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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-777

Filed 16 May 2023

Forsyth County, Nos. 21 JT 58, 59, 60

In the Matter of: R.D.R, K.J.R, J.E.R.

Appeal by Respondent-Father from order entered 21 July 2022 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 25 April 2023.

*Jeffrey L. Miller for Respondent-Appellant Father.*

*Scott Law Group, PLLC, by Harvey W. Barbee, Jr., for Petitioner-Appellee Mother.*

COLLINS, Judge.

Respondent-Father appeals an order terminating his parental rights to his three children, Ron, Kim, and Jim.<sup>1</sup> Father challenges several findings of fact and argues that the remaining findings were insufficient to support the trial court's conclusion that grounds existed to terminate Father's parental rights to his children.

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<sup>1</sup> Pseudonyms are used to protect the identities of the juveniles. See N.C. R. App. P. 42.



Father also argues that the trial court abused its discretion by determining that terminating Father's parental rights to his children was in the children's best interests.

The challenged findings of fact were not supported by clear, cogent, and convincing evidence, and the remaining findings did not support the trial court's conclusion that grounds existed to terminate Father's parental rights to his children. Accordingly, the trial court's order is reversed.

### **I. Background**

Father and Mother are the biological parents of three children, Ron (born 2013), Kim (born 2011), and Jim (born 2008). The parents were living together in Connecticut when Kim was born, but separated after a protective order was issued by the State of Connecticut in connection with domestic violence in their home. The parents continued an on-again, off-again relationship in Connecticut before moving to North Carolina in 2014, hoping for a fresh start. Shortly after moving to North Carolina, another incident of domestic violence occurred, following which Father left North Carolina.

In 2017, Father reached out to Mother expressing a desire to be closer with the children and build a relationship. Mother, who had begun dating her current spouse, agreed that Father could move back to North Carolina and attempt to establish a relationship with the children. Somewhere between 10 and 30 days after Father arrived in North Carolina, he moved back to Connecticut when Mother told him to



leave the home.

In 2019, Father was convicted of multiple criminal charges in Connecticut and was incarcerated from 1 January 2019 until he was released to a halfway house on 11 July 2021. While incarcerated, Father sent several letters to Mother and the children and, in December 2020, he requested video calls with the children. Mother responded via letter in February 2021, stating that the children did not want to engage in video calls with Father. Mother also explained that she planned to marry her current spouse and requested that Father relinquish his parental rights so that her current spouse could adopt the children. Father refused.

On 5 April 2021, Mother filed petitions to terminate Father's parental rights to each child, alleging:

Pursuant to N.C.G.S. §7B-1111(a)(1), the [Father] has neglected the juvenile within the meaning of N.C.G.S. §7B-101(a)(15). The [Father] has been incarcerated for most of the child's natural life for various violent criminal offenses. The [Father] has been convicted of crimes involving domestic violence. The [Father] resides in an environment that is injurious to the juvenile's welfare. The [Father] has failed to provide proper care, supervision, or discipline to the minor child and has abandoned the minor child.

. . . .

[Father] has willfully abandoned the said minor child for the six (6) consecutive months immediately preceding the filing of this petition. (N.C.G.S. §7B-1111(a)(7). The [Father] has made sporadic efforts at contact by writing letters while he has been incarcerated since 2019 but has failed to provide any care for the minor child and has failed to shoulder the burden of taking parental responsibility for



the care or well-being of the minor child.

Mother also alleged, in the petition concerning Jim:

The minor child has been placed in the [Mother's] care pursuant to [a Connecticut custody order]. The [Father] was ordered to pay support for the minor child in the amount of \$100.00 per week. For one year or greater immediately preceding the filing of this petition, the [Father] has willfully failed, without justification, to pay for the child's care and support as required by court order. The [Father's] parental rights are subject to termination pursuant to N.C.G.S. §7B-1111(a)(4).

On 9 July 2021, the court appointed a guardian *ad litem* ("GAL") for the children. The GAL interviewed Father, Mother, Mother's current spouse, and the children, and issued a written report on 19 May 2022.

The matter was heard on 24 May 2022. At the close of evidence, the trial court announced that it had found grounds to terminate Father's parental rights for neglect by abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and took the best interests determination under advisement. On 21 July 2022, the trial court issued a written order terminating Father's parental rights, wherein the trial court concluded that grounds existed to terminate Father's parental rights for neglect by abandonment as well as willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Father timely appealed.

