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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-402

Filed 19 December 2023

Perquimans County, No. 19 JT 012

IN THE MATTER OF: J.H.

Appeal by Father from orders entered 27 May 2022 by Judge Amber Davis in Perquimans County District Court. Heard in the Court of Appeals 3 October 2023.

High & Crowe, LLP, by William Crowe, for petitioner-appellee Perquimans County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant father.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Jackson W. Moore, Jr., for guardian ad litem.

MURPHY, Judge.

At the adjudication stage of a termination of parental rights hearing, the petitioner bears the burden to prove that a ground for termination of the parent's rights exists pursuant to N.C.G.S. § 7B-1111(a). When the petitioner fails to provide clear, cogent, and convincing evidence of a fact necessary to prove grounds for termination but the trial court nevertheless terminates the parent's rights, we reverse the order terminating the parent's rights. Petitioner Perquimans County

Department of Social Services (“DSS”) failed to provide clear, cogent, and convincing evidence that Father would be likely to neglect his minor child, Genevieve,¹ in the future if she were returned to his care or that Father’s proposed alternative caretaker for Genevieve was inappropriate. Accordingly, the trial court erred by terminating Father’s parental rights for neglect by failure to provide proper care pursuant to N.C.G.S. § 7B-1111(a)(1) and for dependency pursuant to N.C.G.S. § 7B-1111(a)(6). Furthermore, the trial court erred by terminating Father’s parental rights for neglect by abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) because neither this ground nor any facts sufficient to put Father on notice that his parental rights may be terminated for this ground were alleged in DSS’s petition.

BACKGROUND

Father appeals from the trial court’s order terminating his parental rights to his minor child, Genevieve. Genevieve was born in October 2016 to Father and Mother. At the time of Genevieve’s birth, Father was incarcerated and was unable to be present at the hospital. After his release, Father resided with Genevieve and Mother for approximately five months from late 2017 to early 2018 before Mother and Father separated. After Mother and Father’s separation, Father had weekend visits with Genevieve. Father continued these visits until June 2018, when he was incarcerated in Virginia.

¹ We use a pseudonym to protect the juvenile’s identity and for ease of reading.

Perquimans County DSS first became involved with Genevieve’s family after Genevieve escaped from her mother and grandmother’s supervision on two occasions. On the second occasion, Genevieve “was found in the woods far away from the home and only after she had been missing for quite a while.” After providing childproof locks to Mother, who refused to use them, and noting that Mother struggled with drug use and “refused to assist herself[,]” DSS opened its case in June 2019. On 15 August 2019, Genevieve escaped from the home for a third time while her mother and grandmother slept. On 16 August 2019, DSS filed its juvenile petition alleging Genevieve to be neglected and dependent and obtained non-secure custody of Genevieve. The trial court adjudicated Genevieve neglected on 15 November 2019.

During the pendency of the juvenile petition, Father was incarcerated. The trial court found that Father was incarcerated at the time of the petition’s filing and that it was “contrary to the welfare and safety of [Genevieve] to remain in the custody of [Mother] and [Father] due to the repeated inability of the parents to care for the child.” The trial court made no findings of fact regarding any attempt by DSS to contact Father in its adjudication order of neglect and dependency.

On 9 March 2020, the trial court entered its disposition order and conducted a review hearing. In its disposition order, the trial court ordered Father to “immediately contact [DSS] to complete an Out-Of-Home Agreement and begin his plan” upon his release from incarceration and found that Father had contacted DSS

in January 2020 to request that his sister-in-law, Genevieve’s maternal aunt, who resided in Virginia, be considered for Genevieve’s placement.

In January 2020, an Interstate Compact on the Placement of Children (“ICPC”) home study of Genevieve’s aunt was approved. However, she voluntarily withdrew from consideration. Father believed that Genevieve’s aunt had been denied placement and, because he believed that she had been the most suitable placement for Genevieve, did not submit his wife, Genevieve’s stepmother, as a viable alternative placement.² Thus, he agreed that Genevieve should remain in her foster home.

