NO. COA14-587
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

IN RE:

M.N.M.,
A Minor Juvenile.

Rowan County
No. 12 JT 11

Appeal by respondent from order entered 27 March 2014 by Judge Marshall Bickett in Rowan County District Court. Heard in the Court of Appeals 27 October 2014.

Kluttz, Reamer, Hayes, Randolph, Adkins & Carter, LLP, by James L. Carter, Jr., for petitioners-appellees.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant.

GEER, Judge.

Respondent father appeals from an order terminating his parental rights on the ground that he willfully abandoned his daughter. Respondent argues on appeal that the trial court erred in concluding he willfully withheld his love, care, and support of the child and, consequently, that the trial court erred in concluding he willfully abandoned her. Because we find that the trial court's relevant findings are supported by

competent evidence and those findings support the trial court's conclusion that respondent willfully abandoned his daughter, we affirm.

Facts

Molly was born on 5 May 2007 to respondent, her biological father, and to Shelly, her biological mother.[1] Molly had cocaine in her system at birth that was supplied to Shelly by respondent. Although respondent and Shelly were living together at the time Molly was born, Shelly moved out in late August 2007 and took Molly with her to live with Molly's maternal grandmother. Respondent saw Molly and Shelly a couple of times after they moved out.

In May 2008, Shelly moved again, but left Molly in the maternal grandmother's care. Between May and September 2008, Shelly had several drug relapses. In May 2008, Molly started living in Salisbury, North Carolina with petitioners, her maternal aunt and uncle, because Molly's maternal grandmother was suffering from health problems.

In late 2009, respondent was incarcerated after being charged with -- and later convicted of -- robbery with a dangerous weapon. On 21 December 2009, Judge R. Marshall

[1]The pseudonyms "Molly" and "Shelly" have been used throughout the opinion to protect the child's privacy and for ease of reading.

Bickett in Rowan County District Court entered an order granting legal custody to petitioners. On 17 April 2013, respondent, although still incarcerated, was transported pursuant to a writ to attend a hearing to modify Molly's custody. At that hearing, however, respondent declined to participate. In May 2013, respondent was released from prison.

On 1 July 2013, Shelly executed a consent for Molly to be adopted by petitioners. On 25 November 2013, petitioners filed a petition to terminate respondent's parental rights so that they could legally adopt Molly. The trial court entered an order on 27 March 2014 granting the petition. The order made the following pertinent findings of fact:

> 8. The bond between Respondent [father] and the minor child is non-existent since Respondent [father] has not seen the minor child since she was an infant.
>
> . . . .
>
> 11. In the six months preceding the filing of the petition, Respondent [father] did not visit the child or make any effort to visit the child, such as driving from his home in the Raleigh area to Salisbury, North Carolina to the home of the Petitioners and requesting to see the child.
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> 12. That since being released from prison in May 2013, that [sic] Respondent [father] has resided and continues to reside in Wake County, North Carolina. That the Court takes Judicial Notice

that Wake County is approximately two hours away from Wilmington, North Carolina and two hours away from Salisbury, North Carolina. That Respondent [father] was able to drive to Wilmington and visit the biological mother of the minor child but did not drive to Salisbury, North Carolina to attempt to visit the minor child.

13. That in the six months preceding the filing of the petition, Respondent [father] did not attempt to contact the child other than by making random telephone calls[] to the home of the Petitioners and sending one card to the child.

14. That in the six months preceding the filing of the petition, although he was employed for a substantial period of that time, the Respondent [father] did not provide any support to the minor child, relying on the fact that he was not under court order to do so.

. . . .

16. That since the filing of the Petition the Respondent [father] has not done anything to contact the minor child or support the minor child.