## **II. Discussion**

### **A. Standard of Review**

"Our Juvenile Code provides for a two-step process for termination of parental



rights proceedings consisting of an adjudicatory stage and a dispositional stage.” *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796-97 (2020) (citation omitted). “At the adjudicatory stage, the petitioner bears the burden of proving by ‘clear, cogent, and convincing evidence’ the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes.” *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)).

We review a trial court’s adjudication of grounds to terminate parental rights “to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.” *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). “A trial court’s finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding.” *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citation omitted). Unchallenged findings of fact are “deemed supported by competent evidence and are binding on appeal.” *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). “The trial court’s conclusions of law are reviewable de novo on appeal.” *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

If the trial court concludes that the parent’s rights may be terminated, “the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights.” *In re D.L.W.*, 368



N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citations omitted). We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735, 740 (2020). Unchallenged dispositional findings are binding on appeal. *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019). A trial court's best interests determination "is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700 (citation omitted).

## **B. Challenged Findings of Fact**

Father challenges findings of fact 22, 36, and 37, in which the trial court found:

22. Once the [Mother] sent the [Father] a letter regarding her intention to pursue a termination of his rights, there was a response by the [Father] with letters to the [Mother] requesting video calls with the minor children. [Father's] request for video calls was denied by the [Mother], as the children indicated that they did not want to have video calls with [Father].

....

36. The [Father] has not filed for child custody or taken any other steps to be involved in the lives of the minor children.

37. [Father] has been inconsistent or absent for the entirety of the lives of all of the minor children.

Finding of fact 22 is not supported by clear, cogent, and convincing evidence in the record. The GAL's report indicates that Mother received Father's request for video calls in December 2020, before Mother's February 2021 letter to Father. Additionally, Mother's February 2021 letter states, "We explained to the kids about



the video call and phone call letter you sent.” Accordingly, finding of fact 22 is disregarded to the extent that it suggests Father’s request for video calls was in response to learning that Mother intended to pursue a termination of his rights.

While the portion of finding of fact 36 that “[Father] has not filed for child custody” is supported by the requisite evidence, the remainder of finding 36 is not. The trial court’s unchallenged, and thus binding, findings of fact indicate several instances where Father took steps to be involved with the minor children:

12. . . . In 2011, the parties had an on-again, off-again relationship and then later had the minor child, [Ron] in 2013.

13. The parties moved to North Carolina in 2014, hoping for a fresh start. . . . [T]he parties lived together for about three (3) months in 2014.

. . . .

16. In 2017, the [Father] contacted the [Mother] . . . . The parties resumed contact at that time, and it was agreed by the parties that the [Father] would move back to North Carolina from Connecticut.

. . . .

18. . . . . The [Father] moved in with [Mother and her current spouse] for somewhere between ten (10) and thirty (30) days. At the conclusion of this short period of time, the [Father] moved back to Connecticut after he was told to leave the home by [Mother].

. . . .

21. The [Father] sent four or five letters to the minor children in the time between the [Father’s] incarceration on or about January 1, 2019 and the filing of this action in February, 2021. During the relevant six-month period there were approximately two letters sent from prison. The letters were primarily directed to the [Mother] although



some references were made to the children.

Additionally, Mother testified that Father initiated contact in 2017 because “[h]e wanted to be closer with his kids and he wanted to build a relationship.” Both parties testified that Father stayed with the children while he was in North Carolina in 2017. In addition to the letters referenced in finding of fact 21, Father requested video calls with the children in December 2020. The GAL’s report also indicates that Father “made attempts over the years to stay in contact with the children[,]” noting that “[h]e has sent some letters and cards to them from prison but had never received any responses until he received the letters [in February 2021]. . . . [Father] reports that a letter he sent to [Jim] in 8.2019 was returned to him, marked ‘Return to Sender, Not Deliverable.’”

The trial court’s binding findings of fact, in addition to other uncontroverted evidence, do not support the conclusion that Father has taken no steps to be involved in the children’s lives. Accordingly, that portion of finding of fact 36 is disregarded.

For the same reasons, finding of fact 37 is likewise unsupported by clear, cogent, and convincing evidence in the record and is therefore disregarded to the extent that it states that Father was “absent for the entirety of the lives of all of the minor children.”