On 30 April 2020, the trial court entered its *Order on Review*. The trial court maintained its condition that Father contact DSS if he is released from incarceration and noted that he continued to be incarcerated. The trial court maintained a primary permanent plan of reunification but noted that Mother had made little progress towards reunification. On 6 August 2020, the trial court entered another order on review in which its references to Father remained identical.

Around or about September or October 2020, Father learned that Genevieve’s aunt had removed herself from consideration, not been denied, and asked that his

² The trial court refers to Genevieve’s stepmother as Father’s “estranged wife.” We have previously relied upon N.C.G.S. § 48-1-101(18)’s definition of “stepparent” when considering the relationship between a stepparent and a juvenile in Chapter 7B. *See* N.C.G.S. § 48-1-101(18) (2021) (defining “stepparent” as “an individual who is the spouse of the parent of a child, but who is not a legal parent of the child”); *see, e.g., In re M.S.*, 247 N.C. App. 89, 93 (2016). Accordingly, we refer to Father’s wife as both Genevieve’s stepmother and Father’s wife throughout this opinion.

wife, the mother and caretaker of Genevieve's eight-year-old half-sister, be considered as placement for Genevieve. After some communication difficulty occurred amongst Father's wife, Father, and DSS while attempting to secure a notarized letter from Father permitting DSS to discuss Genevieve with her stepmother, Father submitted the required letter. However, Father testified that, by that time, DSS informed his wife that "it was pretty much out of [its] hands." An employee for DSS testified that placement with a "nonrelative" such as Father's wife would require an ICPC and certification of Father's wife as a foster parent, a "very lengthy" process, and that DSS did not continue the process of approving Father's wife for Genevieve's placement after Father consented to continued placement with Genevieve's foster parents. The DSS employee testified as follows:

[GUARDIAN AD LITEM COUNSEL:] [I]f [DSS] were to seek an out-of-state placement, particularly say in Virginia with a nonrelative, would [DSS] be asking for an ICPC?

[DSS EMPLOYEE:] Yes. The only way to seek placement outside of the home -- outside of the state is with an ICPC[,] and that process is very lengthy.

[GAL COUNSEL:] And, in particular, Virginia, is that true that they require a match certified and certify as foster parents?

[DSS EMPLOYEE:] Yes.

[GAL COUNSEL:] And that takes a length of time; correct?

[DSS EMPLOYEE:] It does.

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[GAL COUNSEL:] So this is something that would have had to [have] been explored a long time ago.

[DSS EMPLOYEE:] Yes. And due to [Father's] statement to me that he wanted [Genevieve] to stay in the [foster] home, that's why we didn't pursue it.

[GAL COUNSEL:] Okay. So at this juncture it's really not feasible to begin that process; is it?

[DSS EMPLOYEE:] No.

[GAL COUNSEL:] Okay. So based on lack of alternative care plan or an alternative placement option that's suitable, there's really no other option here; is that true?

[DSS EMPLOYEE:] That's correct.

Despite difficulties in communicating from prison, Father maintained contact with Genevieve's foster parents via e-mail until approximately one month before his TPR hearing. Father also sent gifts to his wife through Angel Tree Foundation with the intent that they be forwarded to DSS and given to Genevieve, though he was unsure whether they had been. He coordinated communication between Genevieve's stepmother and foster parents; and, due to this coordination, Genevieve was able to play with her half-sister during a FaceTime call.

On 4 December 2020, the trial court entered its *Order on Permanency Planning*, in which it found that “[F]ather’s attorney stated he would make contact with his client in the Virginia Department of Corrections and see if he would be willing to relinquish his parental rights to [Genevieve].” The trial court relieved DSS

from its reunification efforts and established a new primary permanent plan of adoption, “perhaps by the child’s current foster parents.”

