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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1022

Filed: 7 May 2019

Alleghany County, No. 16 JT 24

IN THE MATTER OF: TJML,
A MINOR JUVENILE

Appeal by Respondent-Appellant-Father from order entered 5 June 2018 by Judge Jeanie R. Houston in Alleghany County District Court. Heard in the Court of Appeals 12 March 2019.

Alleghany County Department of Social Services, by Anne C. Wright and John Benjamin "Jak" Reeves, for Petitioner-Appellee.

Richard Croutharmel for Respondent-Appellant.

Morgan & Carter PLLC, by Michelle F. Lynch, for Petitioner-Appellee Guardian ad Litem.

COLLINS, Judge.

Father appeals an order terminating his parental rights to his minor child based on five different statutory grounds. Because clear, cogent, and convincing evidence does not support the findings, and the findings do not support the conclusion that grounds exist to terminate Father's parental rights, we vacate the order and remand the case to the trial court.

I. Background

On 16 December 2016, the Alleghany County Department of Social Services (DSS) filed a juvenile petition alleging TJML (Toler)[1] was neglected.[2] DSS also took nonsecure custody of Toler on that date. The petition alleged Toler was exposed to substance abuse, improper supervision, improper remedial care, domestic violence, and an injurious environment. The petition further alleged that Toler's mother had signed multiple safety assessments but had been unable to abide by them. Father was not in the home when DSS took custody of Toler as Father had been incarcerated since 2 December 2016 as a result of a domestic violence incident involving Toler's mother.

At a seven-day hearing, custody of Toler was continued with DSS, and he was placed in the home of his paternal[3] aunt and uncle. Father attended the hearing. The trial court conducted a hearing on the petition on 17 January 2017 and by written order entered 20 February 2017, adjudicated Toler neglected. The trial court continued custody of Toler with DSS and ordered Father[4] to engage in services in order to work towards reunification. Although Father was present at the hearing, he

[1] A pseudonym is used to protect the identity of the minor child.

[2] The petition also alleged Toler's sister was neglected. However, Father is not the biological father of Toler's sister and she is not a subject of this appeal.

[3] The record sometimes refers to the "paternal" aunt and uncle while other times refers to the "maternal" aunt and uncle.

[4] The order applied to Toler's mother as well, but she is not a party to this appeal.

was incarcerated and was not granted any visitation while incarcerated. Father was released from jail on 23 January 2017.

On 2 February 2017, Father met with DSS and entered into an Out-of-Home Family Services Agreement (Plan). According to the Plan, Father was to maintain stable housing, maintain stable employment and income, refrain from substance use and criminal activity, attend a substance abuse assessment by 2 May 2017, and comply with random drug screens.

A review hearing was conducted on 16 May 2017 with Father present. The trial court found that Father had failed to comply with the Plan by not obtaining an assessment, not making appointments, and testing positive for drugs. The trial court maintained custody of Toler with DSS and ordered the permanent plan as reunification with his parents, with an alternative plan of guardianship. In July 2017, Father was arrested on an outstanding warrant from December 2016 and incarcerated.

A permanency planning review hearing was held on 15 August 2017. Father had been incarcerated since July and was not present at the hearing. The trial court found that no one had heard from Father since 10 July 2017. By order entered 5 September 2017, the trial court continued custody of Toler with DSS, ceased reunification efforts with Father, and changed Toler's permanent plan to termination of parental rights.

On 31 October 2017, DSS filed a termination of parental rights (TPR) petition. On 21 November 2017, a permanency planning review hearing was held. The trial court again found that no one had heard from Father since 10 July 2017. The trial court continued custody of Toler with DSS and continued Toler's permanent plan as termination of parental rights.

Shortly after the November 2017 review hearing, Father was released from incarceration. Upon release, he moved to Kentucky to live with his sister and to be near other relatives. He remained at that residence throughout the TPR hearing process. In December 2017, Father enrolled in an outpatient substance abuse program in Kentucky. The addiction recovery program required Father to work towards obtaining his GED, and take financial education classes, job readiness training, professional skills classes, and parenting classes.

