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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-231

No. COA21-524

Filed 5 April 2022

Rowan County, No. 20 JT 54

IN THE MATTER OF: S.P.B.

Appeal by Respondent from order entered 30 June 2021 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 9 March 2022.

Wofford Burt, PLLC, by Rebecca B. Wofford and J. Huntington Wofford, for Petitioner-Appellee.

Sean P. Vitrano for Respondent-Appellant.

COLLINS, Judge.

¶ 1 Respondent-Father appeals an order terminating his parental rights to his minor child, "Stephen,"[1] pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) on the ground of willful abandonment. Father challenges various findings of fact and conclusions of law in the order. We conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and that the findings of fact support the trial court's legal conclusions and its determination to terminate Father's parental rights. We affirm the trial court's order.

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

I. Background

¶ 2 Father and Petitioner-Mother were married in 2013. In January 2019, while Mother was pregnant, the couple separated. In March 2019, the parties met to discuss a draft parenting agreement, detailing child support and custody arrangements for the child after his birth. At this meeting, Father advised Mother that his girlfriend was pregnant and that he would "not be able to dedicate the time to [Stephen] as contemplated in the parenting agreement." Mother told Father, "If you're not going to be a hundred percent in, then you need to think about not being involved at all." Father responded, "Okay, have him contact me when he is 18."

¶ 3 Father continued to communicate regularly with Mother about matters such as the financial terms of the separation agreement, but "did not discuss or attempt to discuss visitation, custody, or other roles that he would play in [Stephen]'s life once [he] was born." The parties entered into a separation and property agreement in May 2019. The agreement did not address child custody or child support.

¶ 4 Stephen was born on 23 June 2019. Father did not attend Stephen's birth or visit at the hospital. Father was in another state on a trip with his girlfriend on the day of Stephen's birth, despite having information that Stephen's due date was 26 June 2019. On 30 June 2019, Father texted Mother to ask if Stephen had been born, and how Stephen and Mother were doing. Mother did not respond. After that text, Father did not attempt to contact Mother, ask about Stephen, or visit Stephen, for

over eight months. Father did not provide, nor offer to provide, financial or material support for Stephen during this time.

¶ 5 In January 2020, Mother filed for divorce. Father did not counterclaim for custody or visitation. The divorce was granted in March 2020.

¶ 6 On 5 March 2020, Mother filed a Petition to terminate Father's parental rights to Stephen based on Father's willful abandonment of Stephen. The Petition was served on Father on 27 July 2020, and Father filed an answer on 1 September 2020. Father filed a pro se action for custody and visitation on 4 November 2020. The custody matter came on for hearing on 5 May 2021. Mother did not attend the hearing, and Father was granted temporary physical custody of Stephen. Mother moved to set aside the temporary custody order, and her motion was pending at the time of the hearing on Mother's Petition.

¶ 7 The Petition came on for hearing on 10 June 2021 and concluded on 17 June 2021.[2] By order entered 30 June 2021, the trial court found and concluded that the grounds enumerated in N.C. Gen. Stat. § 7B-1111(a)(7) exist in that "[Father]'s actions after the birth of [Stephen] up until the filing of the Petition, a period of more than six (6) months, indicate a willful determination to abandon" Stephen. The trial

[2] At the hearing, Father made a motion to dismiss under N.C. Gen. Stat. § 7B-1109(a), arguing the delay between the filing of the Petition and commencement of the hearing was prejudicial. The motion to dismiss was denied by order entered on 30 June 2021. Father does not appeal this order.

court further concluded that "termination of [Father]'s parental rights is in the best interests of" Stephen. The trial court thus granted Mother's Petition to terminate Father's parental rights.

¶ 8 Father timely appealed.

II. Discussion

¶ 9 A termination of parental rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). In the initial adjudication phase, the petitioner has the burden to "show by clear, cogent and convincing evidence that a statutory ground to terminate exists" under N.C. Gen. Stat. § 7B-1111(a). *Id.* (quotation marks and citation omitted).