On 7 December 2020, Mother relinquished her parental rights to Genevieve.³ Father expressed that he wished for Genevieve to remain with her foster parents but did not wish to relinquish his parental rights to Genevieve. At this time, DSS anticipated Father would be released from incarceration in May 2024. Father, however, expected that a change in a Virginia statute would permit him to be released in October 2022.

On 5 February 2021, DSS filed a petition to terminate Father’s parental rights to Genevieve using language which mimicked that of N.C.G.S. § 7B-1111(a)(1), (2), (3), and (6),⁴ stating as follows:

³ Mother is, consequently, not a party to this appeal.

⁴ N.C.G.S. § 7B-1111(a)(1), (2), (3), and (6) read as follows:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of [N.C.G.S. §] 7B-101 or a neglected juvenile within the meaning of [N.C.G.S. §] 7B-101.

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

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As alleged below, there are facts sufficient to warrant a determination that grounds exist for the termination of parental rights:

a. The parents have neglected the child within the meaning of [N.C.G.S. §] 7B-101(15),^[5] in that the child does not

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

. . . .

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. §§ 7B-1111(a)(1), (2), (3), (6) (2022).

⁵ N.C.G.S. § 7B-101(15) defines “neglected juvenile,” in pertinent part, as:

Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:

- a. Does not provide proper care, supervision, or discipline.
- b. Has abandoned the juvenile.
- c. Has not provided or arranged for the provision of necessary medical or remedial care.
- d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
- e. Creates or allows to be created a living environment that is injurious to the juvenile’s welfare.

receive proper care and supervision from the parent and lives in an environment injurious to the juvenile's welfare in that:

(i) On [21 June] 2019, [DSS] was called to the home when the minor child had left the home unbeknownst to [Mother] and the sheriff's department was called to assist in finding her. The child was eventually found in the woods, unharmed, and [DSS] worked up a case plan with [Mother], including child-proof locks on the doors, home visits and drug screens.

(ii) Between [21 June and 16 August] 2019, [DSS] tried to follow up with [Mother] concerning her home visits and drug screens, but [Mother] moved several times without informing [DSS] of her new address. Further, when [DSS] was finally able to locate [Mother] and requested drug screens, [Mother] did not attend any of the scheduled drug screens.

(iii) On [16 August] 2019, after [Mother] received a continuance in her pending felony drug charges, [Mother] went home [and] took a nap[,] and the minor child was able to get out of the house again on her own and without the knowledge of [Mother].

(iv) When [DSS] went to the home to inquire as to the latest incident, the grandmother of the minor child informed [DSS] that although the family had installed the child-proof locks on the doors, they were not using the locks, and the child had wandered into the street and down the block before a neighbor finally removed the child from the roadway.

[See N.C.G.S. § 7B-1111(a)(1) (2022).]

f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under [N.C.G.S. §] 14-321.2.

g. Has placed the juvenile for care or adoption in violation of law.

N.C.G.S. § 7B-101(15) (2022).

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b. [Mother] and [F]ather have willfully, and not due solely to poverty, left the child in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting the conditions that led to the child's removal, in that, after over a year of working with [] Mother in the on-going DSS case, [Father] has never appeared to any court hearing nor been able to provide a suitable alternative to placement, and [] Mother has signed a Relinquishment.

[See N.C.G.S. § 7B-1111(a)(2) (2022).]

c. The child has been placed in the custody of [DSS], and [Mother] and [F]ather, for a continuous period of six months next preceding the filing of this Petition, have willfully failed for such period to pay a reasonable portion of the cost of care for the child although physically and financially able to do so, in that both parents are under no known disability, and are capable of gainful employment, but both [M]other and [F]ather have failed to provide monetary support.

