her relinquishment during the revocation period.

The mother identified Respondent-Father, who resides in Florida, as D.L.L.M.’s biological father and DSS mailed a letter to Respondent-Father in April 2015. Respondent-Father contacted the social worker, told her he was the father of D.L.L.M., and submitted to a paternity test on 2 June 2015. Respondent-Father attended the 9 July 2015 permanency planning hearing. However, because the trial court had not yet received the results of the paternity test, it recommended no contact between Respondent-Father and D.L.L.M. until paternity was established.

¹ The mother agreed to place D.L.L.M. with Ms. H. around 28 July 2013 after the mother was told she could not be around D.L.L.M. unsupervised. The mother also stayed with Ms. H. initially, but the agreement fell apart on 21 August 2013, and the mother moved out of the home leaving D.L.L.M. with Ms. H.

After the hearing, Respondent-Father met with the DSS social worker. The social worker explained that, because Respondent-Father lived out of state, he would have to comply with the Interstate Compact on the Placement of Children (“ICPC”) in order to gain custody of D.L.L.M. once his paternity was established. The social worker also informed Respondent-Father that he would need to enter into a case plan, and DSS would need to conduct a home study.

DSS received the results of the paternity test on 10 July 2015 determining Respondent-Father to be the biological father of D.L.L.M., and emailed the results to Respondent-Father on 13 July 2015. Because DSS did not receive a response from Respondent-Father, DSS called him on 14 July 2015 and informed him he was D.L.L.M.’s biological father. DSS again explained to Respondent-Father that he would need to go through the ICPC process before he could gain custody of D.L.L.M. Respondent-Father did not consent to the ICPC process.

The trial court awarded Respondent-Father one hour per week of supervised visitation, and DSS informed Respondent-Father of his visitation rights during a phone conversation. Respondent-Father never asked to exercise his visitation and, at the time of the termination hearing, had never met or spoken to D.L.L.M.

Respondent-Father had no contact with DSS from 24 July 2015 to 29 January 2016, despite multiple attempted phone calls and emails by DSS to Respondent-Father. Respondent-Father contacted the social worker on 29 January 2016 and

asked about the status of the case. The social worker again informed Respondent-Father of his need to consent to start the ICPC process, but Respondent-Father did not do so. While the social worker was talking to Respondent-Father, the connection was weak and the call was disconnected. When DSS attempted to call Respondent-Father back, the number was listed as disconnected. Respondent-Father called the social worker on 2 February 2016, and the social worker informed him that DSS was in the process of terminating his parental rights. The social worker said Respondent-Father became upset and stated that DSS was “setting him up to fail.”

DSS filed a petition to terminate Respondent-Father’s parental rights on 18 February 2016, alleging the grounds of willful failure to pay a reasonable cost of care, failure to legitimate paternity, and willful abandonment. *See* N.C. Gen. Stat. §§ 7B-1111(a)(3), (5), (7) (2015). At the termination hearing, Respondent-Father testified that the mother contacted him sometime in 2013 and told him she was pregnant, but did not want to hear from him until child support was established. Respondent-Father also testified that he filed a custody action in North Carolina in 2014 seeking custody of D.L.L.M., but the action was dismissed for lack of service on the mother because Respondent-Father did not know her whereabouts. While being questioned regarding his decision to downsize his residence from a three-bedroom house to one room in a house, Respondent-Father admitted he was in jail from September 2015 to January 2016 on pending assault charges against the pregnant former landlady of

the three-bedroom house. Respondent-Father further testified that he was found not guilty of the assault charges and was released around 20 January 2016.

The DSS social worker testified that before the petition for termination of parental rights was filed, Respondent-Father did not (1) enter into a case plan, (2) consent to start the ICPC process, (3) ask to exercise his visitation rights, and (4) did not pay any support for D.L.L.M. The trial court entered an order on 19 August 2016 terminating Respondent-Father's parental rights based on all three alleged grounds, N.C. Gen. Stat. §§ 7B-1111(a)(3), (5), and (7). Respondent-Father appealed.

II. *Analysis*

Respondent-Father argues the trial court erred in concluding grounds existed to terminate his parental rights because the trial court's findings did not support its conclusions of law.

"The standard of 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 Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (citation and quotation marks omitted) (2004). Unchallenged findings of facts "are conclusive on appeal and binding on this Court." *In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009). 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).

A. Willful Abandonment

Respondent-Father first argues the trial court erred in concluding that grounds existed to terminate his parental rights based on willful abandonment because the findings of fact do not show the requisite willfulness. We remand for further action.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), a trial court may terminate parental rights when “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the [termination of parental rights] petition or motion.” N.C. Gen. Stat. § 7B-1111(a)(7) (2015). “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 Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). “Willfulness is more than an intention to do a thing; there must also be purpose and deliberation. Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (citation and quotation marks omitted). The trial court’s findings “need[] to show more than a failure of the parent to live up to [his] obligations as a parent in an appropriate fashion; the findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child.” *Id.* at 87, 671 S.E.2d at 53.

To support its conclusion that Respondent-Father willfully abandoned D.L.L.M., the trial court made the following findings of fact.

