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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-857

Filed 05 July 2023

Ashe County, Nos. 21-JT-21, 21-JT-22

IN THE MATTER OF: T.A.C. and I.M.C.

Appeal by Respondent-Father from Order entered 14 July 2022 by Judge David Von Byrd in Ashe County District Court. Heard in the Court of Appeals 23 May 2023.

Anné C. Wright for Petitioner-Appellee Mother.

Rebekah W. Davis for Respondent-Appellant Father.

John C. Johnston for Guardian Ad Litem no brief filed.

RIGGS, Judge.

Appellant-Father (“Father”) appeals from the trial court’s order terminating his parental rights to his minor children, T.A.C. and I.M.C. The trial court’s termination order, entered on 14 July 2022 in a privately instituted termination of parental rights action, was decided on grounds of abuse, neglect, and willful abandonment. Father contends the trial court’s findings of fact did not demonstrate he neglected or abused his children at the time of the termination hearing. He further asserts he did not willfully abandon his children because he was never afforded the opportunity or able to maintain a relationship with them. Finally, Father argues

that the trial court abused its discretion in its best interest determination when it failed to consider that the man who sought to adopt T.A.C. and I.M.C., did not pursue a relationship with his own biological child. After careful review of the record, we reverse the trial court's order terminating Father's parental rights.

I. FACTUAL AND PROCEDURAL HISTORY

Father and Appellee-Mother ("Mother") are the biological parents of T.A.C. (born in August of 2014) and I.M.C. (born in October of 2015).¹ The parents married in August of 2012 and divorced in October of 2020. Mother and Father have a history involving domestic violence with Father having a criminal record that identified him as the perpetrator. Father has been incarcerated since April 2016 for domestic violence, among other charges. Consequently, the children have resided primarily in Mother's care since their births.

On 22 November 2017, Father entered into a consent order for a Domestic Violence Protection Order ("DVPO") based on communications he directed toward Mother. One of the conditions in the DVPO, among others, was that Father was to have no contact or communication directly or indirectly (including by telephone, in-person, email, fax, pager, or gift-giving) with Mother, the children, or Mother's parents. The DVPO remained in effect until 22 November 2018.

Mother filed on 21 April 2021 a petition to terminate Father's parental rights

¹ Father's minor children T.A.C. and I.M.C., collectively, will be referred to as "the children."

to the children in which she alleged abuse, neglect, failure to pay child support, and willful abandonment of the children for more than three years. Father was served with the petition and summons on 6 May 2021. On 30 June 2021 and 30 November 2021, Father wrote two letters to the court in response to the petition for termination of his parental rights. In both letters, Father made the court aware that he was contesting termination of his parental rights.

On 23 February 2022, Father's trial counsel filed a motion to dismiss due to the adjudication hearing not being held within 90 days from the filing of the petition as required by statute. Five days later, on 28 February 2022, the trial court held a pretrial hearing and acknowledged Father's handwritten letters filed with the court as "responsive pleadings" to Mother's petition for termination of his parental rights. The trial court also denied Father's motion to dismiss at that pretrial hearing.

In the following month, on 25 March 2022, the trial court held an adjudication hearing and heard evidence regarding Mother's petition. Mother and Father were both present (Father was present virtually) and testified at the hearing. Mother testified that the last time Father contacted her was five or six years prior to the termination hearing. Mother also acknowledged her contact information had changed since the last time Father contacted her such that Father no longer had current contact information for the children. On cross examination, Mother testified that Father had sent her letters while he was incarcerated but did not specify a timeframe. Mother also testified she believed Father contacted the Department of

Social Services (“DSS”) regarding the children since he has been in prison. Mother stated she has not received any money or gifts for the children from Father since his incarceration.

After the termination hearing, the trial court entered an order on 14 July 2022 terminating Father’s parental rights to the children on grounds of abuse and neglect, and willful abandonment. The trial court concluded as a matter of law, it was in the children’s best interest that Father’s parental rights should be terminated, and Father timely appealed.

II. STANDARD OF REVIEW

The Juvenile Code provides 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) (internal quotations and citations omitted). This Court reviews the “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 I.J.W.*, 378 N.C. 17, 21, 859 S.E.2d 148, 151 (2021) (internal quotations and citations omitted).