¶ 10 If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which 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). If, in its discretion, the trial court determines that it is in the child's best interests, the trial court may then terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

¶ 11 In reviewing a trial court's order terminating parental rights, a reviewing court must first determine whether the adjudicatory "findings of fact are supported by clear, cogent and convincing evidence[.]" *In re S.N.*, 194 N.C. App. 142, 146, 669

S.E.2d 55, 58 (2008) (quotation marks and citation omitted). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt," and requires "evidence which should fully convince." *In re D.A.H.-C*, 227 N.C. App. at 493, 742 S.E.2d at 840 (quotation marks and citations omitted). If satisfied that the record contains clear, cogent, and convincing evidence supporting the findings of fact, the reviewing court must then determine whether the findings of fact support the trial court's conclusions of law. *In re S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. This Court reviews the trial court's legal conclusions de novo. *Id.* at 146, 669 S.E.2d at 59. Finally, with respect to the disposition phase, this Court reviews a trial court's decision that termination is in the best interests of the child for abuse of discretion, and will reverse only where the trial court's decision is "'manifestly unsupported by reason.'" *Id.* (*quoting Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

¶ 12 Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), a trial court "may terminate the parental rights upon a finding . . . [that 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) (2020).

> Abandonment has been defined as wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wi[l]lfully neglects to lend

> support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re Humphrey, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citation omitted). For this ground, "the findings [of fact] must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." *In re B.S.O.*, 234 N.C. App. 706, 710, 760 S.E.2d 59, 63 (2014) (citation and quotation marks omitted). "Wil[l]ful 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. Adjudication of Willful Abandonment

¶ 13 Father argues that the trial court erred by terminating Father's parental rights on the basis of willful abandonment.

¶ 14 The trial court made the following relevant findings of fact in support of its conclusion that Father willfully abandoned Stephen:

> 10. Between March 22, 2019, and the birth of [Stephen], [Father] communicated with [Mother] via text message numerous times about various matters, including financial arrangements contained within the separation agreement. In these messages, [Father] did not discuss or attempt to discuss visitation, custody, or other roles that he would play in [Stephen]'s life once [Stephen] was born.
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> 11. The week of [Stephen]'s due date, [Father] and his girlfriend went on a trip to the west coast.
>
> 12. [Stephen] was born on June 23, 2019. [Father] was not

in the state for the birth.

13. [Father] messaged [Mother] on June 30, 2019 to ask if [Stephen] had been born. This is the first time [Father] had inquired about the birth of [Stephen].

14. [Father] was in possession of [Mother]'s phone number, as well as contact information for members of [Mother]'s family.

15. [Father] did not attempt to ask [Mother] about [Stephen] after June 30, 2019, until after the filing of the Petition for TPR ("the Petition") on March 5, 2020.

16. [Father] did not attempt to see [Stephen] after [Stephen]'s birth until after the filing of the Petition.

17. [Father] did not offer or attempt to provide any financial support for [Stephen] after [his] birth up to the filing of the Petition.

18. [Mother] filed for absolute divorce on January 23, 2020.

19. [Father] did not attempt to counterclaim for custody or visitation of [Stephen] in response to the complaint for divorce.

. . . .

21. [Mother] filed the Petition on March 5, 2020, just over eight (8) months after [Stephen]'s birth and the last time [Father] communicated with her about [Stephen].

. . . .

37. The Court finds that [Mother] had sole physical custody of [Stephen] since birth. [Father] has never seen or interacted with [Stephen].

38. Neither [Father] nor any witnesses for [Father] contested that [Father] made no attempt to contact or see

> [Stephen] between the time of [Stephen]'s birth and the filing of the Petition.
>
> 39. [Father] contended that his phone number and social media was blocked by [Mother] during the time period leading up to the filing of the Petition. However, no evidence was presented to corroborate this assertion. [Father] did not attempt to contact [Mother] about [Stephen] during that time. [Father] also did not attempt to contact any family members of [Mother], despite having knowledge of their whereabouts and contact information during that time.
>
> 40. [Father] neither provided, nor offered to provide, any financial support for the child. While he was not under a court-ordered obligation to do so, the Court finds this behavior consistent with an intent to abandon [Stephen].
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> 41. [Father] only attempted to contact [Mother] about [Stephen] after receiving the Petition.
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> 42. [Father]'s behavior in the period leading up to the birth of the minor child indicated his intention to not be a part of the minor child's life.
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> 43. The Court finds that [Father]'s actions after the birth of [Stephen] up until the filing of the Petition, a period of more than six (6) months, indicate a willful determination to abandon [Stephen] and finds that the grounds enumerated in [N.C. Gen. Stat.] § 7B-1111(a)(7) exist.