On approximately 29 January 2018, Father was served with the TPR petition and summons. On 23 March 2018, the trial court held a TPR hearing. By written order entered 5 June 2018,[5] the trial court terminated Father's parental rights to Toler. On 31 July 2018, Father filed notice of appeal from the TPR order.

II. Appellate Jurisdiction

[5] We note that the written order was entered more the 30 days after the termination and disposition hearing, in violation of N.C. Gen. Stat. § 7B-1109(e) (2018). Father has not argued prejudice as a result of this violation.

Father appeals the TPR order under N.C. Gen. Stat. § 7B-1001(a)(6) (2018). Pursuant to N.C. Gen. Stat. § 7B-1001(b) (2018) and N.C. R. App. P. 3.1(a) and (b) (2018), notice of appeal must be in writing, signed by both the appellant and his trial attorney, and filed and served within 30 days after entry of the appealed order.

On 23 March 2018, the trial court terminated Father's parental rights to Toler. On 4 May 2018, Father signed a notice of appeal given to him by his attorney. On 5 June 2018, the trial court entered the TPR order. Father's attorney lost track of the signed notice of appeal when he placed it in the wrong client file folder. After locating the misplaced document, the attorney "tried the appeal anyway" by filing the notice on 31 July 2018, despite knowing "the time to appeal had expired[.]" The attorney admits the "delay was entirely [his] fault." However, because Father did not file the appeal within 30 days from entry of the TPR order, but instead filed the notice of appeal 56 days after entry of the TPR order, the trial court dismissed Father's appeal on 5 October 2018.

Father has filed a petition for writ of *certiorari* with this Court, asking this Court to address the merits of Father's appeal. Our Rules of Appellate Procedure permit a writ of *certiorari* to be issued in this Court's discretion "in appropriate circumstances" to review lower court judgments and orders "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (2018). Because Father's failure to timely appeal resulted from his trial

attorney's actions, and because Father raises meritorious issues on appeal, we exercise our discretion and grant Father's petition for writ of *certiorari*. *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008) (granting writ of *certiorari* where there was no evidence that respondent contributed to the error and the consequences of the adjudication order were serious).

III. Discussion

A. Standard of Review

"Termination of parental rights is a two-step process." *In re S.N.*, 194 N.C. App. 142, 145, 669 S.E.2d 55, 58 (2008) (citation omitted). "In the [adjudication] phase of the termination hearing, the petitioner must show by clear, cogent[,] and convincing evidence that a statutory ground to terminate exists." *Id.* at 145-46, 669 S.E.2d at 58 (citation omitted). If the petitioner meets its burden with respect to a statutory ground, and the trial court concludes that the parent's rights may be terminated, then the trial court moves to the disposition phase of the termination hearing. In the disposition phase, the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004) (citation omitted). If the trial court so determines, it may terminate the parent's parental rights in its discretion. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

In reviewing an order terminating parental rights, this Court must determine whether the trial court's "findings of fact are supported by clear, cogent[,] and convincing evidence and whether these findings, in turn, support the conclusions of law." *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. "Clear, cogent[,] and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (1985) (citation omitted). The trial court's conclusions of law are reviewable *de novo*. *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59 (citation omitted). If the trial court finds a ground for termination, the trial court's decision whether to terminate parental rights is reviewed on appeal for abuse of discretion and will be reversed "only where it is manifestly unsupported by reason." *Id.* (quotation marks and citation omitted).

B. Grounds for Termination of Parental Rights

The trial court concluded that DSS "has proven by clear, cogent, and convincing evidence that grounds exist to terminate the parental rights of [Father]." To support this conclusion, the trial court made one relevant evidentiary finding of fact, which reads as follows:

> 10. On February 2 ,2017 [Father] formulated [an] Out-of-Home Family Services Agreement with the Petitioner. However, he has not complied with the recommendations. []Father does not have a permanent residence and has relocated to Kentucky. []Father was incarcerated during the course of the

> juvenile case due to drug related charges but has since been released. []Father has had no contact with the Petitioner since July 10, 2017.

