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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-30

Filed: 5 July 2017

Columbus County, Nos. 16 JT 23-24

IN THE MATTER OF: E.M.S.-C. and B.O.S.-C.

Appeal by respondent from orders entered 4 November 2016 by Judge William F. Fairley in Columbus County District Court. Heard in the Court of Appeals 22 June 2017.

*No brief filed for petitioner-appellee mother.*

*J. Thomas Diepenbrock for respondent-appellant father.*

TYSON, Judge.

Respondent-father appeals from the trial court's orders terminating his parental rights to his sons E.M.S.-C. ("Ethan") and B.O.S.-C. ("Brian"). We affirm.

I. Background

Petitioner-mother ("Petitioner") and Respondent-father ("Respondent") have two children, Ethan and Brian, who were born in 2010 and 2007, respectively. Petitioner and Respondent never married, but occasionally resided together until November 2010. Both were natives of Horry County, South Carolina.

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Petitioner and Respondent engaged in a volatile relationship, marked by domestic violence, substance abuse, and occasional arrests and incarceration. In 2011, Respondent was convicted of harassing petitioner and received a three year suspended sentence with three years of probation. Under the terms of his probation, Respondent was prohibited from contacting Petitioner, except as permitted by court order for visitation with his children. Respondent finished his probationary term in mid-2013.

In the summer of 2014, Petitioner and the parties' two sons moved to Columbus County. On 1 July 2015, Petitioner married her current husband, with whom she has a daughter.

On 17 May 2016, Petitioner filed petitions to terminate Respondent's parental rights to Ethan and Brian. She alleged the following grounds for termination: neglect, failure to provide financial support, failure to legitimate, and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (4), (5), (7) (2015).

Following a hearing, the trial court entered an order on 4 November 2016 and found the existence of willful abandonment as a ground for termination. *See* N.C. Gen. Stat. § 7B-1111(a)(7). In a separate disposition order, the trial court concluded termination of respondent's parental rights was in the best interest of the juveniles. Respondent appeals.

II. Issues

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Respondent challenges several of the trial court's findings of fact, and argues the trial court's conclusion that he willfully abandoned his sons is not supported by the findings of fact.

III. Standard of Review

We review a trial court's termination order to determine whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether those findings support the conclusions of law. We review *de novo* the trial court's conclusions of law. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

IV. Analysis

Willful 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 Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation and internal quotation omitted). The trial court may terminate a parent's parental rights upon a finding that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . ." N.C. Gen. Stat. § 7B-1111(a)(7).

"It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "The word willful

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encompasses more than an intention to do a thing; there must also be purpose and deliberation.” *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation and internal quotation omitted).

“[T]he findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child.” *In re S.R.G.*, 195 N.C. App. 79, 87, 671 S.E.2d 47, 53 (2009), *cert. denied*, 363 N.C. 804 (2010).

The court’s following findings of fact are relevant to the ground of abandonment:

4. That prior to November 2010, the Petitioner herein resided at her parents’ home in Horry County, South Carolina and that the residence was known to the Respondent Father.
- .....
7. That the Respondent Father was convicted on a separate occasion of harassing the Petitioner, that violation occurring on March 28, 2011. That the Respondent Father received a three year suspended sentence on certain conditions, including the condition that he have no contact with the victim, that being the Petitioner herein, “except as permitted by Family Court order for child visitation.”
8. That the Respondent Father remained on probation until mid-2013 from that conviction.
9. That the Petitioner herein was incarcerated for two months commencing on November 20, 2010 after she left the children at home alone to go out drinking. That upon her release from jail in January 2010, the

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Petitioner resided at her parents' home for a period of two years. That the address and contact information of the Petitioner for that period of time was known to the Respondent Father and that the Petitioner resided there until January 2013 when the Petitioner moved to a residence in Little River, South Carolina.

