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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1367

Filed: 5 June 2018

Iredell County, No. 17 JT 75

IN THE MATTER OF: B.A.S.

Appeal by respondent from order entered 7 September 2017 by Judge Deborah Brown in Iredell County District Court. Heard in the Court of Appeals 10 May 2018.

*Daly Family Law Firm, by Meg Stacy, and Jones Childers Donaldson Webb, PLLC, by Richard M. Webb, for petitioner-appellee mother.*

*Mark L. Hayes for respondent-appellant father.*

INMAN, Judge.

Respondent appeals from an order terminating his parental rights. Respondent argues that the trial court erred by concluding that grounds existed to terminate his parental rights. After careful review, we vacate and remand.

## I. FACTS AND PROCEDURAL HISTORY

Respondent is the father of the juvenile B.A.S. ("Brett").[1] Petitioner is Brett's mother. Respondent and petitioner never married, and Brett was born out of wedlock

[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 3.1(b).

in December of 1993. On 12 April 2017, petitioner filed a petition to terminate respondent's parental rights. Petitioner alleged as grounds for termination that respondent had: (1) willfully failed to pay child support; (2) failed to legitimize Brett; and (3) willfully abandoned Brett. N.C. Gen. Stat. § 7B-1111(a)(4), (5), and (7) (2017).

The trial court held a termination hearing on 17 August 2017. Prior to the start of trial, the trial judge questioned the parties regarding Brett's paternity:

> THE COURT: Okay. All right. Next is whether paternity has been established or efforts made to establish paternity, so has paternity been established?
>
> [PETITIONER'S ATTORNEY]: No, Your Honor.
>
> THE COURT: Have there been efforts made to establish paternity?
>
> [PETITIONER'S ATTORNEY]: Not that I'm aware of.
>
> THE COURT: The parties were not married. Is that correct?
>
> [PETITIONER'S ATTORNEY]: Yes.
>
> (Pause)
>
> THE COURT: All right. Well, was the respondent father named on the birth certificate?
>
> [PETITIONER'S ATTORNEY]: Yes, Your Honor.
>
> THE COURT: Was there an affidavit of parentage filed?
>
> [PETITIONER'S ATTORNEY]: No.
>
> THE COURT: Has there been any legal proceeding to

> establish him as the father.
>
> [PETITIONER'S ATTORNEY]: No, there's not.
>
> THE COURT: Is there an issue with paternity?
>
> [RESPONDENT'S ATTORNEY]: There's been no objection from my client[.]
>
> . . . .
>
> [PETITIONER'S ATTORNEY]: . . . There's no question who the father is.
>
> . . . .
>
> THE COURT: Are there any stipulations?
>
> (No audible response)

On 7 September 2017, the trial court entered an order terminating respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) and (7). Respondent appeals.

## II. ANALYSIS

Respondent argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

Section 7B-1111 of the North Carolina General Statutes sets out the statutory grounds for terminating parental rights. A finding of any one of the separately enumerated grounds is sufficient to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). "The standard of appellate review is whether

the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed*, *disc. review denied,* 353 N.C. 374, 547 S.E.2d 9 (2001)). 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), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

We first consider the trial court's conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). This section provides that a court may terminate the parental rights of a father of a juvenile born out of wedlock upon a finding that the father has not, prior to the filing of the petition 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 court 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). When basing the termination of parental rights on N.C. Gen. Stat. § 7B-1111(a)(5), the trial court *must* make specific findings of fact as to each subsection. *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005) (emphasis added) (citing *In re Harris*, 87 N.C. App. 179, 188, 360 S.E.2d 485, 490 (1987)).

Respondent contends that there was no evidence presented, and no finding made, that he had not filed an affidavit of paternity with the Department of Health and Human Services ("DHHS"). N.C. Gen. Stat. § 7B-1111(a)(5)(a). Consequently, respondent argues that termination was not proper under this section. In response, petitioner claims that: (1) respondent stipulated at the hearing that paternity had not been legally established; and (2) admitted during his trial testimony that he had not established paternity. Petitioner thus cites *In re A.R.*, No. COA12-752, 223 N.C. App. 520, 735 S.E.2d 451, 2012 WL 5864673 (2012) (unpublished), and argues she was under no obligation to contact DHHS.[2] After careful review of the record, we agree with respondent that there were insufficient findings of fact and evidence upon which to terminate his parental rights on this ground.

[2] We note that unpublished opinions of this Court lack precedential authority. *See* N.C. R. App. P. 30(e)(3) (providing that "an unpublished decision . . . does not constitute controlling legal authority").

In *I.S.*, the trial court found that the father, through counsel, had stipulated:

> [T]hat the juvenile was born out of wedlock and that he, Eddie Ray M[ ], has not prior to the filing of this petition to terminate his parental rights established paternity judicially, or by affidavit which has been filed in a central registry maintained by the Department of Human Resources or legitimated the child pursuant to the North Carolina General Statutes 49-10, or filed a petition for this specific purpose; or legitimated the child by marriage to the mother of the child; or provided substantial financial support or consistent care with respect to the child and the mother.