The trial court made ultimate findings of fact "that grounds exist to terminate the parental rights terminated (sic) based on the following:" (a) neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2018); (b) failure to make reasonable progress, pursuant to § 7B-1111(a)(2) (2018); (c) failure to pay a reasonable portion of the juvenile's care, pursuant to § 7B-1111(a)(3) (2018); (d) dependency, pursuant to § 7B-1111(a)(6) (2018); and (e) willful abandonment, pursuant to § 7B-1111(a)(7) (2018).

The trial court's remaining findings of fact establish the court's jurisdiction (findings 1-6, 12-12d, and 15), recite verbatim allegations in the juvenile petition (findings 7 and 7a), recite verbatim findings from the adjudication order (findings 8-8d), concern Toler's mother's behavior (finding 9), recite verbatim findings in the permanency planning order (findings 11-11d), and find termination is in Toler's best interests (finding 14). While findings of fact reciting verbatim the petition allegations and prior order findings help establish the history and context of the case, they do not support the trial court's "independent determination" as to whether grounds exist for termination of Father's parental rights at the time of the hearing. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 233 (1984).

1. <u>Dependency</u>

Father first argues the trial court erred by terminating his parental rights for dependency because the findings of fact do not support a conclusion that he is incapable of providing for the proper care and supervision of Toler.

Parental rights may be terminated for dependency when

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C. Gen. Stat. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of . . . any . . . cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6). A dependent child is defined as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent . . . is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2018).

"In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re T.B.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (internal quotation marks and citations). Moreover, in addressing the parent's ability to provide care or supervision, the relevant determination is the parent's ability at the time of the termination hearing. *See In re Z.D.*, ___ N.C. App. ___, ___, 812 S.E.2d 668, 677 (2018) ("Petitioners failed to

present clear, cogent, and convincing evidence to support the trial court's finding that Respondent was *currently* incapable of caring for her son and that such incapability would continue for the foreseeable future." (emphasis added)).

The sole evidentiary finding of fact that could be construed as addressing dependency reads as follows:

> 10. On February 2, 2017 [Father] formulated [an] Out-of-Home Family Services Agreement with the Petitioner. However, he has not complied with the recommendations. []Father does not have a permanent residence and has relocated to Kentucky. []Father was incarcerated during the course of the juvenile case due to drug related charges but has since been released. []Father has had no contact with the Petitioner since July 10, 2017.

The trial court then made this ultimate finding of fact:

> 13. . . .
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> d. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), the parents are incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Furthermore, the parents do not have an appropriate alternative childcare arrangement.

We address the evidentiary support of record for each relevant portion of these findings.[6]

i. Compliance with the Out-of-Home Family Services Agreement

The Plan required Father to maintain stable housing (which the trial court referred to as "permanent residence"), refrain from substance use and criminal activity, attend random drug screens, and maintain stable employment and income.

Concerning the stable housing requirement, the DSS Child Protective Services Social Worker (Social Worker) testified that from December 2016 through February 2017, Father was incarcerated and therefore he was "unable to work the [P]lan[.]"[7] The Social Worker further testified that upon Father's release in February 2017, he had stable housing until "right before he was incarcerated again in July when [he] sold the house." The Social Worker offered no testimony on direct examination about Father's housing beyond July 2017.

Father was incarcerated from July 2017 through November 2017. Father testified that upon his release from jail, he moved to Kentucky to live with his sister and her husband, both of whom have no criminal history and are gainfully employed. Father had been living in his sister's home for the four months leading up to the TPR

[6] Although not directly relevant to this dependency analysis, the trial court found that Father "has had no contact with the Petitioner since July 10, 2017[,]" a period of more than eight months before the TPR hearing on 23 March 2018. However, the DSS Child Protective Services Social Worker acknowledged that she had been in contact with Father once in the six months preceding the hearing.

[7] Father did not enter into the Plan until 2 February 2017.

hearing, as the Social Worker acknowledged, and had been seeking out Kentucky Child Protective Services to request that they perform a home evaluation of his sister's residence. Father described the home as "remodeled, it's nice, it's three bedrooms. Nice like bonus -- like the garage is built in. It's really nice."