### **C. Grounds for Termination**

Father argues that the trial court erred because its findings of fact do not support its conclusion that grounds existed to terminate Father’s parental rights



under either N.C. Gen. Stat § 7B-1111(a)(1) or (a)(7).<sup>2</sup>

**1. Willful Abandonment**

A trial court may terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) upon a finding that the parent has “willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion” seeking to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7) (2022). “To find that a parent has willfully abandoned his or her child, the trial court must find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety.” *In re A.L.L.*, 376 N.C. 99, 110, 852 S.E.2d 1, 9 (2020) (quotation marks and citation omitted). “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation omitted). “[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 B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (citations omitted).

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<sup>2</sup> Father also argues that the trial court erred by issuing a written order finding grounds existed to terminate his parental rights under subsections (a)(1) and (a)(7) because the trial court only announced that grounds existed for termination under subsection (a)(1) at the hearing. This argument is without merit. *See In re O.D.S.*, 247 N.C. App. 711, 712, 723, 786 S.E.2d 410, 412, 418 (2016) (finding no error where written order included ground for termination not orally stated at the hearing).



Here, the trial court made no finding that Father had willfully abandoned his children during the six months immediately preceding the filing of the petition. Furthermore, willful abandonment during the relevant six-month period cannot be inferred from the trial court's evidentiary findings. The trial court made only three findings regarding the relevant six-month period:

9. In February of 2021, the [Mother] sent a letter to the [Father] asking if he would voluntarily terminate and relinquish his parental rights, and at that time the [Father] indicated that he would not relinquish his rights.

....

21. .... During the relevant six-month period there were approximately two letters sent from prison. The letters were primarily directed to the [Mother] although some references were made to the children.

22. Once the [Mother] sent the [Father] a letter regarding her intention to pursue a termination of his rights, there was a response by the [Father] with letters to the [Mother] requesting video calls with the minor children. [Father's] request for video calls was denied by the [Mother], as the children indicated that they did not want to have video calls with [Father].

As explained above, finding of fact 22 is not supported by clear, cogent, and convincing evidence to the extent that it represents Father's request for video calls as a response to Mother's letter regarding her intention to pursue a termination of Father's rights. Instead, the record indicates that Father made this request in December 2020.

These findings show only that Father wished to remain in contact with his children during the relevant six-month period and was prevented from doing so by Mother. Furthermore, Father was incarcerated for the entirety of the relevant



six-month period and was unable to do anything more than write letters and request video calls.<sup>3</sup> Accordingly, these findings cannot support an inference that Father “deliberately eschewed” his parental duties. *See In re A.L.L.*, 376 N.C. at 110, 852 S.E.2d at 9.<sup>4</sup> Thus, the trial court’s findings do not support its conclusion that grounds existed to terminate Father’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

## ***2. Neglect by Abandonment***

A trial court may terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) upon a finding that the parent has abused or neglected the juvenile within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (2022). Section 7B-101 defines a neglected individual, in relevant part, as a juvenile whose parent “[h]as abandoned the juvenile.” N.C. Gen. Stat. § 7B-101(15) (2022). Unlike willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7), the relevant time period for a finding of neglect by abandonment “is not limited to the six consecutive months immediately preceding the filing of the termination petition.” *In re D.T.H.*,

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<sup>3</sup> Our courts have repeatedly acknowledged that incarceration limits a parent’s opportunity to be involved with their children. *See, e.g., In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) (“Because respondent was incarcerated, there was little involvement he could have had beyond what he did—write letters to [his children] and inform DSS that he did not want his rights terminated.”); *see also In re D.M.O.*, 250 N.C. App. 570, 575-76, 794 S.E.2d 858, 862-63 (2016) (listing cases acknowledging “that the opportunities of an incarcerated parent to show affection for and associate with a child are limited”).

<sup>4</sup> Although a trial court may consider a parent’s conduct outside the six-month window in evaluating a parent’s credibility and intentions, none of Father’s conduct outside the six-month window suggests that his desire to be involved with his children was disingenuous.



378 N.C. 576, 588, 862 S.E.2d 651, 660 (2021) (citations omitted). Thus, a trial court “should consider the parent’s conduct over an extended period, up to and including the time of the termination hearing.” *In re K.C.T.*, 375 N.C. 592, 600, 850 S.E.2d 330, 336 (2020) (citation omitted). However, “[i]n order to terminate a parent’s rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all claims to the child as of the time of the termination hearing.” *In re D.T.H.*, 378 N.C. at 588, 862 S.E.2d at 660 (quotation marks and citations omitted).