10. That the Petitioner subsequently moved to Columbus County, North Carolina in the summer of 2014.
11. That subsequent to the Respondent Father's conviction for harassment and the resulting probationary judgment, the Respondent Father has not filed any action in South Carolina nor in North Carolina seeking to establish any visitation privileges with his children.
12. That the Court finds no legal impediment to the Respondent Father having been able to file such an action.
13. That the Respondent Father has not seen either of the minor children since November 2010 when the minor child [Brian] was approximately three years old and the minor child [Ethan] was approximately four months old.
14. That the Respondent Father has not provided any financial support for the children since November 2010.
15. That the Respondent Father has been employed throughout that period of time and has at all times possessed the ability to provide financial support in some amount.
16. That at least through January 2013, the Respondent Father knew the physical location and mailing

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address of the Petitioner and could therefore have paid child support directly to her without violating any terms of his probation but that he failed to do so.

17. That the Court notes the testimony of the Respondent Father that he attempted to contact the Department of Social Services to provide child support; however, the Court finds that that testimony lacks credibility.

...

19. That the Respondent Father has provided the minor children no cards, gifts or other remembrances of his affection for them, since November 2010 but for one gift that he left at the home of the Petitioner's parents in December 2013.
20. That the Petitioner moved from her parents' home in January 2013 and thereafter has not provided to the Respondent Father her address.
21. Subsequent to January 2013, the Respondent Father has made no effort to locate the Petitioner.
22. The Court notes the testimony of the Respondent Father, that he attempted to contact Petitioner subsequent to January 2013 through friends. The Court further notes that the Respondent Father has offered to specificity as to when those attempted contacts were made; [ ] the Court infers that the Respondent Father knew individuals[,] either being friends or family[,] who knew how to contact the Petitioner.
23. That there is no evidence that the Respondent Father ever attempted to locate the Petitioner after January 2013 even by matters as simple as conducting an ordinary internet search of the Petitioner's name.

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24. The Court specifically finds that even if the Respondent Father in fact did not know the Petitioner's residence subsequent to January 2013, that his lack of knowledge derived from his failing to undertake the most minimal efforts to locate the Petitioner.

Of these findings of fact, Respondent excepts to and challenges numbers 8, 17, 19, 21, 23, and 24. Respondent also challenges finding of fact number 25, contending that it is actually a conclusion of law. To the extent that this finding would have been more appropriately categorized as a conclusion of law, we treat it as such. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005) (“[I]f a finding of fact is essentially a conclusion of law it will be treated as a conclusion of law which is reviewable on appeal.” (citations, internal quotations, and alterations omitted)).

Respondent has not challenged the remaining findings of fact listed above. We presume the unchallenged findings of fact are supported by competent evidence, and consequently, are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009). We address each challenged finding of fact in turn.

A. Finding of Fact No. 8

In finding of fact number 8, the trial court found Respondent was on probation until mid-2013. Respondent concedes his own testimony supports this finding. He argues it is not supported by clear and convincing evidence, because a court record

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from Horry County, South Carolina shows that he received a three-year probationary sentence beginning on 2 August 2011. Thus, he argues, his term would have ended on or about 2 August 2014, not mid-2013.

It is the trial court's duty to determine the weight and credibility to be given to the evidence and to resolve any conflicts in the evidence. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject.").

The trial court determined Respondent was in the best position to know when his probation was completed. Respondent's own testimony supports this finding, we conclude finding of fact number 8 is supported by competent evidence. Respondent's argument is overruled.

B. Finding of Fact No. 17

Respondent testified he had attempted to contact the Department of Social Services ("DSS") in an effort to provide child support to Ethan and Brian. In finding of fact number 17, the trial court found that this testimony was not credible. Respondent takes issue with the trial court's credibility determination, arguing his testimony is "unrefuted." The trial court weighs the credibility of a witness, and it is

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not our duty to re-weigh such a determination. *See id.* We reject this challenge to finding of fact number 17.

C. Finding of Fact No. 19

In finding of fact number 19, the trial court found that since 2010 Respondent provided only one gift to the children, namely a gift he left for them at Petitioner's parents' home in December 2013. Respondent argues that this finding is not supported by the evidence, because his testimony shows that he actually provided a dozen gifts and a card on this occasion.

