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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-552

Filed: 2 January 2018

Bladen County, Nos. 16 JT 37-38

IN THE MATTER OF: L.C.J. and L.N.J.

Appeal by respondent-father from orders entered 28 February 2017 by Judge William F. Fairley in Bladen County District Court. Heard in the Court of Appeals 14 December 2017.

No brief filed for petitioner-appellee mother.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant father.

BERGER, Judge.

This appeal arises from a private termination of parental rights action. Respondent-father appeals from orders terminating his parental rights to the parties' minor children L.C.J. and L.N.J. Respondent-father contends the trial court erred in terminating his parental rights because there were insufficient findings of fact that he willfully abandoned the children. For the following reasons, we reverse and remand.

Factual and Procedural Background

Petitioner, the mother of L.C.J. and L.N.J., and Respondent-father were in an intermittent relationship from 2000 to 2006. The parties had two children together during the course of their relationship. Following termination of the relationship, Petitioner-mother and the minor children moved in with her mother. Respondent-father visited the children twice during the fall of 2006 for roughly thirty minutes each visit, and that was the last time he saw the children.

On August 26, 2016, Petitioner-mother filed a petition to terminate Respondent-father's parental rights on the ground of willful abandonment. The petition alleged that Respondent-father had not attempted any contact with the children over the last ten years and had not provided any financial support.

The trial court conducted a hearing on the petition on January 17, 2017. On February 28, 2017, the trial court entered orders terminating Respondent-father's parental rights on the grounds of willful abandonment and finding that termination was in the children's best interests. Respondent-father timely appealed.

Respondent-father argues the trial court erred by concluding that grounds existed to terminate his parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) because there were insufficient findings to support a conclusion that he willfully abandoned the children. We agree.

Standard of Review

"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, 221-22, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). "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 S.C.R.,* 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (citation and internal quotation marks omitted), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Unchallenged findings of facts "are conclusive on appeal and binding on this Court." *Id.* at 532, 679 S.E.2d at 909 (citation omitted). We review the trial court's conclusions of law *de novo*. *In re S.N., X.Z.*, 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).

Analysis

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) (2015), 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." *Id.* "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) (citation omitted). "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) (citations 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. "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. . . ." *Bost v. Van Nortwick,* 117 N.C. App. 1, 18, 449 S.E.2d 911, 921 (1994) (citation and internal quotation marks omitted), *appeal dismissed,* 340 N.C. 109, 458 S.E.2d 183 (1995).

To support its conclusion that Respondent-father willfully abandoned the juveniles, the trial court made the following findings of fact:

> 10. That upon the parties['] final separation [in 2006] the petitioner moved to reside with her mother along with the minor children.
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> 11. That while residing at the home of [petitioner's mother], through fall of 2006 the respondent appeared on two occasions to visit with the minor children for roughly thirty (30) minutes a piece and that was the last time the

respondent has seen his minor children.

12. That subsequent to September 2006 the [petitioner's] mother . . . left her residence and the petitioner moved to Bladenboro for approximately one (1) year and thereafter she moved into a mobile home at her father[']s residence for a period of two (2) years through 2009, in 2009 she obtained a separate residence in Lumberton, in 2011 the petitioner moved to Kelly, NC where she currently resides.

13. That the respondent father was incarcerated in the North Carolina Department of Corrections commencing in 2007 for approximately three and one half (3 ½) years.

14. That between 2011 and August 10, 2016 the respondent father was incarcerated on two probation violations, the length of which is unknown to the Court.

15. That the respondent was arrested on August 10, 2016 charged with nine (9) separate felonies and is currently incarcerated in the Robeson County Jail awaiting trial on those issues.

16. That in 2005 at a time when the parties were residing together, the parties engaged in a physical altercation as a result of which the respondent was convicted of assault on a female and a chapter 50B domestic violence protective order was issued preventing the respondent from having any contact with the petitioner herein for a period of twelve (12) months. That order expired in 2006 or 2007 and the respondent has been under no legal prohibition herein from contacting the petitioner or his minor children since that date.