¶ 15 Father first challenges portions of adjudicatory findings of fact 39, 40, and 43 as not being supported by the evidence.

1. Finding 39

¶ 16 Father challenges the portion of finding 39 which states, "[Father] contended that his phone number and social media was blocked by [Mother] during the time

period leading up to the filing of the Petition. However, no evidence was presented to corroborate this assertion." Father does not challenge the remaining portion of finding 39 which states, "[Father] did not attempt to contact [Mother] about [Stephen] during that time. [Father] also did not attempt to contact any family members of [Mother], despite having knowledge of their whereabouts and contact information during that time."

¶ 17 Even assuming *arguendo* that the evidence did not support the trial court's finding that there was "no evidence presented to corroborate" Father's assertion that Mother blocked his phone number and social media accounts, any such error was harmless in light of the unchallenged portion of that finding, as well other findings of fact. *See, e.g.*, *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[E]rroneous findings unnecessary to the determination [of grounds for termination] do not constitute reversible error[.]"). The challenged portion of finding 39 does not constitute reversible error.

2. Finding 40

¶ 18 Father challenges the portion of finding 40 which states that Father's failure to provide financial support for Stephen is "consistent with an intent to abandon the Minor Child[,]" arguing that "the record contains some evidence that [Father] might not have had an ability to pay [financial] support." Father does not challenge the remaining portion of finding 40 that he "neither provided, nor offered to provide, any

financial support for the child."

¶ 19 Father points to text messages between him and his girlfriend to show that during the determinative period he had insufficient funds to hire an attorney, and that in November 2020 he filed an affidavit of indigency in the custody action, which reported that his income exceeded his monthly expenses by only $275, and reported liabilities of $35,900.

¶ 20 However, evidence that Father did not have sufficient funds to hire an attorney is not evidence that Father did not have even minimal funds to provide support for Stephen. Moreover, the affidavit of indigency lists Father's income as $2,800 per month while his expenses were $2,525 per month, leaving him with a surplus of $275 per month. Furthermore, other record evidence shows that Father was employed throughout the determinative period, earning $2,900 per month; purchased a house in January 2020; and received approximately $15,000 in proceeds from the sale of the marital residence.

¶ 21 The record contains clear, cogent, and convincing evidence to support the finding that Father's failure to provide, or offer to provide, even minimal financial support for Stephen, evinces a willful intent to abandon the child. *See In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 16.

3. Finding 43

¶ 22 Father challenges finding 43 which states, "[Father]'s actions after the birth of

the Minor Child up until the filing of the Petition, a period of more than six (6) months, indicate a willful determination to abandon the Minor Child and finds that the grounds enumerated in [N.C. Gen. Stat.] § 7B-1111(a)(7) exist."

¶ 23 Finding 43, is not an evidentiary finding, but rather is an ultimate finding of fact. "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quotation marks and citation omitted). "[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).

¶ 24 "[A]lthough 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 N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (quotation marks and citation omitted).

¶ 25 As Mother filed the Petition on 5 March 2020, the determinative period is from 5 September 2019 to 5 March 2020. Father does not challenge the trial court's findings that, during the determinative period, Father did not ask Mother about Stephen; Father did not attempt to see Stephen; Father did not provide, nor offer to provide, financial support for Stephen; Father did not attempt to counterclaim for custody or visitation of Stephen in response to Mother's complaint for divorce; and

Father has *never* seen or interacted with Stephen. As these findings are unchallenged, they are binding on appeal.

¶ 26 These unchallenged findings of fact "clearly show that [Father's] actions are wholly inconsistent with a desire to maintain custody of" Stephen. *See In re B.S.O.*, 234 N.C. App. at 710, 760 S.E.2d at 63. The evidentiary findings thus support the ultimate finding that Father's actions during the determinative period "indicate a willful determination to abandon" Stephen.

¶ 27 Father contends that his failure to visit or otherwise communicate with Stephen for the first eight months of Stephen's life was the result of Mother blocking Father's phone number, blocking Father on social media platforms, moving without telling Father her new address, and "making it clear" she would not answer texts or calls from Father.

