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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-179

Filed: 17 March 2020

Mecklenburg County, No. 16 JT 456

IN THE MATTER OF: C.A.B.

Appeal by Respondent from order entered 20 November 2018 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. Heard in the Court of Appeals 18 February 2020.

Epperson Law Group, PLLC, by James L. Epperson and Amber R. Morris, for Petitioner-Appellee stepmother.

Robert W. Ewing for Respondent-Appellant mother.

No brief filed on behalf of guardian ad litem.

McGEE, Chief Judge.

Respondent, the mother of C.A.B., appeals from the trial court's order terminating her parental rights. This case is before this Court for a second time. A procedural and factual background can be found in our prior opinion in this case, *In re C.A.B.*, ___ N.C. App. ___, 812 S.E.2d 409, 2018 WL 1801945 (2018) (unpublished). In this appeal, Respondent contends that the trial court erred in terminating her

parental rights based on an adjudication of willful abandonment under N.C.G.S. § 7B-1111(a)(7) and neglect under N.C.G.S. § 7B-1111(a)(1). Because the trial court did not make adequate findings of fact regarding the willfulness of Respondent's lack of contact, we vacate the 20 November 2018 order terminating Respondent's parental rights and remand for specific findings consistent with this opinion.

I. Factual and Procedural History

C.A.B.'s biological father ("Father") executed a consent to adoption on or around 15 March 2016, consenting to C.A.B.'s adoption by her stepmother ("Petitioner"). Petitioner published notice of the pending adoption from 22 April 2016 to 6 May 2016. The publication set a deadline of 1 June 2016 for Respondent to respond.

Respondent filed a handwritten letter objecting to the adoption by Petitioner on 22 July 2016. In the objection, Respondent claimed she could not contact C.A.B. because Father had a restraining order against her for two years and Father "made it impossible" for Respondent's family members to contact C.A.B. Respondent appeared at the adoption proceeding in Charlotte on 12 September 2016 because, as she testified, she did not want "her parental right[s] to be terminated" and she "wanted to see [her] daughter more than anything else after not seeing her for such a long time."

Opinion of the Court

Petitioner filed a petition to terminate Respondent's parental rights on 22 September 2016. The petition asserted that grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1), (4), (7)¹ and alleged:

- (a) That Respondent/Biological mother has a significant history of violence and abused and neglected the minor child.
- (b) That the Respondent/Biological Mother has not provided any financial support or any consistent care or contact with respect to the juvenile and father.
- (c) The Respondent/Biological Mother has abandoned the minor child for in excess of more than six (6) months immediately preceding the filing of this Petition. In fact, it has been six years since she has had any contact with the minor child.

Respondent filed an answer to the petition on 28 October 2016. A hearing was held on the petition on 21 March 2017 in District Court, Mecklenburg County. The trial court entered an order on 21 July 2017 terminating Respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (willful abandonment). Respondent timely appealed to this Court.

By opinion dated 17 April 2018, this Court vacated the 21 July 2017 order terminating Respondent's parental rights and remanded the matter "to the trial court for further findings regarding Respondent's alleged willful abandonment of [C.A.B.]"

¹ The petition listed N.C.G.S. § 7B-1111(a)(1), (6), and (7) as the statutory grounds for termination. At the hearing, the parties and the court discussed the variance between the grounds listed in the petition and the evidence presented at trial.

In re C.A.B., 2018 WL 1801945 at *5. The trial court was advised it could conduct a new hearing and take additional evidence in its discretion. *Id.* The trial court, without taking any new evidence, entered an order on 20 November 2018 concluding grounds existed to terminate Respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7) (willful abandonment) and N.C.G.S. § 7B-1111(a)(1) (neglect) and determined that termination was in the best interest of C.A.B. Respondent appeals.

II. Analysis

Respondent asserts the trial court erred in terminating her parental rights based on an adjudication of willful abandonment under N.C.G.S. § 7B-1111(a)(7).

“This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law.” *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015). “Findings of fact supported by competent evidence are binding on appeal even though there may be evidence to the contrary.” *In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (citation omitted). “Unchallenged findings are binding on appeal.” *In re C.B.* 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016).

