NO. COA10-582

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

S.L.C.

Guilford County
No. 09 J 692

Appeal by respondent from order entered 8 February 2010 by Judge Susan E. Bray in Guilford County District Court. Heard in the Court of Appeals 14 October 2010.

Hatfield & Hatfield, by Kathryn K. Hatfield, for petitioner-appellee.

David A. Perez, for respondent-appellant.

THIGPEN, Judge.

Respondent appeals from the trial court's order terminating his parental rights to S.L.C. on the ground of abandonment. Respondent contends the ground of abandonment is not supported by the evidence or by the findings of fact. We affirm the order of the trial court.

The proceedings to terminate respondent's parental rights were initiated by the filing of a petition by the mother of S.L.C. on 27 October 2009. In the petition, the mother alleged that respondent father willfully abandoned S.L.C. for at least six consecutive months prior to the filing of the petition, that he had not paid any child support for S.L.C. since the couple separated in October

2006, and he had not seen the child since October or November 2007. Respondent father filed a handwritten response on 9 November 2009. Through counsel, respondent filed an answer on 11 December 2009. The matter came on for hearing on 26 January 2010.

Evidence was presented at the hearing that S.L.C. was born in January 2005. His parents, petitioner and respondent, were not married when the child was born, but they married in August 2006 and were separated approximately one month later. Respondent was in jail for two months in early 2007, and then went to prison in April 2007, until he was released on 30 September 2007. Petitioner initiated divorce proceedings in October 2007, and the divorce was finalized on 23 January 2008.

Petitioner testified that respondent left her and the minor child in 2006 without telling her where he was going. She did not hear from him until January 2007 when he called to tell her he was in jail. She stated that when respondent was released from prison in September 2007, he saw the minor child twice for overnight visits before 23 January 2008. She and respondent spoke a few times in November and December 2007, but the last time they spoke was in December 2007 or possibly January 2008. She asked him to help her pay for the cost of the minor child's daycare, but respondent told her he could not afford to help pay for daycare, and he never paid her any money to support S.L.C. When asked if respondent gave her a $50.00 money order, petitioner denied receiving a money order or any other money from respondent. She denied that she refused to take money from respondent.

Petitioner stated that she has lived in the same place since April 2005. She had the same job from August 2005 until July 2009, when she lost her job due to taking care of the minor child when he was sick. She stated respondent knew where she lived and knew where she worked. She testified that he never called her at work, although he could have left a message. She did not talk to him after January 2008, although he called her mother on Father's Day in 2009 and left a voicemail. Her mother has had the same address for three or four years, as well as the same phone number. Petitioner got a new phone with a new number in June 2008 when she remarried, but the number was not restricted and she kept her old phone number until the contract on that phone expired.

Petitioner testified that respondent came to her house unannounced in September 2009. He had two men with him in the car. Petitioner said she told him to get off the property because he brought people to her home who were not known to her. She said at that point, she had not seen respondent, did not know anything about him anymore, or what kind of people with whom he associated.

Petitioner never brought an action against respondent for child support. When she was contacted by the child support agency regarding an action initiated by respondent, she told the agency representative that she did not need their services, because she was pursuing termination of respondent's parental rights.

Respondent testified that since being released from prison, he has been employed either laying carpet for commercial businesses or working at McDonald's. After getting out of prison, he saw the

minor child seven or eight times, the last time being at Easter, around March 2008. He stated he brought the child an Easter basket and was allowed to visit with the child for a short time. With regard to child support, respondent said he gave money regularly to petitioner, whenever he went to her house. He first gave her $100.00, but later on, he could not afford to give that much, so he gave her $50.00 instead. Respondent stated he gave petitioner a money order in the amount of $50.00, and that while petitioner took the money order, she told him she did not want money from him. When respondent called her subsequently, they discussed daycare expenses, and petitioner told respondent she wanted him to pay all of the cost, which was $500.00 per month. He told her he could not afford that much, but he would send what he could. He estimated giving petitioner four or five payments, and admitted not giving any support after March 2008.