22. [Respondent-Father] was informed in July, 2015 that he was the biological father of the minor child.

23. [Respondent-Father] was informed by [DSS] through the foster care worker at the time, Heather Atkins, that before custody of the minor child could be granted to him that he would need to comply with the [ICPC] to determine if he would be a safe and appropriate caregiver for the child and to determine if his home in Florida would be safe and appropriate for the minor child.

24. [DSS] explained to [Respondent-Father] that it was necessary for him to cooperate with the ICPC process, since he was not a resident of North Carolina and was living in Florida.

25. It was further explained to [Respondent-Father] that he would need to enter into a family service case plan and take certain actions that were deemed appropriate for him to complete before the minor child could be placed with him.

26. [Respondent-Father] did not contact [DSS] from July 24, 2015 to January 29, 2016.

27. During [] telephone conversations between [Respondent-Father] and [DSS] on January 29, 2016 and February 2, 2016, [DSS] again informed [Respondent-Father] of the ICPC process he would [need] to undergo to gain custody of the minor child and to begin the ICPC process he would have to consent to start the process.

28. [Respondent-Father] never agreed to start the ICPC process, so the steps could be taken to evaluate whether he would be a proper caregiver for the juvenile.

29. [Respondent-Father] never entered into a family service case plan with [DSS].

30. [Respondent-Father] during Court on July 21, 2016 provided documentation of completing parenting classes, but he completed these classes after the filing of the petition and never provided this information to [DSS] prior to the July 21, 2016 court hearing.

31. [Respondent-Father] testified that [] in January, 2016 he downgraded from a three bedroom house in Florida to renting a one bedroom in a house and he had to make the change due to the financial cost of traveling back and forth from Florida to North Carolina for court regarding the minor child.

32. However, before January, 2016 [Respondent-Father] had only attended court once in regards to the minor child.

33. [Respondent-Father] admitted that from September, 2015 to January, 2016 he was in jail for pending felony assault charges and the alleged victim was his pregnant former landlord of the three (3) bedroom house [Respondent-Father] rented.

34. It is a compete fabrication by [Respondent-Father] [that he] voluntarily downsized to a smaller place. Rather [Respondent-Father] was kicked out of the three bedroom house.

35. Before Court on July 21, 2016 [Respondent-Father] never informed [DSS] that he was in jail and he did not make the admission about being in jail until after the Court asked several questions concerning him downsizing his residence.

36. [Respondent-Father] has been allowed court ordered visitation with the minor child and has not exercised that visitation.

37. [Respondent-Father] has not reached out to [DSS] or the placement provider about the well-being of the minor child.

38. [Respondent-Father] never took any action to establish a relationship with the juvenile.

39. [Respondent-Father] admitted that he earns sixteen hundred dollars (\$1600.00) a month and worked the same job for three (3) years.

....

42. Before the filing of the petition in this matter, [Respondent-Father] has never provided any type of financial support through money or gifts to the minor child directly to the minor child, placement provider, or [DSS].

....

50. [Respondent-Father] is not a credible witness given the many inconsistent statements he made during his testimony on July 21, 2016.

51. Furthermore, the Court finds the other two witnesses more credible than [Respondent-Father] in regards to the actions [Respondent-Father] has not taken in regards to the minor child.

....

55. [Respondent-Father] has never [met] or talked to the minor child, even though [Respondent-Father] was granted visitation through the court orders and he was informed that he was able to have visitation.

Because Respondent-Father does not challenge any of these findings, they are binding on appeal. *S.C.R.*, 198 N.C. App. at 532, 679 S.E.2d at 909. Respondent-

Father contends, however, that these findings do not support the trial court's conclusion of willful abandonment because the findings are insufficient to show the willfulness necessary to support abandonment as a ground for termination.

The petition to terminate Respondent-Father's parental rights was filed on 18 February 2016. Thus, the determinative six-month period was 18 August 2015 to 18 February 2016. Respondent-Father argues he was incarcerated for four of the relevant six months, and the trial court's findings do not establish whether he "made any efforts, had the capacity, or had the ability to acquire the capacity [due to his incarceration], to perform the conduct underlying its conclusion" that he willfully abandoned D.L.L.M.

"Incarceration, standing alone, neither precludes nor requires a finding of willfulness on the issue of abandonment, and despite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child." *Matter of D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 862 (2016) (citation and brackets omitted). "However, the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child." *Id.* at ___, 794 S.E.2d at 862-63.

Here, despite Respondent-Father testifying that he was incarcerated for four of the relevant six months, the trial court did not make any findings regarding Respondent-Father's ability to contact DSS, submit to the ICPC process, enter into a

case plan, pay support, or take any action to establish a relationship with D.L.L.M. while he was incarcerated. Without any findings that Respondent-Father “made any effort, had the capacity, or had the ability to acquire the capacity, to perform” those actions during his four-month incarceration, the trial court’s findings do not establish that Respondent-Father abandoned D.L.L.M. willfully. *Id.* at ___, 794 S.E.2d at 864. While we express no opinion as to whether the evidence introduced at the hearing could support a finding that Respondent-Father willfully abandoned D.L.L.M. within the determinative six-month time period, the trial court’s findings do not support its conclusion that grounds existed to terminate Respondent-Father’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Accordingly, we reverse this portion of the termination order, and remand to the trial court for further findings related to the willfulness of Respondent-Father’s conduct during the relevant six-month period. *See, e.g., In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009) (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)”).