¶ 28 However, the trial court made the following unchallenged findings of fact:

> 10. Between March 22, 2019, and the birth of [Stephen], [Father] communicated with [Mother] via text message numerous times about various matters, including financial arrangements contained within the separation agreement. In these messages, [Father] did not discuss or attempt to discuss visitation, custody, or other roles that he would play in [Stephen]'s life once [Stephen] was born.
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> . . . .
>
> 14. [Father] was in possession of [Mother]'s phone number, as well as contact information for members of [Mother]'s family.

> 15. [Father] did not attempt to ask [Mother] about [Stephen] after June 30, 2019, until after the filing of the Petition for TPR ("the Petition") on March 5, 2020.
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> 16. [Father] did not attempt to see [Stephen] after [Stephen]'s birth until after the filing of the Petition.
>
> 17. [Father] did not offer or attempt to provide any financial support for [Stephen] after [his] birth up to the filing of the Petition.
>
> . . . .
>
> 39. . . . [Father] did not attempt to contact [Mother] about [Stephen] during that time. [Father] also did not attempt to contact any family members of [Mother], despite having knowledge of their whereabouts and contact information during that time.

Father's "failure to even attempt any form of contact or communication with [Stephen] gives rise to an inference that [he] acted willfully in abdicating [his] parental role, notwithstanding any personal animus between [him] and [Mother]." *In Re A.L.S.*, 374 N.C. 515, 522, 843 S.E.2d 89, 94 (2020).

¶ 29 Father also argues that his failure to support Stephen financially does not support a conclusion that he willfully abandoned Stephen where the trial court failed to make a specific finding that he was able to provide financial support during the determinative period. However, as discussed above, no record evidence supports Father's argument that he was not able to provide some support for Stephen. To the contrary, the record contains clear, cogent, and convincing evidence to support the finding that Father's failure to provide, or offer to provide, even minimal financial

support for Stephen, evinces a willful intent to abandon the child. *See In re G.G.M.*, 2021-NCSC-25, ¶ 16.

¶ 30 Father also argues that he did not visit Stephen because he believed that he was not permitted to visit under a term of the Separation Agreement that prevented him from visiting Mother without permission. Although the Separation Agreement did not allow Father to visit Mother unannounced, the order did not prohibit Father from contacting Stephen or requesting visits with him. Further, even if he believed that he was not allowed to visit Stephen, Father never attempted to challenge this provision. *See In re E.H.P.*, 372 N.C. 388, 394, 831 S.E.2d 49, 53 (2019) (rejecting Father's explanation that his lack of contact was the result of a "no-contact provision" in an existing temporary custody order, where Father took no action to change the provision or to otherwise request contact with the children).

¶ 31 Finally, Father argues that his contact o*utside* of the determinative six-month period shows his intent to be involved in Stephen's life. Father points to evidence that he dropped off gifts at Mother's house for Stephen's first birthday and to the finding that he filed for custody of Stephen in November 2020.

¶ 32 "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 months preceding the filing of the petition." *In re D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861 (quotation marks

and citations omitted). Thus, while the court may consider Father's subsequent efforts in seeking a relationship with Stephen to determine his credibility and intentions, Father's subsequent actions will not preclude a finding that he willfully abandoned Stephen if he did nothing to maintain or establish a relationship with Stephen during the determinative six-month period. *See In re B.S.O.*, 234 N.C. App. at 713 n.4, 760 S.E.2d at 65 n.4 (disregarding respondent-father's assertion that he had "close contact" with his children and the social worker prior to his deportation in determining whether he willfully abandoned the children, because it occurred outside the six-month period).

¶ 33 Here, in the six months preceding the filing of the Petition, Father did not ask Mother about Stephen, did not contact Stephen, did not attempt to see Stephen, and did not provide financial support for Stephen. Even considering Father's actions after the determinative period, the trial court's findings demonstrate that Father "willfully withheld his love, care, and affection from [Stephen] and that his conduct during the determinative six-month period constituted willful abandonment." *See In re C.B.C.*, 373 N.C. 16, 23, 832 S.E.2d 692, 697 (2019).