Here, the trial court made no finding that Father had willfully abandoned his children at the time of the termination hearing. Furthermore, the findings of fact that the trial court did make do not support the conclusion that Father willfully abandoned his children.

The relevant unchallenged, and thus binding, findings of fact state the following:

9. In February of 2021, the [Mother] sent a letter to the [Father] asking if he would voluntarily terminate and relinquish his parental rights, and at the time the [Father] indicated that he would not relinquish his rights.

10. The minor child, [Jim], was six (6) months old when the [Father] was released from prison following a 2008 offense of home invasion.

11. The [Mother] and the [Father] lived together in Connecticut when the minor child, [Kim], was born in 2011, however, they lived together for less than one (1) year. . . .



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12. The parties ceased living together due to [] domestic violence and because the [Father's] erratic behaviors and absence from the home. In 2011, the parties had an on-again, off-again relationship and then later had the minor child, [Ron] in 2013.

13. The parties moved to North Carolina in 2014, hoping for a fresh start. The [Mother's] mother and brother moved to North Carolina as well, and the parties lived together for about three (3) months in 2014.

14. The parties ceased living together in 2014 when there was an incident of domestic violence. At this time, [Ron] was six (6) months old. . . . Following that incident, the [Father] left the state of North Carolina and had no contact with the [Mother] or the minor children.

15. From 2014 through 2017, the [Father] had no contact with the minor children and did not pay any child support to the [Mother] for the benefit of the minor children.

16. In 2017, the [Father] contacted the [Mother] . . . . The parties resumed contact at that time, and it was agreed by the parties that the [Father] would move back to North Carolina from Connecticut.

17. The [Mother] was agreeable to [Father] moving back to North Carolina and attempting to establish a relationship with the minor children at the time. . . .

18. . . . . The [Father] moved in with [Mother and her current spouse] for somewhere between ten (10) and thirty (30) days. At the conclusion of this short period of time, the [Father] moved back to Connecticut after he was told to leave the home by [Mother].

19. In 2019, to the [Father] was convicted on multiple charges in Connecticut, including third-degree assault, risk of injury to a child and disrupting the peace. . . .

20. The [Father] was arrested on the aforementioned charges on or about January 1, 2019.

21. The [Father] sent four or five letters to the minor children in the time between the [Father's] incarceration on or about January 1, 2019 and the filing of this action in



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February, 2021. During the relevant six-month period there were approximately two letters sent from prison. The letters were primarily directed to the [Mother] although some references were made to the children.

....

29. [Mother] moved in 2020 and did not update [Father] of her new address, however, the [Mother] has maintained the same email address and telephone number since 2014.

....

34. Despite [Father's] familiarity [with North Carolina], there were few to no visits between the [Father] and the minor children between 2014 and the filing of this action, although the majority of the time between 2017 to present, [Father] has been incarcerated either serving a jail sentence or awaiting trial on pending charges. When the [Father] was not incarcerated during this time period, he made little effort to involve himself in the lives of the children.

These findings indicate that, possibly excepting 2014-2017, Father was either involved in the children's lives, excluded from the children's lives by Mother, or incarcerated and unable to be involved in the children's lives. Furthermore, Father proactively requested video calls with his children in 2020, refused Mother's request that he voluntarily relinquish his parental rights in 2021, and attended the termination hearing in 2022 by phone despite his incarceration in Connecticut to testify in support of maintaining his parental rights. These actions leading up to and including the time of the termination hearing do not support the conclusion that Father "has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all claims to the child as of the time of the termination



hearing.” *See Id.* Thus, the trial court’s findings do not support its conclusion that grounds existed to terminate Father’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). In light of this conclusion, we need not address Father’s argument that the trial court abused its discretion by concluding that terminating Father’s parental rights was in the children’s best interests.

### **III. Conclusion**

Because the trial court did not find that Father willfully abandoned his children at any time, and because willful abandonment cannot be inferred from the trial court’s findings, the trial court’s order terminating Father’s parental rights is reversed.

REVERSED.

Judges TYSON and RIGGS concur.

Report per Rule 30(e).