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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-974

Filed 21 May 2025

Davie County, Nos. 22 JT 000057-290 & 22 JT 000058-290

IN THE MATTER OF:
B.E.R., P.M.E.R.

Appeal by Respondent from order entered 25 July 2024 by Judge Jon W. Myers
in Davie County District Court. Heard in the Court of Appeals 20 March 2025.

*Wallace Morris Barwick, by Attorney Kimberly C. Benton, for Respondent–
Appellant Father.*

*Martin, Van Hoy & Raisbeck, LLP, by Attorney Cindy G. Ellis, for Petitioner–
Appellee Mother.*

MURRY, Judge.

Respondent Cody L. Roberts (Father) appeals from an order terminating his
parental rights to his minor children, B.E.R. (Brittany) and P.M.E.R. (Preston).¹ For
the reasons below, this Court affirms the order.

I. Background

¹ In accordance with North Carolina Rule of Appellate Procedure 42(b), we refer to the minor children by pseudonyms to protect their identities. *See* N.C. R. App. P. 42(b).

Father and Kaitlin Matlock (Mother) began a relationship in 2010 and had two children together, Brittany and Preston, born in 2015 and 2016, respectively. Father and Mother married on 20 October 2018 but separated four months later due to Father's methamphetamine use and domestic violence in the children's presence. Father served multiple prison sentences throughout the children's lives and was incarcerated for a parole violation as of Mother's petition.

On 26 February 2020, the trial court awarded Mother sole custody of the children and allowed Father supervised visitation rights to be exercised at Mother's sole discretion. As part of that custody arrangement, the trial court ordered Father to undergo regular drug testing. Mother obtained two domestic violence protective orders (DVPOs) against Father prohibiting him from contacting her or the children—first in 2019 and again in 2023. She and the trial court based the DVPOs on Father's refusal to obtain a drug test before visiting their children. Father has not visited Brittany or Preston since 5 March 2020, in part because of his incarceration up to that point for various assault charges against Mother and probation violations more generally, with certain charges still pending. After his release, Father contacted Mother to request visitation with the children. Mother responded with a copy of the DVPO, which Father interpreted as a prohibition against any visitation with the children. Father also claimed a good-faith belief that the latter DVPO prohibited him from contacting Mother or their children, including paying child support, in the six months prior to the filing of this action.

Mother and Father's child custody order required Father to pay child support but left the specific amount to be determined at a future hearing. Mother testified that she never asked the trial court to determine a specific child support amount because she did not believe that Father would pay, much less appear in court.

On 28 November 2022, Mother petitioned to terminate Father's parental rights to Brittany and Preston. On 25 July 2024, the trial court found statutory grounds under N.C.G.S. § 7B-1111(a) to terminate Father's parental rights based upon willful abandonment and failure to pay child support. It also held that the termination of Father's parental rights was in the best interests of the children. Father timely appealed this order on 21 August 2024.

II. Jurisdiction

Under N.C.G.S. § 7B-1001, this Court has jurisdiction to hear Father's appeal because it concerns an "order that terminates parental rights or denies a petition or motion to terminate parental rights." N.C.G.S. § 7B-1001(7) (2023).

III. Analysis

On appeal, Father argues that the trial court erred in finding that he had willfully failed to pay child support and that he had willfully abandoned his children. A trial court's judgment concerning grounds for termination of parental rights is reviewed to determine whether "clear, cogent, and convincing evidence" supports the trial court's findings of fact. *In re S.R.*, 384 N.C. 516, 520 (2023). If such evidence exists, the findings of fact are "conclusive even if the record contains evidence that

would support a contrary finding.” *Id.* The trial court’s conclusions of law are reviewed *de novo* to determine whether they are supported by the findings of fact. *Id.* For the reasons below, this Court holds that the trial court did not err on either count.

A. Willful Failure to Pay Child Support

Father argues that the trial court erred in finding that he willfully failed to pay child support because (1) he was not subject to a valid child-support order, and (2) even if he were subject to one, his failure to pay child support was not willful. Terminating parental rights based on nonpayment of child support requires the court to find that “an order or parental agreement requiring the payment of child support was in effect” and that the parent whose rights are sought to be terminated “had [willfully] not paid child support as required . . . within the year preceding the entry of the [termination] petition.” *In re S.T.*, 238 N.C. App. 149, 158–59 (2022); *see* N.C.G.S. § 7B-1111(a)(4).

Here, Father and Mother’s child-custody agreement states that Father must “pay child support in an amount consist[ent] with the North Carolina Child Support Guidelines but the specific amount is reserved for future hearings.” Father incorrectly claims that, because no amount is specified in the order, his failure to pay any amount cannot be regarded as a violation. Failure to pay any amount of child support whatsoever plainly violates an order that child support be paid, the specific amount to be determined notwithstanding. Nowhere in the child-support guidelines could Father have found a basis for concluding that he owed nothing at all. Mother’s

petition indicates as much when she states that Father “has not provided for *any* of the needs of [Brittany and Preston] and has been completely absent from [their] li[ves].” (Emphasis added.)