Regarding the requirement that Father refrain from substance use, at a review hearing on 16 May 2017, Father took a drug test at the request of the trial court which was positive for methamphetamines. The Social Worker testified that Father went to a substance abuse assessment on 26 May 2017 and a substance abuse group on 20 June 2017. The Social Worker further testified that, other than that, Father had not complied with his assessment and was not, to her knowledge, currently working a substance abuse assessment case plan with anyone. On appeal, DSS cites incidents from November and December 2016 to support the trial court's finding of fact. However, these incidents predated the February 2017 Plan and thus cannot support a finding that Father did not comply with the Plan.

Father testified that, after moving to Kentucky, he enrolled in an addiction recovery program. He was fully compliant with his probation in Kentucky and was attending multiple treatment and counseling programs three to four times per week. Additionally, he was taking GED classes twice a week. He was taking drug screens as a condition of his probation, and had not failed a single drug test.

Father introduced into evidence a letter from the Director of the addiction recovery program, which detailed Father's progress with his substance abuse issues. The Director wrote that Father's "commitment to the program has been above the 'norm,'" and that "he has taken advantage of several different resources we are able to offer." The Director further wrote that what separates Father from others is that "he has been willing to admit to his faults, learn from them, and has truly made some necessary changes in order to become a better person. He has done what it takes to change the trajectory of his life."

Regarding the requirement that Father refrain from criminal activity, evidence was presented that Father was criminally charged on 14 April 2017 with assault on a female, and was granted a prayer for judgment continued. Father was convicted of possession of drug paraphernalia on 11 July 2017, for an act that occurred on 5 May 2017.

The Social Worker characterized Father's July 2017 arrest on an outstanding warrant, issued in December of 2016, as a violation of the Plan requirement that Father refrain from criminal activity. However, upon redirect examination, the Social Worker admitted that Father had, in fact, not violated the Plan requirement with this arrest, as the warrant was issued in December of 2016 for an alleged offense committed before that date.

Concerning Father's employment and income, it was uncontradicted that Father was not employed at the time of the hearing. However, Father testified that he was unable to work due to major surgeries, but had applied for disability pay, attended the disability hearing to determine his eligibility, and was awaiting the ultimate decision on the disability award. He was also taking financial, job readiness, and parenting courses.

While the evidence is clear, cogent, and convincing that Defendant had not complied with most of the recommendations of the Plan between the time he entered the Plan in February 2017 and the time he was incarcerated in July 2017, the relevant determination was Father's *current* ability to provide proper care and supervision of Toler at the time of the termination hearing. *See In re Z.D.*, ___ N.C. App. at ___, 812 S.E.2d at 677. The evidence is not clear, cogent, and convincing that Defendant had not complied with the recommendations of the Plan between the time he was released from incarceration in November 2017 and the date of the TPR hearing in March 2018. Thus, the trial court's finding that Father had not complied with the recommendations of the Plan could not support its ultimate finding that Defendant was incapable of providing for the proper care and supervision of Toler "*at the time of the termination proceeding*." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. Moreover, given the lack of clear, cogent, and convincing evidence that Father was incapable of providing for the proper care and supervision of Toler at the time of the

termination proceeding, and the evidence of the positive trajectory of Father's behavior between November 2017 and the date of the TPR hearing in March 2018, the record could not support a finding that any "incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6).

ii. Appropriate Alternative Childcare Arrangement

The single evidentiary finding does not address whether Father had an appropriate alternative child care arrangement and the ultimate finding that Father does not have an appropriate alternative childcare arrangement is not supported by clear, cogent, and convincing evidence. "[I]n order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives." *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011). "Having an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement . . . ." *Id.* at 366, 708 S.E.2d at 198.

The Social Worker acknowledged at the TPR hearing that after the permanency planning hearing,[8] Father had suggested his sister, with whom he was living at the time of the TPR hearing, as a potential kinship placement. Father likewise testified that he desired his sister be considered for kinship placement, and further testified that he would be willing to remove himself from her home in order

[8] It is not clear to which permanency planning hearing the Social Worker was referring. Regardless, both permanency planning hearings occurred months before the TPR hearing.

that she be considered a placement for Toler. Father also testified that he was seeking out Kentucky Child Protective Services to request that they perform a home evaluation of his sister's residence. There is no record evidence that placement with Father's sister was unsuitable or even explored. *Cf. In re N.T.U.*, 234 N.C. App. 722, 735-36, 760 S.E.2d 49, 58-59 (2014) (respondent's three proposed caretakers for the minor child were deemed unsuitable after DSS vetted each one). Thus, clear, cogent, and convincing record evidence does not support a finding that Father does not have "an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-1111(a)(6).