[See N.C.G.S. § 7B-1111(a)(3) (2022).]

d. [Mother] and [F]ather are incapable of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of [N.C.G.S. §] 7B-101(9),⁶ and that there is a reasonable probability that

⁶ N.C.G.S. § 7B-101(9) defines "dependent juvenile" as follows:

A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-101(9) (2022).

such incapability will continue for the foreseeable future. The following facts support this ground:

(i) On [21 June] 2019, [DSS] was called to the home when the minor child had left the home unbeknownst to [Mother] and the sheriff's department was called to assist in finding her. The child was eventually found in the woods, unharmed, and [DSS] worked up a case plan with [Mother], including child-proof locks on the doors, home visits and drug screens.

(ii) Between [21 June and 16 August] 2019, [DSS] tried to follow up with [Mother] concerning her home visits and drug screens, but [Mother] moved several times without informing [DSS] of her new address. Further, when [DSS] was finally able to locate [Mother] and requested drug screens, [Mother] did not attend any of the scheduled drug screens.

(iii) On [16 August] 2019, after [Mother] received a continuance in her pending felony drug charges, [Mother] went home [and] took a nap[,] and the minor child was able to get out of the house again on her own and without the knowledge of [Mother].

(iv) When [DSS] went to the home to inquire as to the latest incident, the grandmother of the minor child informed [DSS] that although the family had installed the child-proof locks on the doors, they were not using the locks, and the child had wandered into the street and down the block before a neighbor finally removed the child from the roadway.

(v) [Mother] has signed a voluntary relinquishment after being unable to complete her case plan, and [Father] has remained incarcerated throughout the life of this case, with his earliest possible release date another three years away, [and] he has been unable to provide any alternative caseplan and has not seen or talked to the minor child since almost the child's birth.

[See N.C.G.S. § 7B-1111(a)(6) (2022).]

On 28 June 2021, the trial court presided over the hearing on DSS’s petition to terminate Father’s parental rights. On 3 August 2021, the trial court entered an order terminating his parental rights to Genevieve pursuant to N.C.G.S. § 7B-1111(a)(2) and (a)(7),⁷ which read as follows:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

....

(2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

....

(7) The 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)(2), (7) (2022). Father appealed; and, on 3 May 2022, we vacated and remanded the order terminating his parental rights because the trial court failed to “make appropriate findings of fact and conclusions of law regarding

⁷ Petitioner DSS had not alleged N.C.G.S. § 7B-1111(a)(7), abandonment, as a ground for terminating Father’s parental rights. *See In re J.H.*, COA 21-667, ___ N.C. App. ___ (2022), 871 S.E.2d 582, 2022 WL 1313581 at *5 (unpublished).

the grounds under [N.C.G.S. §] 7B-1111(a) that form the basis for [its] ultimate decision concerning [Father's] parental rights to [Genevieve]." *In re J.H.*, COA21-667, ___ N.C. App. ___ (2022), 871 S.E.2d 582, 2022 WL 1313581 at *5 (unpublished).

On remand, the trial court did not hold a new hearing and relied on the evidence it previously heard at the 28 June 2021 hearing. On 27 May 2022, the trial court entered amended adjudication and disposition orders for termination of Father's parental rights. The trial court concluded that DSS established sufficient grounds for terminating Father's parental rights to Genevieve under N.C.G.S. § 7B-1111(a)(6), dependency, and N.C.G.S. § 7B-1111(a)(1), neglect. Specifically, the trial court stated:

The Petitioner [DSS] established sufficient grounds to terminate the parental rights of [Father], in that:

- i. pursuant to N.C.G.S. § 7B-1111(a)(6), [Father] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S.] § 7B-101, there is a reasonable probability that the incapability will continue for the foreseeable future, and [Father] is unable or unavailable to parent the juvenile and . . . lacks an appropriate alternative child care arrangement; and
- ii. pursuant to N.C.G.S. § 7B-1111(a)(1), [Father] has willfully neglected the aforesaid juvenile, as defined by abandonment under [N.C.G.S.] § 7B-101(15)(b) and in addition by failing to provide proper care under [N.C.G.S.] § 7B-101(15)(a), among other factors.

Father timely appealed. We granted the GAL's motion to dismiss Father's appeal for untimely service of the record on 23 February 2023. However, we granted Father's *Petition for Writ of Certiorari* on 30 March 2023.