17. Although not part of the court's 7(B) 1110 [sic] determination, the court notes that since the Respondent [father] turned sixteen years of age, that he has spent twenty-six of the last thirty-eight years of his adulthood incarcerated. Specifically, he was imprisoned from 1977-1988, during the time his oldest child, [K.H.] was aged one to eleven years of age, and that he was again incarcerated from 1993-2004, while [K.H.] was aged sixteen into early adult hood. That

> the Respondent [father] was incarcerated during a substantial period of his oldest child's life and has been incarcerated for a substantial period of the life of the minor child who is the reason for the petition that is before the court.
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> . . . .
>
> 19. That the Respondent [father] has willfully withheld his presence, love, care, and support of the minor child.
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> . . . .
>
> 22. That the juvenile is in need of a permanent plan of care at the earliest possible age, and this can only be accomplished by severing the relationship between the juvenile and the Respondent father. That the respondent father has not been a consistently committed parent to the minor child. That the minor child is in need of a safe, stable, and permanent home. That the respondent father has been completely unavailable to parent the minor child and has not attempted to be substantially involved in the life of the minor child in any meaningful way.

Based on these findings, the trial court concluded that petitioners had proven by clear, cogent, and convincing evidence that respondent willfully abandoned Molly and that it is in the child's best interest to terminate respondent's parental rights.

Discussion

We review a trial court's termination of parental rights ("TPR") order to determine whether the findings of fact are

supported by clear, cogent, and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6 (2004). We conduct de novo review of the court's conclusions of law. *In re S.N., X.Z.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). Findings of fact not challenged on appeal are deemed supported by evidence and are binding. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Respondent's Challenges to Findings of Fact

Respondent first challenges findings of fact 11 and 12. Although respondent concedes that he "did not drive to Salisbury to attempt to visit with Molly," he argues that the trial court "unreasonably infers . . . that, because he did not drive to Salisbury and request a visit with Molly, he did not attempt to visit her." In particular, he contends that there was "actual evidence" to the contrary in that after petitioners told respondent he would need to hire a lawyer and go to court to establish visitation rights, he "could not afford to take [petitioners] to court" and so he instead "regularly attempted to talk with [petitioners]."

We are bound by findings of fact "where there is some evidence to support those findings, even though the evidence

might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). In this case, the evidence is undisputed that respondent did not visit Molly or drive to Salisbury to attempt to visit Molly during the six months preceding the filing of the petition. Although respondent called petitioners and asked once to visit the child, he never made any attempt -- pro se or otherwise -- to ask the court for visitation rights despite having been alerted of the need to do so. In fact, approximately one month before his release from prison, respondent appeared in court in connection with an action brought by the child's mother to modify the child custody agreement with petitioners, but he declined to participate in the hearing, and the order arising out of that hearing noted that respondent did not ask the court to establish his rights with respect to Molly. This evidence is sufficient to support the trial court's findings of fact 11 and 12. Respondent's argument merely asserts that the trial court should have given greater weight to evidence favorable to his position.

Respondent next challenges finding of fact 13, arguing that the finding is internally inconsistent and contradictory because he did attempt to contact his daughter by calling petitioners' home and mailing her one card. Respondent, however, has made no attempt to show that the finding is unsupported by evidence. In

fact, the evidence is undisputed that respondent made only the attempted contacts found by the court.

With respect to finding of fact 16, respondent argues that the finding is incorrect because the evidence shows that after the TPR petition was filed, he mailed two cards to Molly and left a message on petitioners' answering machine wishing Molly a happy Thanksgiving. We agree with respondent that the first portion of the finding -- that respondent did not do anything to contact Molly after the filing of the TPR petition -- is not supported by the evidence. Respondent, however, does not challenge the second part of the finding in which the court noted respondent had not done anything to support Molly, and this portion of the finding is, therefore, binding.

Even when findings are unsupported by evidence, reversible error will not result if the erroneous findings are unnecessary to the trial court's ultimate adjudication. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). The dispositive period for termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) (2013), willful abandonment, is the six months prior to the filing of the petition. The erroneous portion of finding of fact 16 addressed activity subsequent to the pertinent time frame and, therefore, was unnecessary to the

trial court's conclusion that respondent willfully abandoned Molly.

