An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-19

Filed: 17 April 2018

Catawba County, No. 17 JT 114

IN THE MATTER OF: K.R.R.

Appeal by respondent-mother from order entered 22 September 2017 by Judge Wesley W. Barkley in Catawba County District Court. Heard in the Court of Appeals 5 April 2018.

Stephen M. Schoeberle for petitioner-appellee.

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant mother.

ZACHARY, Judge.

Respondent appeals from an order terminating her parental rights to her minor child K.R.R. ("Kathy").[1] The father is not a party to this appeal. We vacate the trial court's termination order and remand for further fact-finding.

Kathy was born in August 2007. Starting in 2010, Kathy would stay with petitioner, the paternal grandmother, from time to time. Kathy's parents divorced in

[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading.

2013 and shared legal and physical custody of Kathy thereafter. However, Kathy lived with petitioner since 2012. On 26 July 2016, Kathy's father obtained an Ex Parte Temporary Custody Order that gave physical custody of Kathy to petitioner. Petitioner was allowed to intervene in the matter in a subsequent hearing, and on 28 October 2016, the trial court ordered that petitioner be given legal and physical custody of Kathy. On 3 May 2017, the father signed a consent for petitioner to adopt Kathy. Petitioner filed a petition to terminate respondent's parental rights the next day, alleging willful abandonment as grounds for termination. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (2017). Following a hearing on the petition, the trial court entered an order on 22 September 2017 terminating respondent's parental rights on the grounds of neglect and abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (7) (2017). Respondent timely filed written notice of appeal.

Respondent contends that the trial court erred in determining that grounds existed to terminate her parental rights. We agree.

As an initial matter, respondent argues and petitioner concedes, that the ground of neglect was not alleged in the termination petition, and that the trial court therefore could not use neglect as a ground to terminate respondent's parental rights. *See In re C.W.,* 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during

the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground."). Thus, the issue in this case is whether the trial court correctly adjudicated the existence of abandonment as a ground to terminate respondent's parental rights.

N.C. Gen. Stat. § 7B-1111(a)(7) provides that the trial court may terminate parental rights upon finding that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2017). "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 omitted). " '[I]f a parent withholds his 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.' " *In re J.D.L.*, 199 N.C. App. 182, 189-90, 681 S.E.2d 485, 491 (2009) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). While the six months immediately preceding the filing of the petition is the determinative period for adjudicating abandonment, the trial court may consider a parent's conduct outside of the six-month period to evaluate the parent's credibility and intentions. *In re C.J.H.*, 240 N.C. App. 489, 503, 772 S.E.2d 82, 91 (2015). This Court reviews the trial court's adjudicatory decision to determine "whether the trial court's findings of fact are based

upon clear, cogent, and convincing evidence and whether the findings support the conclusions of law." *In re I.T.P-L.*, 194 N.C. App. 453, 461, 670 S.E.2d 282, 287 (2008) (citation omitted), *disc. review denied*, 363 N.C. 581, 681 S.E.2d 783 (2009). The trial court's conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

While respondent challenges numerous findings of fact as unsupported by the evidence, we need not review those challenges given our determination that the trial court's findings do not support its conclusion that respondent's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). More specifically, while the trial court found that respondent abandoned Kathy, the court did not find that respondent's abandonment of Kathy was willful, which is a necessary finding to adjudicate the existence of abandonment. *See In re T.M.H.*, 186 N.C. App. 451, 455-56, 652 S.E.2d 1, 3 (vacating the trial court's termination order and remanding where the order did not contain a finding that the respondent's abandonment of the juvenile was willful), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007). The finding of willfulness was especially important given conflicting evidence regarding the extent to which respondent had the ability to exercise parental duties and participate in Kathy's rearing. We remand the matter to the trial court with instructions to make appropriate findings as to the willfulness of respondent's conduct. On remand, we

leave to the discretion of the trial court whether to hear additional evidence. *Id.* at 456, 652 S.E.2d at 3.

VACATED AND REMANDED.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).