ANALYSIS

On appeal, Father argues that the trial court erred by terminating his parental rights to Genevieve because the trial court's findings of fact did not support its conclusions that Father's parental rights could be terminated under N.C.G.S. § 7B-1111(a)(1) and (a)(6). Specifically, Father argues that the trial court failed to make necessary findings to support its termination of his parental rights: (A) for neglect by failure to provide proper care pursuant to N.C.G.S. § 7B-1111(a)(1), that Father would be likely to neglect Genevieve in the future if she were returned to his care; (B) for neglect by abandonment pursuant to N.C.G.S. § 7B-1111(a)(1), that Father's actions demonstrated willfulness to relinquish his parental claims to Genevieve; and (C) for dependency pursuant to N.C.G.S. § 7B-1111(a)(6), that Genevieve's stepmother was not an appropriate alternative caretaker available to Father. To the extent that the trial court made such findings, Father argues DSS failed to present clear, cogent, and convincing evidence to support these findings.

We review the trial court's order terminating Father's parental rights by examining (1) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and (2) whether those findings of fact support the trial court's conclusions of law. *In re Z.A.M.*, 374 N.C. 88, 94-95 (2020); *In re T.H.T.*, 185

N.C. App. 337, 343 (2007), *aff'd as modified*, 362 N.C. 446 (2008). Unchallenged findings of fact are presumed to be supported by competent evidence, and consequently, they are considered binding on appeal. *In re K.H.*, 281 N.C. App. 259, 266 (2022); *accord Koufman v. Koufman*, 330 N.C. 93, 97 (1991). When a challenged finding of fact contains information which is not supported by clear and convincing evidence, we disregard that finding of fact. *See In re A.J.L.H.*, 384 N.C. 45, 48 (2023). If the trial court's findings of fact are insufficient to support its grounds for termination, we must reverse. *In re Z.G.J.*, 378 N.C. 500, 513 (2021).

In its order terminating Father's parental rights, the trial court made findings of fact that,

since [Father] admitted that he had no suitable family members available to take care of the child, and because he himself was incapable of providing for the proper care and supervision of the child as he was not scheduled for release from the Virginia Department of Corrections until at least May of 2024, [] there is a reasonable probability that his incapability will continue for the foreseeable future, and the [trial court] finds as a fact that [Father] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future, and [Father] lacks an appropriate alternative child care arrangement, in that [Father] never provided any possible alternative placement until the eve of this Termination Hearing, and the one name he finally provided was not a relative of the minor child.

The trial court further found that

[Father] has neglected the juvenile pursuant to N.C.G.S. § 7B-1111(a)(1), as defined by abandonment under [N.C.G.S.] § 7B-101(15)(b) and in addition by failing to provide proper care under [N.C.G.S. §] 7B-101(15)(a), among other factors.

On appeal, Father challenges both the trial court’s conclusions of law, *see supra Background*, and the above “findings of fact,” arguing that, in substance, they are more aptly classified as conclusions of law, reviewable de novo, or—in the alternative—a combination of findings of fact and conclusions of law.

A. Neglect

A trial court may terminate a parent’s parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) upon finding that the parent’s minor child is “a neglected juvenile within the meaning of [N.C.G.S. §] 7B-101.” N.C.G.S. § 7B-1111(a)(1) (2022). Under N.C.G.S. § 7B-101(15)(a)-(b), a “neglected juvenile” includes “[a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[]” or “[h]as abandoned the juvenile.” N.C.G.S. § 7B-101(15)(a)-(b) (2022). The trial court terminated Father’s parental rights to Genevieve pursuant to N.C.G.S. § 7B-1111(a)(1) upon concluding that Father neglected Genevieve by (1) failing to provide her with proper care and (2) abandoning her. Although both neglect by failure to provide proper care and neglect by abandonment are means of establishing grounds to terminate parental rights under N.C.G.S. § 7B-1111(a)(1), each of these theories requires distinct findings of fact evidencing Father’s neglect.