The trial court’s findings of fact are conclusive on appeal when supported by

competent evidence, even if that evidence could sustain contrary findings. *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125 (2007) (internal quotations and citations omitted). While the trial court considers whether there is clear, cogent, and convincing evidence to support the findings of fact, this Court may not reweigh the evidence in making the determination of whether the findings are supported. *In re I.K.*, 377 N.C. 417, 426, 858 S.E.2d 607, 613 (2021). In termination of parental rights cases, a trial court's conclusions of law are reviewed de novo. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008). "The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion." *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019).

III. ANALYSIS

On appeal, Father challenges the trial court's findings and conclusions that grounds existed for termination of his parental rights under North Carolina General Statutes § 7B-1111(a)(7) for willful abandonment and § 7B-1111(a)(1) for abuse and neglect. First, Father contends the trial court erred when it concluded grounds existed to terminate his parental rights based upon evidence that he *willfully* abandoned the children—specifically, Father argues he was never afforded the opportunity to maintain a relationship with the children. We agree.

A. Challenged Findings

Father first argues many of the trial court's findings were in error because they were not supported by the evidence. Specifically, Father asserts the trial court's

findings do not support a finding for *willfulness* and the findings did not establish the correct dates for his incarceration. Father challenges the following relevant findings:

23. Since [Father's] most recent incarceration in October 2017 [he] has made no good faith attempt at contact with the . . . children and has not maintained a relationship with the children or financially supported the . . . children. This has been for a period well in excess of one year immediately preceding the filing of the petition in this matter. [Father] wrote letters to [Mother] several years ago and wrote no letters thereafter. [Mother's] contact information hasn't changed, and neither has her mother's contact information changed.

24. [Father] was incarcerated on or about October of 2017 and has remained incarcerated since that time. He expects to be released in October of 2022.

. . . .

28. [Father] has not participated in the care of the . . . children in the last year and has not had any meaningful interaction with the . . . children in well over one year. [Father] has not had any meaningful interaction with the . . . children for at least six consecutive months immediately preceding the filing of the petition in this matter and has not participated in the care of the . . . children for at least six consecutive months immediately preceding the filing of the petition in this matter.

. . . .

36. [Father], despite having the ability to do so, has willfully failed to pay any portion of the cost of care for the . . . children in excess of one year preceding the filing of this action, during which time the . . . children have been in the custody of . . . [Mother].

37. [Father] has at all times known the whereabouts of the . . . children and had access to the legal system, postal services, and the ability to access the . . . children via telephone or other means and/or pay child support.

. . . .

38. [Father] has not made any attempt to contact or see the . . .

children for at least the one (1) year next preceding the filing of this action but in no event since he assaulted [Mother] in October 2017.

39. [Father] has at all times known the whereabouts of the . . . children and been able to contact the . . . children and/or pay child support therefore. [Father] has further had access to significant funds which he could have put to use for [the] children, but voluntarily failed to do so.

40. [Father] has had access to mail and telephonic means of communication, and has contacted his family, but he has not contacted the . . . children. The domestic violence order against him expired in 2018.

. . . .

42. [Father] has not seen, inquired about, sent gifts or letters to, or in any other way contacted the [children] well in excess of a year prior to filing and hearing on this matter.

43. [Father] has not called or corresponded via letters, birthday or holiday cards to the . . . children in well over a year preceding the filing and hearing on this matter.

. . . .

44. [Father] has not seen, visited, or otherwise communicated with the . . . children or attempted to see, visit, or communicate with the . . . children in over a year prior to the hearing in this matter. The Court does not find credible his excuse that he did not think he could contact the children. His denial of acts of domestic violence that he was convicted of, and indeed his denial of doing anything inappropriate to [Mother], as well as inconsistent testimony about various things, demonstrate a lack of credibility.

. . . .

48. The Court finds that based on the foregoing, [Father] is subject to termination of his parental rights pursuant to N.C. Gen. Stat. §7B-1111(a)(7) as [Father] willfully abandoned the . . . [children].

In this review, we must address several discrepancies in the trial court's findings. *In re M.K.*, 241 N.C. App. 467, 471, 773 S.E.2d 535, 538 (2015) (noting that trial court's findings are required "to reflect a true reconciliation and adjudication of all facts in evidence to enable the appellate courts to review the trial court's conclusions.").