Respondent stated that at a certain point, he could not reach petitioner anymore, because her phone number was restricted. He did try to see the minor child by stopping by petitioner's house in September 2009, but petitioner told him to get off her property, and that S.L.C. was not his son anymore. He denied bringing men with tattoos to the house with him. When asked what other efforts he has made to change custody or visitation, respondent stated that he had spoken to a lawyer, but could not afford additional services.

Respondent presented evidence that on 28 September 2009, he submitted an application to the Davidson County Child Support

Agency in order to initiate a child support action against himself. He listed his monthly income as $600.00. He stated he did not send money directly to petitioner because he did not think she would use it.

Davidson County child support agent Cynthia Dotson confirmed that she received an application for child support enforcement from respondent. The first time she spoke with respondent about the action was in November of 2009. She did not ask him why he was pursuing the action. Ms. Dotson sent petitioner an appointment letter. When petitioner called back, she told Ms. Dotson that she had not seen respondent in years and she was in the process of hiring an attorney in order to pursue termination of respondent's parental rights. She advised Ms. Dotson that she did not want to pursue a child support action against respondent. Despite petitioner's desire not to pursue such an action, a complaint was filed on her behalf and a hearing was scheduled.

After hearing evidence in the adjudication phase of the hearing, the trial court found by clear, cogent, and convincing evidence that respondent willfully abandoned the minor child for at least six consecutive months preceding the filing of the termination petition.

At disposition, evidence was presented by petitioner and her husband, Bryan Kington, regarding the bond they have with S.L.C., including the fact that the minor child considers Mr. Kington his father, and Mr. Kington's desire to adopt the child. Respondent's mother and his girlfriend each testified to the bond respondent had

with S.L.C. The child's guardian *ad litem* submitted a report to the court recommending that if grounds to terminate were found, termination of respondent's parental rights would be in the best interests of the child.

At the close of disposition, the trial court determined that termination of respondent's parental rights was in the best interests of the minor child. Based on its findings of fact and conclusions of law, the trial court ordered that respondent's parental rights be terminated. From the order entered, respondent appeals.

Termination of parental rights is a two-step process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase of the hearing, the petitioner must show by clear and convincing evidence that statutory grounds for termination exist. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). "The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark,* 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984). Findings of fact when supported by ample competent evidence are binding on appeal even though there may be evidence to the contrary. *In re J.M.W.,* 179 N.C. App. 788, 791-92, 635 S.E.2d 916, 919 (2006). Once a trial court has determined at the adjudication phase that at least one ground for termination exists, the case moves to the disposition phase where the trial court decides whether a termination of parental rights is in the best

interest of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908; N.C. Gen. Stat. § 7B-1110(a) (2009). Respondent argues the trial court erred by finding that grounds exist to terminate his parental rights on the basis of abandonment. He specifically challenges Findings of Fact 8, 9, 11, and 16 as either being unsupported by the evidence or containing inaccurate implications not fully supported by the evidence. We disagree.

To establish willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7), a petitioner must present evidence that respondent willfully abandoned the minor child for at least six months preceding the filing of the petition to terminate his parental rights. N.C. Gen. Stat § 7B-1111(a)(7) (2009); *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009), *disc. review and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). Since the petition in the instant case was filed on 27 October 2009, the determinative time period is 27 April 2009 to 27 October 2009. "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 Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). Willfulness consists of more than mere intent. "[T]here must also be purpose and deliberation." *Id.* "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514.

The following findings of fact are relevant to the trial court's determination that respondent willfully abandoned S.L.C.:

> 8. Between the date of [respondent's] release from prison and January of 2008, [respondent] visited with [S.L.C.] a few times including two overnight visits. He has not seen [S.L.C.] since at least Easter of 2008. At all times [respondent] has known the address of the child and [petitioner] and knew the place of employment of [petitioner].
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> 9. [Respondent] has testified that he made three or four payments to [petitioner] between November 2007 and January 2008, but he has presented no receipts verifying these claims. [Respondent] has presented one Money Order Receipt for $50 on which his girlfriend . . . has hand written "child support," but the Court is not satisfied that this money order was ever actually received by [petitioner]. Besides the usual necessities, the child has been in day care during this time up until July 2009. Though asked by [petitioner] to pay half of the cost of day care, [respondent] refused to pay any, contending it was too expensive. [Respondent] has provided no support for the child since at least March of 2008.
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> 10. During all times when [respondent] was not incarcerated, he was employed either earning $10 an hour installing carpets and flooring in commercial buildings or earning minimum wage at McDonalds.
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> 11. The Court finds by clear, cogent and convincing evidence that [respondent] has wilfully abandoned the child, [S.L.C.], for at lest [sic] six consecutive months immediately preceding the filing of the Petition.