Nor can Father claim that his failure to pay child support was not willful. He cites *In re Adoption of Maynor*, 38 N.C. App. 724, 726 (1978), to assert that he “d[id] not act willfully in failing to make child[-]support payments” because he simply “lack[ed] the ability” to do so. In support of this claim, Father testified to earning only \$4.90 per week when he was employed in prison. He also claims to have believed that at least one DVPO prohibited him from paying child support during the six months prior to Mother’s petition filing, based on photos of the DVPO that she sent him. Because the child-support order did not specify an amount, Father would have had to demonstrate that he was unable to pay *any* amount to claim a general lack of ability to pay child support. On the contrary, he testified that he earned a weekly salary, however minimal. Father could have rectified his mistaken belief regarding the DVPO by examining the date on the order in the photos he received or by consulting with his attorney as to the meaning of “contact” under the order. His failure to seek clarification cannot now excuse his misapprehension of the DVPO. Thus, this Court holds that the trial court did not err by holding that Father willfully failed to pay his required child support.

B. Willful Abandonment

Father next argues that the trial court erred in finding that he willfully abandoned his children in the six months immediately preceding the filing of the termination petition. Our Supreme Court has stated that “[a]bandonment 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 C.B.C.*, 373 N.C. 16, 19 (2019). Thus, a trial court’s findings of fact must “clearly show” that the parent’s conduct is “wholly inconsistent with a desire to maintain custody of the child” and consists of “more than a failure of the parent to live up to [his] obligations as a parent in an appropriate fashion.” *In re S.R.G.*, 195 N.C. App. 79, 87 (2009) (quotation omitted). Because a parent’s incarceration cannot be the sole basis for terminating the parent’s rights, *see In re K.N.*, 373 N.C. 274, 282–84 (2020), termination decisions for incarcerated parties require a trial court to “recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children.” *In re A.G.D.*, 374 N.C. 317, 320 (2020).

Here, Father claims that his incarceration was “absolutely used as a shield” by the trial court to terminate his parental rights and that he provided “valid reasons” for not visiting his children. But the trial court did not terminate Father’s parental rights based on his incarceration status alone. It noted his “concerning” history of domestic violence and threats to his children. It also reasoned that Father was employed and had a commissary account with access to stationery and postage while

incarcerated, yet he did not contact the children through cards, letters, or phone calls since 2020. The order specified that Father's incarceration "is used as neither a sword nor a shield" and that he "acknowledges that his incarceration periods were lawful and a result of his own conduct." He also did not explain his failure to contact his children during his incarceration and his unwarranted misapprehension of the DVPO's enforceability. Father's series of repeated stints of incarceration, including currently pending charges at the time of the termination hearing, do not accord with the priorities and responsibilities of a parent. His incarceration alone does not prove willful abandonment but does contribute to a pattern of conduct "wholly inconsistent with a desire to maintain custody" of his children. *S.R.G.*, 195 N.C. App. at 87.

IV. Conclusion

For the reasons discussed above, this Court affirms the trial court's order terminating Father's parental rights to Brittany and Preston.

AFFIRMED.

Judge GORE concurs.

Judge HAMPSON dissents by separate opinion.

Report per Rule 30(e).

No. COA24-974 – *In re: B.E.R., P.M.E.R.*

HAMPSON, Judge, dissenting.

In my view this case is controlled by our Supreme Court’s decision in *In re S.R.*, 384 N.C. 516, 886 S.E.2d 166 (2023). Accordingly, I respectfully dissent.

First, with respect to grounds to terminate under Section 7B-1111(a)(4), this section is very specific:

[o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, *as required by the decree or custody agreement*.

N.C.G.S. § 7B-1111(a)(4) (2023) (emphasis added). As our Supreme Court has recognized, for this ground to be met based on failure to comply with a child support order, a petitioner “must show ‘the existence of a support order that was enforceable during the year before the termination petition was filed.’” *In re S.R.*, 384 N.C. at 521, 886 S.E.2d at 171–72 (2023) (quoting *In re C.L.H.*, 376 N.C. 614, 620, 853 S.E.2d 434 (2021)). In the absence of an enforceable support decree, this ground is not met. Here, there is no enforceable child support order, as that issue was not resolved by the parties’ custody order. Moreover, there has never been a determination of Respondent’s child support obligation under the Guidelines or otherwise based on his

income, ability to pay, or the children's needs. Indeed, there is no finding Respondent's failure to pay support was willful. *See id.* at 522–23, 886 S.E.2d at 172–73. Thus, the trial court's adjudication of willful failure to pay support under subsection (a)(4) is unsupported by the Record. Therefore, the trial court's adjudication of this ground should be reversed.

Second, the trial court's adjudication of willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) is unsupported by sufficient findings of fact. "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." *Id.* at 526, 886 S.E.2d at 175 (internal quotations omitted) (citation omitted). "Willful 'intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.'" *Id.* (citation omitted). "If a parent withholds that parent's presence, . . . love, . . . care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* (citation omitted).

Here, the trial court's findings again fail to grapple with the critical question of the willfulness of Respondent's conduct as willfulness is defined in our case law. *See id.* Thus, the trial court's findings do not support its adjudication of willful abandonment as a basis for terminating Respondent's parental rights. Therefore, I would vacate the trial court's adjudication of grounds under subsection (a)(7) and remand this matter to the trial court to determine whether it can—or cannot—make

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findings on this Record to support its adjudication. Consequently, I would reverse the trial court's order terminating Respondent's parental rights in part, vacate the order in part, and remand this matter for additional findings of fact.