1. Neglect by Failure to Provide Proper Care

To terminate a parent's parental rights for neglect by failure to provide proper care when "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing," the trial court must find by "clear and convincing evidence" not only that the parent neglected his child in the past, but also that, if the child were returned to this parent, such neglect would likely continue in the future. *In re E.L.E.*, 243 N.C. App. 301, 307-08 (2015). If the trial court fails to make the "necessary and distinct determination of a likelihood of future neglect[.]" such failure "constitutes reversible error." *In re M.B.*, 382 N.C. 82, 87 (2022); *accord In re D.T.H.*, 378 N.C. 576, 589-90 (2021).

Father has been consistently incarcerated since 2019; therefore, Genevieve had been removed from his custody for a significant period of time prior to the termination hearing. Consequently, to terminate Father's parental rights under the neglect by failure to provide proper care theory of N.C.G.S. § 7B-1111(a)(1), the trial court must find both past neglect and likelihood of future neglect. Here, the trial court made no findings that Father would be likely to neglect Genevieve in the future if she were returned to his care after his release. The trial court's only finding purporting to anticipate Father's future behavior, finding of fact 32, reads, in relevant part:

[Father] is currently in prison again, with no evidence that he has been rehabilitated during his current incarceration

such that anything would change in his or the child's life once he is released, presumably in 2024.

This finding of fact is insufficient to constitute a “necessary and distinct determination of a likelihood of future neglect.” *In re M.B.*, 382 N.C. at 87.

Furthermore, a review of the record indicates that DSS presented no clear, cogent, and convincing evidence upon which the trial court could base a future neglect finding. No evidence in the record supports the trial court's finding that Father has not been rehabilitated while incarcerated, nor was Father required to present such evidence. Rather, “[a]t the adjudicatory stage, the petitioner [DSS] bears the burden of proving by clear, cogent, and convincing evidence the existence of . . . grounds for termination under [N.C.G.S. § 7B-1111(a)].” *In re Z.G.J.*, 378 at 506 (marks omitted). DSS failed to meet its burden of proving the existence of grounds to terminate Father's parental rights for neglect by failure to provide proper care, and the trial court erred by terminating Father's parental rights under this ground. Thus, we reverse this ground and proceed to analyze whether the trial court could nevertheless terminate Father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) under the theory of neglect by abandonment. *See In re K.H.*, 375 N.C. 610, 618 n. 5 (2020) (noting that, because no clear, cogent, and convincing evidence existed in the record “that could support findings of fact necessary to conclude that [the respondent's] parental rights could be terminated[,] . . . the proper disposition is to reverse rather than remand”).

2. Neglect by Abandonment

A trial court may also terminate a parent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) upon finding the juvenile to be neglected within the meaning of N.C.G.S. § 7B-101(15)(b). N.C.G.S. § 7B-1111(a)(1) (2022). As discussed above, the trial court terminated Father's parental rights to Genevieve pursuant to N.C.G.S. § 7B-1111(a)(1) using two definitions of neglect: neglect by failure to provide proper care, N.C.G.S. § 7B-101(15)(a), and neglect by abandonment, N.C.G.S. § 7B-101(15)(b).

“[T]o terminate a parent's rights on the ground of neglect by abandonment [pursuant to N.C.G.S. § 7B-1111(a)(1)], 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 parental claims to the child[.]” *In re N.D.A.*, 373 N.C. 71, 81 (2019) (marks omitted), *abrogated on other grounds by In re G.C.*, 384 N.C. 62 (2023). The trial court's findings may be based on the parent's relevant conduct at any time; however, the trial court must find the parent's willful intent to abandon his child “*as of the time of the termination hearing.*” *Id.* (emphasis added).