Respondent specifically challenges the factual content of findings 8, 9, and 11 as being unsupported by the evidence.[1] We will address each contention in turn.

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[1] While respondent purports to also challenge Findings of Fact 12 and 14, he has made no mention of them in his brief. Thus, the issues concerning these findings have been abandoned. N.C.R. App. 28(b)(6).

Respondent contends Finding of Fact 8 is inaccurate in that respondent did not "at all times" know petitioner's place of employment, because she testified that she lost her job in July 2009. He also asserts that the finding is misleading in that it suggests that respondent had access to petitioner's place of residence and employment. He contends that in actuality, petitioner told him not to contact her at work and she cancelled her voicemail, thereby leaving respondent with no way to contact her. Our review of the evidence, however, reveals that respondent did at all times know where petitioner lived, as she has been at the same address since 2005. Further, respondent did know where petitioner worked at all times when she was working up until July 2009. We conclude that Finding of Fact 8 is supported by the evidence.

Regarding Finding of Fact 9, respondent argues that he did not provide support after March 2008 because petitioner would not accept anything less than full payment of the total cost of child care for the minor child, and according to respondent, she "belittled" the amount he did offer. He also contends that his attempt to establish child support by using the Child Support Enforcement Agency supports his contention that he was willing to pay child support. We note that petitioner's evidence was unequivocal that respondent had not provided any support, for child care or otherwise. By respondent's own testimony he did provide some support, but he acknowledged that he provided no support after March 2008. Respondent provided no clear explanation or evidence for why he waited a year and a half before attempting to provide further support, other than to say that

petitioner refused to take his money. We conclude that Finding of Fact 9 is supported by competent evidence.

Respondent also contends that Finding of Fact 11, although more appropriately analyzed as a conclusion of law, is unsupported by the evidence. The evidence presented clearly supports the court's findings that respondent had no contact with the minor child since at least March 2008. While petitioner and respondent presented different versions of whether respondent provided any support, the court specifically relied on respondent's slightly more favorable evidence when it found that respondent had not provided any support since March 2008.

Respondent also challenges the trial court's Finding of Fact 16 as part of his argument that the trial court erred in finding willful abandonment. Finding of Fact 16 is as follows:

> 16. The Court finds that there has been a concerning lack of contact by [respondent] with the child. He has known where the child and [petitioner] lived since the birth of the child. He has known where [petitioner] worked up until July 2009 when she left her employment. Notwithstanding this knowledge, [respondent] has let two years elapse with very little effort being made to contact the child and with no photographs, cards, or letters being sent to the child acknowledging holidays or birthdays.

Respondent states while the finding is "technically correct," he appears to challenge the finding on the basis that the trial court failed to acknowledge that the lack of contact between respondent and the minor child after March 2008 was due to petitioner's actions preventing any contact. As discussed above, we have determined that

the evidence supports a finding that respondent knew how to contact petitioner at home or at work until July of 2009, and yet still provided no support and did not see the child after March 2008. Thus, the evidence establishes willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). Based on the evidence presented at the hearing, we find that the challenged findings of fact are amply supported by the evidence, and that the trial court did not err in making these findings of fact.

Respondent further argues that his actions in September of 2009 in attempting to visit S.L.C. and initiating a child support enforcement action against himself negate a finding of willful abandonment. We conclude that even if the trial court had made findings of fact regarding these two isolated incidents, the incidents do not preclude a conclusion of willful abandonment. *See In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) (one abandoned attempt to establish visitation and support, without more, insufficient to negate a finding of willful abandonment). Here, the evidence supports a determination that respondent deliberately intended "to forego all parental duties." Therefore, we conclude that the trial court did not err in determining that abandonment is a proper ground upon which to terminate respondent's parental rights.

In conclusion, the trial court did not err in concluding that grounds existed to terminate respondent's parental rights.

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).