B. Failure to Pay Reasonable Cost of Care

Respondent-Father next argues the trial court erred in concluding that grounds existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). We remand for further action.

A trial court may terminate a parent's parental rights if the juvenile has been in the custody of DSS, "and the parent, for a continuous period of six months next preceding the filing of the petition . . . , 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. Gen. Stat. § 7B-1111(a)(3). "The trial court must examine the child's reasonable needs and the parent's ability to pay." *In re J.E.M., Jr.*, 221 N.C. App. 361, 364, 727 S.E.2d 398, 401 (2012).

The trial court made the following relevant findings of fact:

33. The respondent father admitted that from September, 2015 to January, 2016 he was in jail for pending felony assault charges[.]

.....

39. The respondent father admitted that he earns sixteen hundred dollars (\$1600.00) a month and worked the same job for three (3) years.

40. The respondent father admitted that he is currently and always has been financially and physically able to pay a reasonable portion of the care for the minor child.

41. Given the needs of the child described by the placement provider, the reasonable portion of the care of the minor child is at least five hundred (\$500.00) a month.

42. Before the filing of the petition in this matter, the respondent father has never provided any type of financial support through money or gifts to the minor child directly to the minor child, placement provider, or [DSS].

Respondent-Father challenges finding of fact 40 as not being supported by the evidence. The trial court found that Respondent-Father had worked the same job for the past three years and usually worked five to six days a week. However, the trial court also found that Respondent-Father admitted he had been incarcerated from September 2015 to January 2016. Although Respondent-Father testified that he was currently able to work and provide support, he never admitted that he had “always [] been financially and physically able to pay a reasonable portion of the cost of care” and the evidence found by the trial court failed to support this portion of the finding. Therefore, we vacate the portion of finding of fact 40 finding that Respondent-Father “always has been” able to pay a reasonable cost of care.

The trial court did not make any findings regarding Respondent-Father’s ability to pay during the time he was incarcerated four out of the six relevant months. Therefore, the findings are insufficient to show Respondent-Father willfully failed to pay, and do not support the trial court’s conclusion that grounds existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). *See In re Faircloth*, 161 N.C. App. 523, 526, 588 S.E.2d 561, 564 (2003). Accordingly, we reverse this portion of the trial court’s order, and remand for further findings on Respondent-Father’s ability to pay during the entire continuous period of six months next preceding the filing of the petition, including the four month period he was incarcerated.

C. Failure to Legitimate Paternity

Finally, Respondent-Father argues the trial court erred in concluding grounds existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5).

We agree.

A trial court may terminate a parent's parental rights when

[t]he father of a juvenile born out of wedlock has not, prior to the filing of the petition or motion to terminate parental rights:

- a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
- b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
- c. Legitimated the juvenile by marriage to the mother of the juvenile.
- d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
- e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

N.C. Gen. Stat. § 7B-1111(a)(5). In order to terminate parental rights based on this ground, the trial court must make specific findings of fact as to all subsections, and

the petitioner bears the burden of proving the father has failed to comply with any of the five subsections. *See In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005).

We hold Respondent-Father's paternity was judicially established in prior permanency planning orders. N.C. Gen. Stat. § 7B-1111(a)(5)(e). Respondent-Father submitted to a paternity test on 2 June 2015, and the results indicated a 99.9% probability that he was the father. In the trial court's review orders entered 3 September 2015 and 7 January 2016, the trial court addressed the paternity test and found that the "results showed that [Respondent-Father] [was] the biological father of the juvenile." Thus, when DSS petitioned for termination of parental rights on 18 February 2016, Respondent-Father's paternity had been judicially established. *See Helms v. Landry*, 194 N.C. App. 787, 792, 671 S.E.2d 347, 350 (Jackson, J., dissenting) (holding that father's paternity was established in a prior court order finding he was the biological father), *rev'd for reasons stated in dissent*, 363 N.C. 738, 686 S.E.2d 674 (2009). Therefore, in the present case, the trial court erred in terminating Respondent-Father's parental rights on this ground. Accordingly, we vacate the portion of the trial court's order terminating Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5).

III. *Conclusion*

Because Respondent-Father's paternity was judicially established, the trial court erred in terminating his parental rights pursuant to N.C. Gen. Stat. § 7B-

1111(a)(5), and we vacate that portion of the order. Because the trial court failed to enter adequate findings of fact to support its conclusions that grounds existed to terminate parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(3) and (7), we reverse those portions of the trial court's order and remand for further findings of fact on those two grounds. The trial court may, in its discretion, hear and receive additional evidence. *See In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court.") (quotation marks omitted).

VACATED IN PART; REVERSED AND REMANDED IN PART.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).