17. That the respondent knew that the petitioner was residing at the mobile home through 2009, that being the residence immediately adjacent to the petitioner's father[']s residence and the respondent was aware of the petitioner[']s residence at that location together with the

> presence of the minor children.
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> 18. That the respondent has not known since 2009 the specific address of the petitioner and her children.
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> 19. That the respondent knew of the cell phone number of the petitioner's mother . . . from 2008 until 2012, that he called [petitioner's mother] on one occasion during that period of time to wish [L.N.J.] a happy birthday but did not access the petitioner[']s mother's phone in order to have any contact with the children or to learn of the location of the petitioner or the children or their contact information.
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> 20. That in 2011 upon his release from prison the respondent was served with a Civil Complaint seeking child support.
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> 21. That in 2014 the petitioner was working at a local grocery store as a clerk and she was preparing to close her cash register at the time when the respondent came into the store accompanied by his mother, that the respondent saw the petitioner in the store at that time and stared at her but did not speak to her, did not inquire about the welfare of the children and made no effort to have any contact thereafter notwithstanding the knowledge that the petitioner worked at that grocery store.
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> 22. That at no time since 2006 has the respondent seen the minor children and he has not provided to the minor child[ren] since that date any support either in the form of cash or any kind of materials needed for the support of the minor children.
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> 23. That the respondent has not made any effort to provide to the minor children any cards, gifts or remembrances of any kind since 2006.

Respondent-father contends that findings of fact 22 and 23 are not "entirely accurate" because he testified that in 2011 he left $20 or $30 with Petitioner-mother's

aunt for L.C.J.'s birthday, but that Petitioner-mother told her aunt she did not need it. However, Petitioner-mother testified at the hearing that since 2006 Respondent-father had not provided any money, presents, letters, or supplies of any sort to the children. "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *S.C.R.,* 198 N.C. App. at 531-32, 679 S.E.2d at 909 (citation, quotation marks, and brackets omitted). Thus, it was within the trial court's discretion to find Petitioner-mother's testimony to be more credible and make the appropriate finding. Because findings 22 and 23 are supported by competent evidence they are binding on appeal even though there may be evidence to the contrary. *Id.* at 531, 679 S.E.2d at 909.

Respondent-father does not specifically challenge any of the remaining findings of fact as not being supported by the evidence and they are binding on this Court. *Id.* at 532, 686 S.E.2d at 909. Respondent-father contends, however, that the findings of fact do not support the trial court's conclusion of willful abandonment because the findings do not pertain to the relevant six-month period and are insufficient to show Respondent-father's lack of contact with the juveniles was willful.

The time period relevant to a determination of willful abandonment is the six months prior to the filing of the petition to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7). Petitioner-mother filed the petition to terminate Respondent-

father's parental rights on August 26, 2016. Thus, the relevant time period in this case is February to August, 2016. Respondent-father argues that his failure to contact the children during the relevant six months was not willful because he did not know where Petitioner-mother lived or how to contact her and the children, and the trial court failed to make any findings that he had the ability to show care or concern for the children during that time.

Although the findings clearly show that Respondent-father has not had any contact with his children for ten years, we agree that none of the findings address Respondent-father's ability to contact the children during the relevant six-month period in order to show willfulness. The findings indicate that Respondent-father knew where Petitioner-mother lived up until 2009 but did not know her current address, that Respondent-father had the ability to contact Petitioner-mother's mother via her cell phone from 2008 to 2012, and that in 2014 Respondent-father knew Petitioner-mother's place of employment. However, Petitioner-mother's mother changed her phone number multiple times since 2012, and at the time of the termination hearing, Petitioner-mother had a new employer and the record is silent as to when she started at her new job. Thus, although the court's findings show that Respondent-father had the opportunity to obtain Petitioner-mother's contact information at different periods over the last ten years, the findings failed to specifically address Respondent-father's ability to contact Petitioner-mother or the

children from February to August, 2016 in order to determine whether his conduct was willful.

Although there may be evidence in the record to support a finding that Respondent-father had the ability to contact the children and willfully abandoned them, "it is not the duty of this Court to issue findings of fact." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). "Our review on appeal is limited to determining whether the trial court's findings are based on clear, cogent and convincing competent evidence[,]" and whether those findings support the conclusions of law. *In re Locklear*, 151 N.C. App. 573, 576, 566 S.E.2d 165, 167 (2002) (citation omitted). Without a finding of Respondent-father's ability to contact the children during the relevant six-month period, the trial court's findings (1) do not establish that Respondent-father's lack of contact was willful, and (2) do not support its conclusion that Respondent-father willfully abandoned the children during the determinative period pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

Conclusion

The orders terminating Respondent-father's parental rights are reversed, and these matters are remanded to the trial court for further findings relating to the willfulness of Respondent-father's conduct during the determinative six-month period.

REVERSED AND REMANDED.

Judges ELMORE and ARROWOOD concur.

Report per Rule 30(e).