1. Findings of Fact 23, 24, and 38

In Finding of Fact 18, the trial court admitted into evidence Father's certified conviction record and incorporated it into the court's findings. In several of its findings, the trial court references Father's incarceration and domestic violence acts against Mother as occurring in October 2017, specifically, Findings of Fact 23, 24, and 38. However, the evidence before the trial court indicates that was not correct: Father's certified conviction record provides he was charged for assault on a female and communicating threats in April 2016, not October 2017. And while Father was incarcerated at the time of the termination hearing, there is no record evidence establishing when that sentence began, for which crime(s) he was imprisoned, and whether he spent time on supervised release while serving a suspended sentence.

2. Findings of Fact 23, 37, 39

Next, Findings of Fact 23, 37, and 39, of the trial court's findings indicate that Mother's contact information had not changed during Father's incarceration, and that Father "has at all times known the whereabouts" of the children. But Mother clearly testified that her contact information *has* changed since Father's

incarceration, and conceded as much in her brief.

3. Finding of Fact 35(c)

Lastly, the trial court's Finding of Fact 35(c) states that no responsive pleadings were filed by Father. However, at the pretrial hearing, the trial court acknowledged Father's handwritten letters filed with the court in response to the termination petition were being accepted by the court as responsive pleadings.

In each of these categories of contested facts, the trial court's findings were irreconcilably inconsistent with the uncontested evidence introduced at the termination hearing. Therefore, we hold that Findings of Fact 23, 24, 35(c), 37, 38 and 39 were not "supported by clear, cogent and convincing evidence." *In re I.J.W.*, 378 N.C. at 21, 859 S.E.2d at 151 (internal quotations and citations omitted).

B. Willful Abandonment

Article 11 of Chapter 7B (Juvenile Code) of the North Carolina General Statutes governs termination of parental rights proceedings. N.C. Gen. Stat. §§ 7B-1100-1111 (2021). Section 7B-1111 sets forth the guidelines trial courts must follow when a petition has been filed for termination of parental rights. N.C. Gen. Stat. § 7B-1111. For termination on grounds of abandonment, subsection 7B-1111(a)(7) requires a showing 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) (emphasis added).

“Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation.” *In re C.K.C.*, 263 N.C. App. 158, 161, 822 S.E.2d 741, 743 (2018) (citation omitted). “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.” *B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (internal quotation and citation omitted).

In reaching this decision, “the trial court must make findings of fact that show that the parent had a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child[.]” *In re A.J.P.*, 375 N.C. 516, 532, 849 S.E.3d 839, 852 (2020). “Because [willful] intent is an integral part of abandonment and is a question of fact to be determined from the evidence, a trial court must make adequate evidentiary findings to support its *ultimate* finding of willful intent.” *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (internal quotations and citations omitted) (emphasis added).

In this case, Mother filed her petition to terminate Father’s parental rights on 21 April 2021; therefore, the relevant six-month period preceding the filing of the termination petition is 20 October 2020 to 20 April 2021. Father has been incarcerated this entire time period. This created a barrier to Father spending time with the children, and combined with their young ages, created an additional barrier

to him contacting the children at all. The children were in Mother's care, and because she conceded that she changed her contact information, that barrier became greater and impacts our analysis of whether abandonment is *willful*. *In re D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861.

Mother testified that Father began writing her letters from jail following his arrest in 2016 to check on her and expressed that he hoped the children were "doing well." While the record in this matter largely centers around criminal record print outs (and the trial court's orders contains dates that are contradicted by the criminal records, which frustrates our review), it appears that these attempts to contact Mother regarding the children violated an earlier no contact order and resulted in subsequent criminal charges against Father, which were later dismissed.

At the termination hearing, Father stated that he loved his children very much and they were the reason why he was present in court to testify. When asked how Father ensured the children's well-being, Father stated that his family and friends would send him pictures of the children, and contact him while he was in prison to let him know how the children were doing. Father testified he was also able to verify the children's well-being through his mother and Ashe County DSS, because he contacted DSS from prison for a child well-being check. As Mother correctly concedes in her brief, an incarcerated parent's "options for showing affection are greatly limited, the [parent] will not be excused from showing interest in the child's welfare by *whatever means* available." *In re Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d

372, 376 (2003) (emphasis added). While the trial court did not find credible Father’s testimony that he did not think he could contact his children, the trial court did not discredit the specific pieces of testimony referenced above. As this Court has previously held, “[r]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge” absent an indication concerning “whether [the trial court] deemed the relevant portion of [the] testimony credible.” *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021).