As clear, cogent, and convincing evidence does not support the trial court's evidentiary finding or ultimate finding, and the evidentiary finding does not support the ultimate finding or a conclusion that Father was currently incapable of caring for his son and that such incapability would continue for the foreseeable future, the trial court erred in terminating Father's parental rights on this ground.

2. <u>Neglect</u>

Father next argues that the trial court failed to make sufficient findings of fact to support its conclusion that grounds existed to terminate his parental rights based on neglect. Specifically, Father argues that "the TPR order is lacking because it makes no findings concerning the probability of future neglect."

A trial court may terminate parental rights when "[t]he parent has . . . neglected the juvenile." N.C. Gen. Stat. § 7B-1111(a)(1). A neglected juvenile is one

who does not receive "proper care, supervision, or discipline" from the juvenile's parent; or "who has been abandoned"; or "who is not provided necessary medical care"; or "who is not provided necessary remedial care[.]" N.C. Gen. Stat. § 7B-101(15) (2018).

When considering whether grounds exist to terminate parental rights for neglect, if the parent has not had physical custody of the child for some period of time leading up to the TPR hearing, the trial court must assess the probability of future neglect. *Ballard*, 311 N.C. at 714, 319 S.E.2d at 231. "Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). "The trial court's order must reflect that the termination of parental rights for neglect was based on an independent determination of existing neglect or a determination that conditions exist which will in all probability precipitate a repetition of neglect." *In re Stewart Children*, 82 N.C. App. 651, 654, 347 S.E.2d 495, 497 (1986).

The sole finding of fact addressing neglect is the trial court's ultimate finding which reads: "The respondents have neglected the juvenile pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as that term is defined by N.C. Gen. Stat. § 7B-l01."

In this case, Father had not had physical custody of Toler for more than ten months preceding the TPR hearing. However, the trial court failed to make a finding of fact addressing the probability of future neglect. DSS offers the trial court's finding

of Father's failure to make progress completing his Plan as indicative of a likelihood of future neglect. However, this finding does not specifically and adequately address the likelihood of future neglect. Moreover, this finding is not supported by clear, cogent, and convincing evidence, as discussed above. DSS also argues that a portion of the ultimate finding of fact addressing dependency—"there is a reasonable probability that such incapability will continue for the foreseeable future"—is "tantamount to a finding that there would be a high probability of repetition of neglect[.]" However, this ultimate finding regarding Toler's dependency cannot suffice for an evidentiary or ultimate finding on the likelihood of future neglect. Moreover, this ultimate finding regarding Toler's dependency was not supported by evidentiary findings of fact based on clear, cogent, and convincing evidence, as discussed above.

We agree with DSS' ultimate concession that "[t]he trial court did not make an explicit finding of fact as to the probability of repetition of neglect." Moreover, there is insufficient record evidence to support a finding of a probability of repetition of neglect. Accordingly, the trial court erred in terminating Father's parental rights on this ground.

3. <u>Failure to Pay Financial Support</u>

Father next argues that the trial court failed to make sufficient findings of fact to support its conclusion that grounds existed to terminate his parental rights based

on his failure to pay financial support. Specifically, Father argues that the "trial court failed to make findings that [he] was able to pay some amount of financial support within his means in the six-month window of consideration."

Parental rights may be terminated when a child is placed in the custody of the department of social services and the respondent parent, "for a continuous period of six months immediately preceding the filing of the petition . . . willfully failed 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). "[T]here is no requirement that the trial court make a finding as to what specific amount of support would have constituted a 'reasonable portion' under the circumstances." *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000). However, the trial court is required to "make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period." *Id.* (citations omitted).