Parental rights may be terminated pursuant to N.C.G.S. § 7B-1111(a)(7) if “[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.G.S. § 7B-1111(a)(7)

(2017). “It has been held that if a parent withholds h[er] presence, h[er] love, h[er] care, the opportunity to display filial affection, and wil[l]fully 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). Further,

[a] judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her 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.

In re S.R.G., 195 N.C. App. at 87, 671 S.E.2d at 53. “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). “The willfulness of a parent’s conduct is a ‘question of fact to be determined from the evidence.’” *In re C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 (quoting *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 63 (2014)). The trial court’s findings of fact must “demonstrate that [a parent] had a ‘purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims’ to [the child].” *In re S.Z.H.*, 247 N.C. App. 254, 264, 785 S.E.2d 341, 348 (2016) (quoting *In re S.R.G.*, 195 N.C. App. at 87–88, 671 S.E.2d at 53).

In the present case, Petitioner filed the petition to terminate Respondent’s parental rights on 22 September 2016; therefore, the relevant six-month period for

assessing Respondent's actions was from 22 March 2016 to 22 September 2016. *See* N.C.G.S. § 7B-1111(a)(7). This Court noted in its first opinion that the trial court's findings in the 21 July 2017 termination order "fail[ed] to resolve a major conflict in the evidence—whether Respondent could contact [C.A.B.] during the relevant six-month period, despite the domestic violence protective orders." *In re C.A.B.*, 2018 WL 1801945 at *4. We explained that although "Respondent testified she did not contact [C.A.B.] due to the multiple domestic violence protective orders [Father] obtained against her[,] . . . the court made no findings regarding the protective orders, or the custody order, and any possible effect of the orders on Respondent's contact, or lack thereof, with [C.A.B.]." *Id.* Thus, we remanded to the trial court for "further findings regarding Respondent's alleged willful abandonment of [C.A.B.]" *Id.* at *5.

On remand, the trial court made the following findings of fact relating to the trial court's conclusion that Respondent willfully abandoned C.A.B.:

9. Father initiated a custody proceeding in Mecklenburg County which came on for trial on December 16, 2010. During the pendency of the custody proceedings, [Respondent] was detained in an Atlanta, Georgia jail for violation of U.S. Immigration laws. . . . At the time of the trial, [Respondent's] whereabouts were unknown. Father was awarded sole legal and physical custody of the minor child and [Respondent] was prohibited from having contact with the minor child pending further orders of the court.

10. . . . During this three-year period [2011-2014], [Respondent] failed to file any motion in the cause seeking visitation rights or modification of the January 6, 2011 custody order.

...

12. . . . Father obtained a Domestic Violence Protective Order in 2013 as a result of [Respondent] assaulting him and he moved for renewal of the order in 2014 because he continued to fear [Respondent]. The Domestic Violence Protective Order expired in 2016.

13. [Respondent] left the state of North Carolina in 2014 and has neither provided father her address nor engaged in any effort to establish a relationship with her daughter.

14. [Respondent] has had no contact whatsoever with the minor child since December 25, 2012. She asserts that the Domestic Violence Protective Order prohibited her from initiating contact with father and essentially cut her off from contact with the minor child. This argument fails as she could have filed a motion in the case seeking visitation rights or modification of the custody order entered January, 2011. The provisions of the protective order prohibiting contact with father expired in 2016.

15. In fact, [Respondent's] explanation for failing to provide any financial or material support since 2012 was that she "wanted nothing to do with him [father] at all." [Respondent's] lack of contact, support or efforts to establish visitation rights arose from her animosity toward father and her own chaotic life choices.

16. There was no evidence of any disability prohibiting [Respondent] from being gainfully employed and earning some income to provide support for the minor child. [Respondent] has failed since at least 2012 to provide any financial or material support for the maintenance of the minor child.

17. [Respondent's] explanation that she has had no contact with and has provided no material support to her daughter since 2012 was caused by a restraining order entered in

2012 has no merit and certainly does not absolve her of the opportunity or even the responsibility to initiate a reasonable proceeding in family court to establish visitation or custodial rights.