¶ 34 Father next argues that the unchallenged findings do not support the trial court's conclusion that respondent willfully abandoned the juvenile for more than six consecutive months prior to the filing of the petition, and the order should be vacated. However, for the reasons stated above, the challenged evidentiary findings of fact are

supported by the evidence. The evidentiary findings of fact support the trial court's ultimate finding of fact that "[Father]'s actions after the birth of [Stephen] up until the filing of the Petition, a period of more than six (6) months, indicate a willful determination to abandon [Stephen] and finds that the grounds enumerated in [N.C. Gen. Stat.] § 7B-1111(a)(7) exist." The evidentiary findings of fact and the ultimate findings of fact in turn support the trial court's conclusion that "Petitioner has demonstrated by clear, cogent, and convincing evidence that [Father] has willfully abandoned [Stephen] for more than six consecutive months prior to the filing of the Petition."

B. Dispositional Phase

¶ 35 Father next argues the trial court abused its discretion by concluding that terminating Father's parental rights was in Stephen's best interests.

¶ 36 In determining whether terminating a parent's rights is in the minor child's best interests, the court shall consider the following criteria and make written findings regarding those criteria that are relevant:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and

> the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2020).

¶ 37 Although the trial court must consider each of the factors in N.C. Gen. Stat. § 7B-1110(a), written findings of fact are required only "if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [trial] court." *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019) (quotation marks and citation omitted). "The trial court's dispositional findings are binding on appeal if supported by any competent evidence." *In re J.S.*, 374 N.C. 811, 822, 845 S.E.2d 66, 75 (2020). If the trial court determines that termination is in the child's best interests, it may terminate the parent's rights. *In re Howell*, 161 N.C. App. at 656, 589 S.E.2d at 161.

¶ 38 The trial court made the following findings of fact regarding Stephen's best interests:

> 44. The child's young age, two (2) years at the time of this order makes it imperative that a permanent and stable family situation is established as soon as possible.
>
> 45. [Mother]'s fiancé views [Stephen] as a son and demonstrates his intent to adopt him. [Stephen] has a strong bond with [Mother] and [her] fiancé.
>
> 46. [Stephen] refers to [Mother]'s parents as his 'gramma' and 'poppa.'

> 47. [Mother] has a strong family support system between her own parents, her fiancé, and her fiancé's family. This support system demonstrates the ability to provide a stable environment for the Minor Child.
>
> 48. Termination of [Father]'s parental rights will aid in the adoption of [Stephen] by [Mother]'s fiancé and will help achieve a permanent stable family unit for [Stephen].
>
> 49. [Father] has no relationship or bond with [Stephen]. No one in [Father]'s family has a relationship or bond with [Stephen].

The trial court thus made findings regarding Stephen's age, N.C. Gen. Stat. § 7B-1110(a)(1); whether the termination will aid in establishing a permanent plan for Stephen, *id.* § 7B-1110(a)(3); the total lack of a bond between Stephen and Father, *id.* § 7B-1110(a)(4); the quality of the relationship between Stephen and the members of the proposed permanent placement, including Mother, Mother's fiancé, and the fiancé's family, *id.* § 7B-1110(a)(5); and other relevant considerations, such as the support systems available to Mother, *id.* § 7B-1110(a)(6).

¶ 39 These findings support the trial court's conclusion that termination of Father's parental rights was in Stephen's best interests.

¶ 40 Father does not argue that the above findings are not supported by competent evidence, but rather, argues that "Stephen was already in a permanent and stable family situation with [Mother]. He was not in DSS custody, foster care, or any temporary situation where permanency planning was an issue. Adoption was not necessary to create stability." However, even disregarding the portions of the

findings addressing Stephen's potential adoption, the trial court's findings demonstrate that it considered the relevant factors under N.C. Gen. Stat. § 7B-1110(a) and made a reasoned decision based on those findings. *See In re Z.A.M.*, 374 N.C. 88, 101, 839 S.E.2d 792, 801 (2020) ("Because the trial court made sufficient dispositional findings and performed the proper analysis of the dispositional factors, we are satisfied the trial court's best interests' determination was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision."). The trial court did not abuse its discretion by concluding that terminating Father's parental rights was in Stephen's best interests.

III. Conclusion

¶ 41 The trial court's order contains sufficient findings based on clear, cogent, and convincing evidence to establish the existence of a statutory ground of willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) for terminating Father's parental rights. Further, the trial court did not abuse its discretion under N.C. Gen. Stat. § 7B-1110(a) by concluding it is in Stephen's best interests that Father's parental rights be terminated. Accordingly, we affirm the trial court's order terminating Father's parental rights.

AFFIRMED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).