Respondent also challenges findings of fact 19 and 22. He contends these findings are more in the nature of conclusions of law, but further argues that to the extent they are findings of fact, they are not based on logical reasoning from the evidentiary facts. Respondent specifically challenges the portions of the findings in which the court stated: (1) in finding of fact 19, that respondent withheld his presence, love, care, and support of the minor child; (2) in finding of fact 22, that respondent has not been a "consistently committed parent" to the child; (3) in finding of fact 22, that respondent has been "completely unavailable" to parent the child; and (4) in finding of fact 22, that respondent has not "attempted to be substantially involved in the life of the minor child in any meaningful way."

"As a general rule, . . . any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d

653, 657-58 (1982)). Neither finding of fact 19 nor finding of fact 22 requires the application of legal principles or the exercise of judgment, but rather they involve logical reasoning from the evidentiary facts and, therefore, are properly denominated findings of fact.

We further hold that each of these findings is supported by other findings of fact and the evidence regarding the six months prior to the filing of the TPR petition on 25 November 2013. Petitioner Mrs. Blake testified that she talked with respondent by telephone on 1 June 2013 and that respondent did not request to speak to Molly. Respondent left messages on 1 August 2013 and 15 November 2013 asking Mrs. Blake to call him, but not mentioning Molly. Also, during the week of that Thanksgiving, respondent called and left two messages: one asking why petitioners were seeking to terminate his parental rights and the second wishing them a happy Thanksgiving. Respondent did not ask to speak with Molly in any of these messages. Between September 2008 and Thanksgiving 2013, respondent did not send any mail to the petitioners' home other than one card to Molly at Thanksgiving 2013 -- after the TPR petition was filed -- and he did not send any money, checks, money orders, or gift cards for the child, as respondent acknowledged in his own testimony.

Further, Mrs. Blake testified that respondent never asked the Blakes to bring Molly to prison to see him during the time he was incarcerated. Moreover, approximately one month before his release from prison, respondent while appearing in court in connection with an action brought by Shelly to modify the child custody agreement with petitioners, respondent elected in open court not to participate in the hearing. The court made a finding of fact in the order from that hearing, which was in evidence at the TPR hearing, that respondent did not ask the court to establish his rights with respect to Molly.

This evidence -- combined with the trial court's additional findings of fact that during the six months preceding the filing of the TPR petition respondent only made random attempts to contact Molly, that he did not visit Molly after being released even though he was able to at least attempt a visit, and that he did not provide financial support for her even though he was employed -- all support the finding that respondent "willfully withheld his presence, love, care, and support." The findings and evidence also support the ultimate findings that respondent "has not been a consistently committed parent" to Molly, that he has "been completely unavailable to parent" Molly, and that he "has not attempted to be substantially involved" in Molly's life.

Respondent nonetheless points to evidence in the record that when Molly was born, he was "present and active" in her life and "[d]uring his incarceration, he kept in contact with Molly's mother [and] asked about Molly and sent small items for her." Respondent contends that this evidence showed he attempted to be involved in Molly's life in meaningful ways but was "usually thwarted by others." However, by finding that respondent had the means to attempt to visit Molly or to attempt to contact her directly after his release from prison, yet failed to do so, and also by acknowledging that respondent had not attempted to be involved in Molly's life in "any meaningful way," the trial court clearly gave less weight -- as it was entitled to do -- to evidence of respondent's efforts to be involved in Molly's life. Findings of fact 19 and 22 were, therefore, amply supported and are binding on appeal.

Respondent's Challenge to the Conclusions of Law

Respondent next argues that the trial court's findings of fact do not support its conclusion of law that respondent willfully abandoned Molly. Parental rights may be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) upon a finding that the parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" to terminate parental rights. "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). Respondent argues the court's findings of fact do not demonstrate that he had "a 'willful determination to forego all parental duties and relinquish all parental claims . . . .'" (Quoting *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009).)

"It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). The trial court, in this case, made these specific findings with regard to respondent's presence, love, care, and support. The trial court's findings of fact further show that respondent had been incarcerated for most of the child's life and has not seen her since she was an infant. During his incarceration, respondent did not maintain a relationship with his child. Shortly before his release from prison, respondent failed to assert rights to his child in a custody proceeding. After his release from prison, other than sporadic telephone calls to

petitioners and a call to determine whether he owed child support, he made no effort to actually visit Molly, to obtain permission from the court to have visitation with Molly, or to provide any financial support for Molly.

