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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-233

Filed: 4 October 2016

Henderson County, No. 12 JT 131

IN THE MATTER OF: J.S.M.O.

Appeal by respondent from order entered 21 December 2015 by Judge Emily G. Cowan in Henderson County District Court. Heard in the Court of Appeals 7 September 2016.

*Deputy County Attorney Rebekah R. Price for petitioner-appellee Henderson County Department of Social Services.*

*Michael E. Casterline for respondent-appellant father.*

*Parker Poe Adams & Bernstein LLP, by Thomas N. Griffin III, for guardian ad litem.*

TYSON, Judge.

Respondent-father appeals from the trial court's order terminating his parental rights to J.S.M.O., age nine. We affirm.

I. Factual Background

On 22 August 2012, Henderson County Department of Social Services ("HCDSS") received reports of unsafe and unsanitary conditions at the home of J.S.M.O.'s great-aunt. These conditions were confirmed during a home visit. J.S.M.O. was residing with his great-aunt, because his mother was unable to care for

him. He had previously been adjudicated dependent as a result of the mother's drug use in 2008. J.S.M.O.'s mother and Respondent-father are not married. Although the mother regained legal custody on 23 February 2009, J.S.M.O. continued to reside with the great-aunt. Respondent-father has not been a primary caregiver for the juvenile at any point in time. On 13 June 2008, Respondent-father was arrested and he has remained incarcerated throughout the underlying proceedings.

On 26 April 2013, J.S.M.O. was adjudicated neglected. The trial court found the mother remained unable to care for him and Respondent-father was incarcerated. At disposition, the trial court granted custody of J.S.M.O. to the great-aunt. However, on 18 November 2013, the court found that the great-aunt was not complying with her case plan, and the juvenile was removed and placed in foster care.

On 15 April 2015, HCDSS filed a petition for termination of parental rights, which alleged grounds existed to terminate Respondent-father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress), and N.C. Gen. Stat. § 7B-1111(a)(7) (willful abandonment). On 21 December 2015, the trial court terminated both Respondent-father's and the mother's parental rights to J.S.M.O. Respondent-father filed timely notice of appeal.

## II. Issue

Respondent-father's sole argument on appeal asserts the trial court erred in finding grounds exist to terminate his parental rights.

### III. Standard of Review

“On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law.” *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotation marks omitted). We review the trial court's conclusions of law *de novo* on appeal. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

### IV. Analysis

The trial court may terminate parental rights where “[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.” N.C. Gen. Stat. § 7B-1111(a)(7) (2015). “Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. The word willful encompasses more than an intention to do a thing; there must also be purpose and deliberation.” *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (internal quotations and citations omitted).

Factors to be considered include a parent's financial support for a child and “emotional contributions,” such as “respondent's display of ‘love, care and affection’

for his children.” *In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 510 (2000) (citations omitted).

The trial court made the following findings of fact regarding Respondent-father’s willful abandonment of the juvenile:

31. Father was incarcerated from November 2006 until March 31, 2007 on an assault conviction and then again on June 13, 2008 until the present as the result of convictions for Involuntary Manslaughter and selling/delivering cocaine as well as having habitual felon status. His projected release date is December 22, 2015. He has past convictions involving assault, injury to personal property, and drugs.

....

33. Prior to his incarceration, the father made no effort through the court system or DSS to obtain custody of the juvenile.

34. Prior to his incarceration, the father only saw the juvenile approximately 5 to 7 times and has not seen the juvenile since 2007.

35. The juvenile has never lived with the father or any of his relatives and has not seen his father since he was 20 months old.

36. Prior to incarceration, the father did not serve as the primary caregiver of this juvenile.

....

42. The father testified that he believed after a certain point that because the therapist had recommended no more phone calls due to the juvenile’s therapeutic needs that he was not allowed to send letters either; however, he

admitted that he had never inquired as to whether he could continue to write to the juvenile and in fact it was the testimony of the social worker Amy Corral that she went to see the father while he was incarcerated and encouraged him to write to the juvenile and he did not do so.

43. While the father states that he provided gifts and cards to the juvenile prior to the juvenile entering HCDSS custody on October 24, 2013, the father has not sent any letters or cards to the juvenile since the juvenile has been in HCDSS custody and, as a result, has had no contact whatsoever for at least six months prior to the filing of the petition for the termination of parental rights in this matter.

Respondent-father only challenges finding of fact number 43. He does not deny the veracity of this finding, but argues it does not speak to his intention to abandon his son. He contends that he only stopped contacting J.S.M.O. because J.S.M.O.'s therapist recommended that phone calls from him would not be in the juvenile's best interests while J.S.M.O. was transitioning into a new home. Respondent-father allegedly interpreted this advice to also mean for him not to write to J.S.M.O.

However, as stated in undisputed finding number 42, the case worker for HCDSS testified that she had visited Respondent-father in February 2015 and urged him to write letters and send cards to J.S.M.O., which he failed to do. Respondent-father has not objected to any of the other findings of fact cited therein and we are bound by them. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (unchallenged findings are deemed supported by competent evidence and are binding on appeal).

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“Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405, *aff’d*, 357 N.C. 568, 597 S.E.2d 674 (2003). Thus, a showing of incarceration of a parent standing alone is insufficient to prove willful abandonment. *In re Blackburn*, 142 N.C. App. 607, 612, 543 S.E.2d 906, 909 (2001) (citing *In re Adoption of Maynor*, 38 N.C. App. 724, 726-27, 248 S.E.2d 875, 877 (1978)). As this Court noted when we considered a respondent-parent’s incarceration with respect to another ground for termination (neglect), “[a]lthough his options for showing affection are greatly limited, the respondent will not be excused from showing interest in his child’s welfare by whatever means available.” *In re J.L.K.*, 165 N.C. App. 311, 318-19, 598 S.E.2d 387, 392 (2004) (quoting *Whittington v. Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003)).

Here, the record evidence demonstrates Respondent-father has never been the primary caregiver for J.S.M.O., visited with him infrequently prior to his own incarceration, and has never sought custody. Respondent-father failed to provide the juvenile with cards or letters after October 2013, despite being encouraged to do so by a social worker. Based on the trial court’s findings of fact, we conclude the trial court properly determined that Respondent-father had willfully abandoned J.S.M.O. for more than six months prior to the filing of the petition. The trial court did not err

by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Respondent-father's parental rights.

Respondent-father also argues the trial court erred by concluding that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (2) to terminate his parental rights. However, willful abandonment existed and was proven pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to support the trial court's order. We need not address the remaining grounds found by the trial court as alternate or additional bases to support termination. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990) (existence of any one of the separately enumerated grounds is sufficient to support termination).

#### V. Conclusion

Clear, cogent and convincing evidence supports the trial court's findings of fact and these findings in turn support the court's ultimate conclusion that Respondent-father willfully abandoned J.S.M.O. The trial court's order terminating Respondent-father's parental rights is affirmed.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).