18. [Respondent's] conduct from 2009 through 2016 constitutes willful abandonment in that she has, without justification or excuse, withheld her presence and affection from her daughter and has failed to provide financial, material or emotional support of any kind for that entire period.

On remand, the trial court followed the mandate of this Court inasmuch as it found that "Father was awarded full custody of [C.A.B.] pursuant to an order entered January 6, 2011," which "prohibited [Respondent] from having contact with the minor child pending further orders of the court." The trial court also found that Father obtained a protective order in 2013, which was renewed in 2014, and expired in 2016. These findings are unchallenged by Respondent and are thus binding on appeal. *In re C.B.*, 245 N.C. App. at 199, 783 S.E.2d at 208.

The trial court made additional findings pertinent to the question of willful abandonment; however, just as we held in our prior decision, "[t]he findings do not address the willfulness of Respondent's lack of contact[.]" *In re C.A.B.*, 2018 WL 1801945 at *4. Although the trial court found Respondent has not had any contact with C.A.B. since 25 December 2012, has not filed a motion seeking visitation rights or a motion to modify the custody order, and has not provided financial support for C.A.B. since 2012, "the trial court's findings fail to adequately address the extent to

which [R]espondent[’s] acts or omissions were willful[.]” *In re N.D.A.*, 373 N.C. 71, 78, 833 S.E.2d 768, 774 (2019).

Notably, the trial court’s findings did not resolve the issue of “whether Respondent could contact [C.A.B.] during the relevant six-month period, despite the domestic violence protective orders[.]” which this Court deemed “a major conflict in the evidence” in its prior opinion. *In re C.A.B.*, 2018 WL 1801945 at *4. In Finding of Fact #14 and Finding of Fact #17, the trial court acknowledges Respondent’s argument that the protective order prohibited her from contacting C.A.B.; however, the court finds this argument meritless because Respondent was not “absolve[d] . . . of the opportunity or even the responsibility to initiate a reasonable proceeding in family court to establish visitation or custodial rights” and Respondent “could have filed a motion in the case seeking visitation rights or modification of the custody order entered January, 2011.” Thus, “the trial court’s findings make no mention of the issue of whether [R]espondent . . . had the ability to contact [C.A.B.] during the relevant six-month period.” *In re N.D.A.*, 373 N.C. at 79, 833 S.E.2d at 774. A finding regarding Respondent’s ability to contact C.A.B. pursuant to protective order is relevant in assessing the willfulness of Respondent’s conduct. *See In re I.R.L.*, ___ N.C. App. ___, ___, 823 S.E.2d 902, 905 (2019) (“The finding of willfulness was especially important given that the court found that during the entirety of the relevant six month period, Father was subject to a DVPO, in which he was ordered

to stay away from and have no contact with [the m]other, who had custody of [the child].”).

Moreover, in this Court’s prior opinion, we noted “the [21 July 2017] order contains no findings addressing Respondent’s 22 July 2016 *pro se* filing with the Office of the Clerk of Court for Mecklenburg County opposing Petitioner’s adoption.” *In re C.A.B.*, 2018 WL 1801945 at *4. On remand from this Court, however, the trial court failed to make any findings regarding Respondent’s *pro se* objection or Respondent’s appearance at the 12 September 2016 adoption proceeding, despite the evidence showing that both instances occurred in the relevant six-month period. Findings of fact regarding Respondent’s involvement in the adoption proceedings of C.A.B. are necessary for us to determine whether Respondent had a “purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [C.A.B.]” *In re S.R.G.*, 195 N.C. App. at 87–88, 671 S.E.2d at 53.

We recognize the additional findings the trial court entered on remand regarding its conclusion that Respondent willfully abandoned C.A.B. However, these findings are not adequate evidentiary findings of the willfulness of Respondent’s conduct. *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (“[A] trial court must make adequate evidentiary findings to support its ultimate finding of willful intent.”). This Court specifically identified in its prior opinion the findings of

fact the trial court should have made to support a finding of willfulness. *In re C.A.B.*, 2018 WL 1801945 at *4. We noted that the trial court made no findings “regarding the protective orders, or the custody order, and any possible effect of the orders on Respondent’s contact, or lack thereof, with [C.A.B.]” and “no findings addressing Respondent’s 22 July 2016 *pro se* filing with the Office of the Clerk of Court for Mecklenburg County, opposing Petitioner’s adoption petition.” *Id.* We explicitly stated that “[f]indings regarding this evidence presented to the trial court [are] necessary for meaningful appellate review.” *Id.* at *5. However, because the trial court did not comply with our mandate on remand, we are still unable to conduct meaningful appellate review and must vacate the 20 November 2018 order terminating Respondent’s parental rights and remand to the trial court. *See Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (“On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.” (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962))).