Respondent nonetheless argues that here, as in *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997), his relationship with petitioners was a "'probable hostile relationship'" that provided a "plausible explanation for non-contact which is inconsistent with willful abandonment." (Quoting *In re Young*, 346 N.C. at 252, 485 S.E.2d at 617.) In *In re Young*, however, the Supreme Court's reversal of the termination of the respondent mother's parental rights was not based solely on the existence of a hostile relationship between the respondent and the individuals with custody of the child. Instead, the Court reasoned:

> The findings of fact indicate the probable hostile relationship between respondent and petitioner's family members who cared for Eric during this period of time. The findings of fact also indicate that there may have been a period of time during which respondent did not know the whereabouts of her child. However, upon learning that Eric was in the custody of Mrs. Street, she began visiting him. The trial court made no findings of fact with respect to respondent's diagnosis of breast cancer during this time, but the transcript shows that the court heard testimony about respondent's cancer during the termination proceeding. For example, the transcript

> contains petitioner's testimony that respondent had asked to see Eric before her surgery and that petitioner had denied her request. This conduct does not evidence a willful abandonment of her child on the part of respondent.

Id. at 252, 485 S.E.2d at 617. The Court also specifically noted that the respondent mother not only was diagnosed with breast cancer, but also underwent surgery and radiation treatment during the pertinent time. *Id.*

Here, unlike *In re Young*, respondent was aware at all times of Molly's location and yet never visited her or attempted to obtain permission from the court for visitation. Further, there was no evidence during the pertinent timeframe that respondent ever asked to speak with Molly. The trial court made no findings that indicate a "probable hostile relationship," and the evidence did not suggest any factor comparable to breast cancer that interfered with respondent's ability to see or contact Molly. *Id.* *In re Young* is, therefore, not controlling.

Respondent also relies upon *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994), in arguing that he did not willfully abandon Molly. In *Bost*, the trial court had found that the respondent failed to pay court-ordered child support, that he had a severe alcohol problem that impaired his ability to pay child support, and that this failure to pay was willful. *Id.* at 15, 449 S.E.2d at 919. Based on this and other findings,

the trial court concluded that the respondent willfully abandoned his children. *Id.* at 18, 449 S.E.2d at 921. However, this Court held that the finding of willful failure to pay was not supported by clear, cogent, and convincing evidence. *Id.* It also held that "'a mere failure of the parent of a minor child in the custody of a third person to contribute to [the child's] support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wilful intent to abandon.'" *Id.* (quoting *Pratt*, 257 N.C. at 501-02, 126 S.E.2d at 608). Moreover, *Bost* held that "[o]ur review of respondent's inability to pay child support . . . does not support a finding of willful abandonment." *Id.*

Here, unlike *Bost*, the trial court did not base its conclusion that respondent willfully abandoned Molly solely on a failure to pay child support. While the court did find that respondent was "employed for a substantial period" after being released from prison and that respondent "did not provide any support to [Molly]," the court also made findings establishing that respondent withheld "his presence, his love, [and] his care" from Molly. *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. Although respondent had the means to contribute to Molly's welfare, financially or otherwise, he made economic and other

choices that took priority over Molly after being released from prison.

Unlike the findings in *Bost*, the findings here support a conclusion of abandonment. *See In re B.S.O., V.S.O., R.S.O., A.S.O., Y.S.O.*, ___ N.C. App. ___, ___, 760 S.E.2d 59, 65 (2014) ("Both the evidence and the court's findings reflect that respondent-father's arrest and subsequent deportation did not prevent him from communicating with his children and [custodian Youth and Family Services]. In light of respondent-father's single phone call to respondent-mother and his children during the six months immediately preceding 9 May 2011, the district court did not err in finding that he willfully abandoned the children."). We hold the trial court's findings of fact are supported by competent evidence and the findings of fact in turn support the court's conclusion of law. Consequently, we affirm the trial court's order terminating respondent's parental rights.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).