The above, taken in conjunction with the erroneous findings and unresolved conflicts in the record evidence, lead us to conclude that the trial court did not have adequate evidentiary support to conclude that Father had “purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the [children].” *In re A.J.P.*, 375 N.C. at 532, 849 S.E.3d at 852. The private party petitioner, Mother in this case, bears the burden of establishing the evidence necessary to justify the State’s formal severing of the legal parent-child relationship, and petitioner did not carry this burden. N.C. Gen. Stat. § 7B-1109(f). “Because [willful] intent is an integral part of abandonment,” we hold that there are not “adequate evidentiary findings” to “support [the] ultimate finding of *willful* intent,” based on this record. *In re D.M.O.*, 250 N.C. App. at 572–73, 794 S.E.2d at 861 (cleaned up).

C. Termination Grounds for Abuse and Neglect

Next, Father contends that the trial court erred when it concluded grounds existed to terminate his parental rights to the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) for abuse and neglect. Father asserts the trial court's findings and evidence did not show the children were abused or neglected at the time of the termination hearing, or the likelihood of future neglect. *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016). We agree.

The trial court may terminate a parent's parental rights for abuse or neglect "if the court finds the juvenile to be . . . an abused or neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1). "An abused juvenile is one whose parent, among other things, inflicts upon the juvenile serious physical injury by other than accidental means, uses upon the juvenile cruel or grossly inappropriate procedures to modify behavior, or creates serious emotional damage to the juvenile evidenced by the juvenile's severe anxiety, depression, withdrawal, or aggressive behavior." *In re L.C.*, 181 N.C. App. 278, 285, 638 S.E.2d 638, 643 (2007). In reaching this conclusion, the trial court "must admit and consider all evidence of relevant circumstances or events which existed or occurred before the adjudication of abuse, as well as any evidence of changed conditions in light of the evidence of prior abuse and the probability of a repetition of that abuse." *Id.*

With respect to neglect, subsection § 7B-101 defines a neglected juvenile as: "[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or

caretaker . . . [h]as abandoned the juvenile [or] . . . [c]reates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15)(b), (e)(2021). When termination of parental rights is based upon evidence of neglect, subsection 7B-101(15) “requires a showing of neglect at the time of the termination hearing or, *if* the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.” *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167. (emphasis added).

This Court has held, “that evidence of a child’s continued exposure to domestic violence may constitute an environment injurious to the juvenile’s welfare . . . [w]here the evidence . . . shows such exposure *negatively impacts* the child, and places the child at risk, that evidence may support an adjudication of neglect.” *In re M.K.*, 241 N.C. App. 467, 475, 773 S.E.2d 535, 541 (2015) (emphasis added). “When determining whether future neglect is likely, the trial court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.” *In re Z.A.M.*, 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020).

Turning then to the findings, the trial court’s order terminating Father’s parental rights included the following pertinent findings for purposes of subsection 7B-1111(a)(1):

19. [Father] committed significant domestic violence in the presence of the . . . children. [Father] assaulted Mother by strangulation, which resulted in Mother losing

consciousness. On this occasion, [Mother's] family found her unconscious and wrapped in a covering with marks on her neck. [Father] was present and tried to use [I.M.C.] as a shield/barricade to prevent [Mother's] family from entering the home or assisting [Mother]. [Father] has assaulted and injured [Mother] in multiple ways.

20. [Father] was convicted of assault on a child under 12 as to the minor child . . . [T.A.C.]. This offense date was April 29, 2015.

47. The Court finds that based on the foregoing, [Father] is subject to termination of his parental rights pursuant to N.C. Gen. Stat. §7B-1111(a)(1) in that [Father] has abused and neglected the . . . [children] as defined in N.C. Gen Stat. §7B-101. [Father] assaulted [T.A.C.] and subjected him and [I.M.C.] to an environment injurious to their welfare. There is a likelihood of future neglect of the [children] by [Father] if the [children] were returned to [Father's] care.