The sole finding of fact concerning Father's alleged failure to pay financial support consisted of this ultimate finding:

> 13. . . .
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> c. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(3), the juvenile has been placed in custody of Alleghany County Department of Social Services, a licensed child-placing agency, and the parent, for a continuous period of 6 months next preceding the filing of this

> action, has failed to pay a reasonable portion for the care of the juvenile despite having the ability to do so.

The trial court failed to make any evidentiary finding that Father was able to pay some amount greater than zero during the relevant time period. DSS concedes that "the trial court did not make an explicit finding that Respondent Father paid zero towards Toler's care though the evidence would support such a finding." We disagree that the record contains clear, cogent, and convincing evidence that Father paid no support during the relevant period or that Father was able to pay more than zero. The Social Worker admitted she had never asked Toler's aunt or uncle if Father had paid support, and only responded, "Not to my knowledge[,]" when asked if Father had paid support. As the trial court failed to make any evidentiary finding that Father was able to pay some amount greater than zero during the relevant time period, the trial court erred in terminating Father's parental rights on this ground.

4. <u>Willful Failure to Make Progress to Reunify</u>

Father next argues that his parental rights could not be terminated for failure to make reasonable progress towards unification because Toler had not been placed out of his home for more than 12 months prior to DSS' filing the TPR petition.

Parental rights may be terminated if the "parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the

circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2). The Social Worker testified at the TPR hearing that Toler had remained in DSS' custody for more than 12 months preceding the filing of this TPR. However, Toler was removed from his parents' home on 16 December 2016 and DSS filed the TPR petition ten-and-a-half months later, on 31 October 2017. As conceded by DSS on appeal, the trial court erred in terminating Father's rights on the ground of willful failure to make reasonable progress because Toler's ten-and-a-half-month, out-of-home placement prior to DSS' filing the TPR petition fell short of the 12-month threshold requirement. The trial court thus erred in terminating Father's parental rights on this ground.

5. <u>Abandonment</u>

Father last argues that the trial court erred by terminating his parental rights for abandonment where there are no findings in the order concerning Father's willfulness.

Parental rights may be terminated for abandonment where "[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). 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 Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation

omitted). In the context of abandonment, "[w]illfulness is 'more than an intention to do a thing; there must also be purpose and deliberation.'" *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (quoting *In re Searle*, 82 N.C. App. at 275, 346 S.E.2d at 514). Because "[w]ilful intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]" *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962), "a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent." *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (citation omitted).

In this case, the sole finding of fact addressing abandonment is the trial court's ultimate finding of fact which reads:

> 13. . . .
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> e. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) Respondents have willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of this petition.

The trial court made no evidentiary findings to support this ultimate finding of willful abandonment. DSS cites on appeal the trial court's finding that "Father has had no contact with the Petitioner since July 10, 2017" as support for the ultimate finding of willful abandonment. However, Father's lack of contact with Petitioner (DSS) is not supported by the record where the Social Worker acknowledged that she had been in

contact with Father in the six months preceding the hearing. Moreover, the finding does not address Father's contact with Toler and does not address the willfulness of Father's actions or inactions. Accordingly, the trial court erred in terminating Father's parental rights on this ground.

Conclusion

The trial court's relevant evidentiary finding of fact was not supported by clear, cogent, and convincing evidence. The trial court's ultimate findings of fact that grounds existed to terminate Father's parental rights under N.C. Gen. Stat. § 7B-1111 (a)(1), (2), (3), (6), and (7) were not supported by the evidentiary finding of fact or by clear, cogent, and convincing record evidence. The trial court's conclusion that DSS "has proven by clear, cogent, and convincing evidence that grounds exist to terminate the parental rights of [Father]" is thus not supported by the findings of fact. Accordingly, the trial court erred in terminating Father's parental rights.

We vacate the order terminating Father's parental rights and remand the case to the trial court to take additional evidence, in its discretion; make findings of fact supported by clear, cogent, and convincing record evidence; and make conclusions of law supported by its findings of fact. *In re D.R.B.*, 182 N.C. App. 733, 738-39, 643 S.E.2d 77, 81 (2007) (vacating and remanding termination order for entry of adequate findings of fact and conclusions of law to demonstrate grounds for termination and permitting the trial court to receive additional evidence on remand).

VACATED AND REMANDED.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).