A trial court may also terminate a parent's parental rights on the ground of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). As with neglect by abandonment, “[t]o find abandonment, the trial court must find that the parent's conduct ‘manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[.]’ *but* the relevant inquiry is limited to the statutory

period of six months.” *In re E.Q.B.*, __ N.C. App. __, __, 891 S.E.2d 473, 476 (2023) (quoting *In re C.B.C.*, 373 N.C. 16, 19, 22 (2019)) (emphasis added).

Father contends that two of the trial court’s findings suggest the trial court operated under a misunderstanding of the differences between the grounds of neglect under N.C.G.S. § 7B-1111(a)(1) and abandonment under N.C.G.S. § 7B-1111(a)(7):

49. [Father] has not appeared at any court hearings prior to today’s hearing, he has not attended any of the meetings with [DSS] except one after the filing of the petition [to terminate his parental rights], and [Father] has done nothing to meaningfully participate in any stage of this process or in his daughter’s life during more than six months before the filing of this petition.

50. Although [Father] may not have been able to make progress in correcting the circumstances in [Mother’s] home which led to the removal of [Genevieve], there was no effort by [Father] to assist [DSS] or [Mother] or his child to prevent this petition for the termination of his parental rights from being filed; he remained absent, and neither he nor his family filed any custody action to intervene in this matter; and there was no effort by [Father] to attend any of the meetings or hearings over the phone prior to the filing of this petition.

Both N.C.G.S. § 7B-1111(a)(1) neglect by abandonment and N.C.G.S. § 7B-1111(a)(7) require a finding of “willful determination” to abandon the child. The difference in proving the two grounds lies in the relevant time period which the trial court may consider. *See* N.C.G.S. § 7B-1111(a)(1), (a)(7) (2022). Thus, the trial court’s consideration of grounds for “abandonment” does not indicate it misunderstood the grounds for termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

However, as Father notes, “[t]here was no allegation of abandonment in the petition [to terminate his parental rights].”

The trial court originally ordered that Father’s parental rights be terminated pursuant to N.C.G.S. § 7B-1111(a)(2) and N.C.G.S. § 7B-1111(a)(7). On appeal from this first order, we determined that the trial court made insufficient findings of fact and conclusions of law to permit meaningful appellate review and remanded to the trial court for further findings of fact and conclusions of law. *In re J.H.*, COA 21-667, ___ N.C. App. ___, (2022), 871 S.E.2d 582, 2022 WL 1313581 at *5 (unpublished). However, we noted that abandonment under N.C.G.S. § 7B-1111(a)(7) “was neither alleged by DSS in its termination petition nor addressed by the court’s findings of fact.” *Id.* We further noted:

This issue is not necessarily fatal to this ground for termination. Although it is well established that a termination of parental rights may not stand when a petition “alleges the existence of a particular statutory ground and the court finds the existence of a ground not cited in the petition,” a termination of parental rights may nevertheless stand if “the petition alleges facts to place the parent on notice that parental rights could be terminated on that ground.” *In re T.J.F.*, 230 N.C. App. 531, 532[] . . . (2013). In light of our disposition of this appeal, we express no opinion on the merits of this ground for termination.

Id. at *5 n. 3 (citation omitted). “The facts alleged [in the petition to terminate parental rights] need not be exhaustive or extensive[,] but they must be sufficient to put a party on notice as to what acts, omission or conditions are at issue.” *In re T.J.F.*, 230 N.C. App. at 532 (marks omitted). “When the petition alleges the existence of a

particular statutory ground and the court finds the existence of a ground not cited in the petition, termination of parental rights on that ground may not stand unless the petition alleges facts to place the parent on notice that [his] parental rights could be terminated on that ground.” *Id.* (citing *In re B.L.H.*, 190 N.C. App. 142, 147-48 (2008)).