Petitioner testified to receiving one gift for her son, Brian, during the time that Respondent was on probation, but claimed the gift lacked any indication of who sent it. It appears that the trial court inferred this was the same gift-giving instance Respondent referenced in his own testimony.

The trial court in its discretion could discredit Respondent's claim to have provided a dozen gifts, especially in light of the fact Respondent had not provided his children with any other support or gifts between 2010 and the date of the petitions. We reject Respondent's challenge to finding of fact number 19 as without merit.

D. Finding of Fact Nos. 21, 23, and 24

In finding of fact numbers 21, 23, and 24, the trial court found that after 2013, Respondent made no effort to locate Petitioner and that his lack of knowledge was attributable to his failure to "undertake the most minimal efforts" to locate her or his

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sons. Respondent claims that these findings are not supported by the evidence because (1) he made monthly attempts to contact Petitioner through third parties and social media, and (2) Petitioner acknowledged having received a “Facebook” message from Respondent’s girlfriend, as well as an inquiry from Respondent’s father in 2013.

Respondent does not challenge finding of fact number 22, in which the trial court acknowledged Respondent’s testimony that he had attempted to contact Petitioner through friends and relatives. The fact that the trial court acknowledged this testimony, but nevertheless found Respondent failed to make even minimal efforts to contact Petitioner, demonstrates the trial court again weighed the admitted testimony and determined credibility.

The trial court’s findings state Respondent never attempted to contact Petitioner, despite having the means to locate her and his sons’ whereabouts. Even if the trial court were to believe all of Respondent’s testimony, Respondent stated that he attempted contact through third parties and social media. Respondent’s testimony does not contradict these findings, nor does Petitioner’s testimony regarding attempted contact by Respondent’s father and girlfriend. Finding of fact numbers 21, 23, and 24 are supported by the properly admitted evidence.

E. Conclusion of Law

Next, Respondent argues his actions do not evince a settled purpose to forego all parental duties. He submits he contacted DSS and asked friends, family, and used

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social media to reach out to Petitioner to contact his sons. Although his purported attempts were made prior to the statutory six-month period, he claims that they are relevant to the issue of willfulness.

Additionally, Respondent submits: (1) he was under a no-contact order until after Petitioner had moved to North Carolina; (2) he did not know where she lived; and, (3) Petitioner deliberately withheld her contact information from him. Respondent argues that these factors further demonstrate that his actions do not amount to willful abandonment. We disagree.

The findings of fact establish that Respondent has not seen either of his sons since 2010, when Ethan was four months old and Brian was three years old. Although Petitioner was subject to a no-contact provision as part of his probation, he was not prohibited from seeking visitation of his children through appropriate legal channels. His probationary sentence explicitly stated “no contact [with] victim *except as permitted by Family court order for child visitation.*” (emphasis supplied). Respondent made no efforts to seek such visitation, whether by hiring an attorney or filing a *pro se* action with the family court in South Carolina.

After Respondent was released from probation, he made virtually no efforts to contact his children. Respondent acknowledged he had friends in common with Petitioner and family members who would have been able to provide Respondent with Petitioner’s and his sons’ contact information. Despite these connections, Respondent

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never attempted to locate petitioner and claims to have only attempted to contact her through third parties or on social media.

The trial court evidently accorded little credibility to Respondent's claims. We decline to review the trial court's credibility determination after hearing all of the testimony and reviewing all of the evidence.

V. Conclusion

The findings demonstrate Respondent had no contact with Ethan and Brian since 2010, despite having the ability to seek or maintain some level of contact with his children. *See M.D.*, 200 N.C. App. at 43, 682 S.E.2d at 785-86 (holding that a father had willfully abandoned his children because he had not visited, spoken to, or sent any cards or gifts to them for several years despite having the ability to do so).

Additionally, the trial court found Respondent gave the children one single gift since 2010 and provided no financial support for his children. The findings of fact support the trial court's conclusion that Respondent willfully abandoned Ethan and Brian pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

We affirm the trial court's order of termination of Respondent's parental rights based on the ground of willful abandonment. *It is so ordered.*

AFFIRMED.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).