1. Abuse

First, the trial court indicates that termination under (a)(1) is appropriate because the “Father has abused and neglected the [children] as defined in N.C. Gen. Stat. § 7B-101 . . . [when] Father assaulted [T.A.C.], and subjected him and [I.M.C.] to an environment injurious to their welfare.” While the trial court’s findings document Father’s criminal arrests for assaultive behavior towards Mother and the children that occurred almost six years prior to the filing of the termination petition, the court failed to explain how that rose to the level of the children being abused as defined in § 7B-101. Further, because Father has had no communications with the children and has been separated from the children since his arrest in April 2016, the

trial court is required to “consider . . . any evidence of changed conditions in light of the evidence of prior abuse and the probability of a *repetition* of that abuse.” *In re L.C.*, 181 N.C. App. at 285, 638 S.E.2d at 643 (emphasis added). The record does not reflect that the court was presented with any evidence, by Mother or from any other source, that: (1) Father has had access to the children; (2) the children have exhibited behavioral or emotional problems due to Father’s past abuse; or (3) the children sustained any serious physical injuries.

Indeed, at the adjudication hearing on 25 March 2022, as reflected in the 14 July 2022 termination order, the trial court found that the children were “healthy and functioning well,” despite Father’s past conduct towards Mother and the children in 2015 to 2016. *Cf. In re L.C.*, 181 N.C. App. at 285–86, 638 S.E.2d at 643 (holding that findings that a child exhibited symptoms from abuse such as emotional and behavioral problems were sufficient to support an adjudication of abuse based on the “probability of future abuse.”). Instead, the trial court summarily concluded that the children were abused without addressing the nature of the physical injury, if any, created by the 2015 and 2016 assaults, and did not address at all whether there existed the “probability of future abuse.” *In re L.C.*, 181 N.C. App. at 285–86, 638 S.E.2d at 643.

Because the trial court’s order failed to address or make findings concerning the “changed conditions in light of the evidence of prior abuse and the probability of a *repetition* of that abuse,” its conclusion that the children were abused within the

statutory meaning of section 7B-101 cannot stand. *In re L.C.*, 181 N.C. App. at 285–86, 638 S.E.2d at 643; *see also* N.C. Gen. Stat. § 7B-101(1)(b).

2. Neglect

The trial court’s analysis of neglect is similarly flawed. Although the trial court cursorily recites that “[t]here is a likelihood of future neglect of the [children] by [Father] if the [children] were returned to [Father’s] care,” it predicates that conclusion on past neglect and its insufficient analysis of abandonment, discussed above. Even granting that the environment created by Father’s past domestic abuse was one that was “injurious to [the children’s] welfare” and the past neglect showing is satisfied, the trial court failed to rest its prediction of likelihood of future neglect on sufficient evidence. Past acts of neglect are not sufficient to justify termination of parental rights when the parent and child have been separated for some period of time. *In re M.B.*, 382 N.C. 82, 87, 876 S.E.2d 260, 265 (2022).

Further, it appears that beyond past neglect, the trial court rests the future neglect on its findings that it mistakenly concluded established willful abandonment. Because we addressed that in detail above, we will not revisit that analysis except to make clear that where the record evidence is insufficient to establish willful abandonment, it is likewise inadequate to establish neglect by abandonment. *See, e.g., In re B.R.L.*, 379 N.C. 15, 22 n.6, 863 S.E.2d 763, 770 n.6 (“For the same reasons discussed above that grounds did not exist to terminate parental rights based on

willful abandonment, the findings do not support a conclusion of neglect by abandonment.”).

Finally, with respect to Father’s last issue raised in his brief, the background of Mother’s fiancée and the trial court’s best interest determination, because we find that the trial court’s findings do not justify a conclusion that the grounds for termination under §7B-1111(a)(1) or (7) were established, we do not need to reach this issue. *In re Z.A.M.*, 374 N.C. at 94, 839 S.E.2d 792, 796–97 (citation omitted).

Accordingly, we reverse the trial court’s order terminating Father’s parental rights to the children and remand this case to the District Court for further proceedings not inconsistent with this opinion. *In re D.T.H.*, 378 N.C. 576, 591–93, 862 S.E.2d 651, 662–63 (2021).

IV. CONCLUSION

For the foregoing reasons, we reverse the trial court’s 2022 Order Terminating Parental Rights.

REVERSED AND REMANDED.

Judges Hampson and Flood concur.

Report per Rule 30(e).