*Id.* at 85-86, 611 S.E.2d at 472. On appeal, the father challenged the trial court's finding on the basis that it exceeded the stipulation made by his attorney. This Court agreed, finding that "the stipulation made by respondent's attorney did not encompass all of the elements attributed to it by the trial court." *Id.* at 86, 611 S.E.2d at 472. This Court noted, however,

> If respondent's attorney had, in fact, stipulated to all of the facts the trial court found her to have stipulated to, there would have been no need for further findings of fact on the issue of whether grounds existed to terminate respondent's parental rights.

*Id.* at 86, 611 S.E.2d at 472.

In *A.R.*, the trial court similarly terminated the father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5). However, in contrast to *I.S.*, this Court found that there was sufficient evidence to support termination of the father's parental rights. In *A.R.*, at the termination hearing, the father was "clearly asked

whether he had ever filed an affidavit to establish his paternity[.]" The father replied that he had not. Based on *I.S.*, this Court concluded in *A.R.* that respondent's testimony that he had not filed the affidavit was sufficient to support the trial court's conclusion that grounds existed to terminate his parental rights based on N.C. Gen. Stat. § 7B-1111(a)(5). *See A.R.*, 2012 WL 5864673 at *3 ("By stating that a stipulation would be sufficient to support a conclusion of failure to legitimate pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), the Court necessarily implied that admission into evidence of the certified reply from the Department of Health and Human Services regarding whether the father had filed an affidavit of paternity is not a strict requirement, and the father's failure to file the affidavit could be proved by other means.") citing *I.S.*, 170 N.C. App. at 86, 611 S.E.2d at 472)).

Here, the trial court solely found that respondent "is not contesting the fact that he is the biological father of [Brett], although he has never legitimized the juvenile or established paternity through judicial proceedings." However, no evidence was presented, nor any finding made, regarding the filing of an affidavit of paternity. Petitioner cites the pre-trial hearing in which the trial court questioned the parties regarding Brett's paternity, and claims that respondent stipulated that paternity had not been legally established. However, the transcript demonstrates that respondent's counsel merely conceded that respondent was the father, and that there was no objection to paternity. We note that the transcript reveals "no audible response" by

counsel or the parties to the trial court's question whether there were any stipulations.[3] We conclude, therefore, that there was no stipulation on the record concerning respondent's failure to legitimize Brett.

During the trial, respondent testified that he was Brett's father. He further testified that he did not see or sign Brett's birth certificate at the hospital following Brett's birth. Respondent was then asked the following questions by his attorney on direct examination:

> Q. What was your concern of your name not being on the birth certificate?
>
> A. My right to be able to see [Brett], [to be] there to watch him grow.
>
> Q. Is it your understanding if you weren't on the birth certificate that you [would be] unable to see [Brett[?
>
> THE COURT: Sustained as to the leading.
>
> Q. What was your understanding if your name was not on the birth certificate?
>
> A. That pretty much I had no rights, so it was her rules. You know, I didn't file nothing for the four years, but, I mean, I didn't want to drag him through the mud, pretty much.

[3] In cases such as this, where the transcript was prepared from a sound file on a compact disk, the monetary savings gained by substituting a mechanical audio recording system for a human court reporter may be penny wise and pound foolish. In any event, it bears repeating that Rule 9(c)(1) of our Rules of Appellate Procedure provides counsel with means to present "the true sense of the evidence received" where the verbatim transcript reveals itself to be deficient. N.C. R. App. P 9(c)(1) (2016); *see also In re Clark*, 159 N.C. App. 75, 80-81, 582 S.E.2d 657, 660-61 (2003) (discussing the use of Rule 9(c)(1) to reconstruct the presentation of testimonial evidence offered at trial in a termination of parental rights action where the verbatim transcript failed to include certain portions of a witness's testimony).

As opposed to the father in *A.R.*, respondent was never clearly asked whether he had filed an affidavit to establish paternity. So respondent's testimony was insufficient to obviate petitioner's burden to prove that respondent had not filed an affidavit of paternity with DHHS. Accordingly, we conclude the trial court's conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) is unsupported.

We next consider the trial court's determination that respondent willfully abandoned Brett. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), the trial court may terminate parental rights where "[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. The word willful 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) (internal quotations and citations omitted). Factors to be considered include a parent's financial support for a child and "emotional contributions," such as "respondent's display of love, care and affection for his children." *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 510 (2000) (citations omitted). "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). Because petitioner filed her petition to terminate respondent's parental rights on 12 April 2017, the relevant time period for considering whether respondent abandoned Brett is 12 October 2016 to 12 April 2017.

Here, the trial court found that respondent: (1) had not visited with Brett since 2013; (2) provided only twenty dollars in financial support for Brett; (3) had not provided cards or gifts for Brett in several years; (4) made only sporadic contact with petitioner; and (5) failed to bring forth any sort of legal action seeking visitation or custody. However, even assuming *arguendo* that there is an evidentiary basis for these findings, the trial court's order wholly fails to address the willfulness of respondent's conduct, a required element under N.C. Gen. Stat. § 7B-1111(a)(7). *In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007); *see also D.M.O.*, __ N.C. App. at __, 794 S.E.2d at 861 ("Because '[w]ilful[l] intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]' a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent.") (citation omitted). Consequently, we conclude that the trial court failed to enter adequate findings of fact to demonstrate that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate respondent's parental rights.

Accordingly, we vacate the trial court's order and remand to the trial court for further findings and conclusions to support the grounds upon which it relied to terminate respondent's parental rights. "We leave to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009).

VACATED AND REMANDED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).