Although DSS’s petition to terminate Father’s parental rights mimicked the language of N.C.G.S. § 7B-1111(a)(1), it limited its allegation of neglect “within the meaning of [N.C.G.S. §] 7B-101(15)” to an allegation “that the child does not receive proper care and supervision from the parent and lives in an environment injurious to the juvenile’s welfare” Furthermore, the facts contained in DSS’s petition were insufficient to place Father on notice that his parental rights could be terminated for neglect by abandonment. The trial court erred by terminating Father’s parental rights under the neglect by abandonment theory of N.C.G.S. § 7B-1111(a)(1), and we reverse this ground for termination. Finally, we proceed to determine whether the trial court could properly terminate Father’s parental rights under N.C.G.S. § 7B-1111(a)(6), dependency.

B. Dependency

A trial court may terminate a parent’s rights upon finding

[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S.] § 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future.

Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6) (2022). Under N.C.G.S. § 7B-101, a dependent juvenile is one who is

in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-101(9) (2022). To terminate a parent's rights pursuant to N.C.G.S. § 7B-1111(a)(6), the trial court must address both the parent's ability to provide care or supervision for the child and the availability of alternative child care arrangements to the parent. *In re K.R.C.*, 374 N.C. 849, 859 (2020).

The trial court made an unchallenged finding of fact that “[Father] is currently incarcerated in the State of Virginia [and] has been incarcerated since prior to the filing of the original Abuse, Neglect and Dependency petition on [6 August] 2019, and he will remain incarcerated for at least another year past this hearing [date, 28 June 2021].” This finding supports its conclusion that Father “is incapable of providing for the proper care and supervision of [Genevieve] . . . and that there is a reasonable probability that the incapability will continue for the foreseeable future.” N.C.G.S. § 7B-1111(a)(6) (2022); *see, e.g., In re L.R.S.*, 237 N.C. App. 16, 21 (2014) (“Thus, at the

time of the hearing[,] . . . [the] respondent was not scheduled to be released from federal custody for at least 13 additional months, and potentially faced up to 30 additional months imprisonment. [The respondent's] extended incarceration is clearly sufficient to constitute a condition that rendered her unable or unavailable to parent [the minor child].”).

However, no clear, cogent, and convincing evidence exists to support the trial court's finding that “[Father] lacks an appropriate alternative child care arrangement, in that [Father] never provided any possible alternative placement until the eve of this Termination Hearing, and the one name he finally provided was not a relative of the minor child[.]” Consequently, the trial court erred by concluding that grounds existed to terminate Father's parental rights to Genevieve pursuant to N.C.G.S. § 7B-1111(a)(6).

Our General Assembly has defined “relative” as “[a]n individual directly related to the juvenile by blood, *marriage*, or adoption” N.C.G.S. § 7B-101(18a) (2022) (emphasis added). Father provided his wife—both Genevieve's stepmother and the caretaker of Genevieve's half-sister—as a possible alternative placement for Genevieve. Furthermore, Father testified that he submitted Genevieve's stepmother to DSS for consideration as a placement option around or about September or October of 2020. The trial court found that Father also *followed up* on this proposal in May of 2021. The trial court held Father's termination of parental rights hearing on 28 June 2021. No information in the record contradicts the timeline of Father's original

submission of his wife for consideration. Father's proposal that DSS place Genevieve with her stepmother, around or about 8 or 9 months prior to the termination hearing, cannot be considered to have occurred on "the eve of [the] Termination Hearing." Furthermore, the DSS employee testified that DSS chose not to pursue an ICPC to determine whether Genevieve's stepmother would be an appropriate placement because it would be "very lengthy" and, "at this juncture[,] . . . really not feasible to begin that process[.]" DSS did not inquire into the appropriateness of Genevieve's stepmother as an alternative caretaker and consequently did not submit clear, cogent, and convincing evidence upon which the trial court could base its finding that Father lacked an appropriate alternative child care arrangement for Genevieve. Accordingly, we reverse this ground for termination. *See In re K.H.*, 375 N.C. at 618 n. 5.

CONCLUSION

The trial court erred by terminating Father's parental rights under N.C.G.S. § 7B-1111(a)(1) and (a)(6).

REVERSED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).