On remand, the trial court must make a finding establishing whether the protective order prohibited Respondent from contacting C.A.B. during the relevant period. The trial court must also make a finding regarding the relevance of Respondent’s *pro se* filing opposing Petitioner’s adoption petition for the purpose of

determining the willfulness of Respondent's conduct. Finally, the trial court must make a finding regarding the relevance of Respondent's appearance at Petitioner's adoption proceeding for the purpose of determining the willfulness of Respondent's conduct. In addition to these three mandated findings, the trial court may, in its discretion, make any additional findings regarding Respondent's alleged willful abandonment of C.A.B. and may conduct a new hearing and take additional evidence.

Because we vacate and remand the order, we need not address Respondent's contention that the trial court erred by finding neglect as an alternative ground for terminating Respondent's parental rights.

III. Conclusion

For the reasons discussed above, we vacate the 20 November 2018 order terminating Respondent's parental rights and remand to the trial court for further findings consistent with this opinion.

VACATED AND REMANDED.

Judges BRYANT concurs.

Judge HAMPSON concurs with separate opinion.

Report per Rule 30(e).

No. COA19-179 – *In re C.A.B.*

HAMPSON, Judge, concurring.

The majority opinion in this case vacates in its totality the trial court's Order on remand from this Court again terminating Respondent-Mother's parental rights and remands this matter for proceedings consistent with this Court's prior decision in the case. I fully concur in this result and the majority opinion's analysis of the trial court's failure to make the findings required by this Court's prior decision in this case as it relates to the trial court's re-adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7).

Because the majority opinion vacates the trial court's order in its entirety, the majority opinion does not address the trial court's adjudication of neglect under N.C. Gen. Stat. § 7B-1111(a)(1) as a new and separate ground to support termination of Respondent-Mother's parental rights. I write separately to emphasize the trial court's adjudication of neglect as a ground to terminate parental rights on remand from this Court was error—a conclusion firmly supported in this Court's decision in *In re S.R.G.*, 200 N.C. App. 594, 598, 684 S.E.2d 902, 905 (2009) (*S.R.G. II*).

As in this case, in *S.R.G.*, the trial court initially adjudicated grounds to terminate the respondent-mother's parental rights including, *inter alia*, on the basis of willful abandonment. On appeal, in a decision cited here by the majority opinion, this Court vacated and remanded that adjudication for additional findings to support

the adjudication of willful abandonment. *In re S.R.G.*, 195 N.C. App. 79, 87-88, 671 S.E.2d 47, 53 (2009) (*S.R.G. I*). On remand, as here, the trial court added a new adjudication of neglect as a separate basis to support termination of parental rights. In *S.R.G. II*, this Court vacated the adjudication of neglect on the basis the trial court's adjudication was precluded by the law of the case established by this Court's decision in *S.R.G. I* and the fact the trial court had not adjudicated neglect as a ground to terminate parental rights originally, which functionally operated as a determination neglect *did not* exist as a ground to terminate parental rights. This Court summarized its decision:

In *S.R.G.*, we reversed the trial court's order finding the existence of grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(7). *S.R.G.*, — N.C. App. at —, 671 S.E.2d at 53. Our decision reversing grounds for termination therefore became the law of the case. However, on remand, the trial court found that neglect existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) as grounds for termination. Such a finding was in error, based on the trial court's previous failure to find such a ground.

S.R.G. II, 200 N.C. App. at 598–99, 684 S.E.2d at 905.

In the case *sub judice*, it was, thus, error for the trial court to adjudicate neglect as grounds for termination based on the trial court's previous failure to find such a ground. On remand, the trial court should, therefore, not consider neglect as a separate ground for termination of parental rights.