IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-419

Filed: 6 December 2016

Transsylvania County, No. 14 JT 22

IN THE MATTER OF: B.M.A.

Appeal by Respondent-Father from order entered 22 March 2016 by Judge Mack Brittain in District Court, Transylvania County. Heard in the Court of Appeals 7 November 2016.

Emily Sutton Dezio for Petitioner-Appellee.

Mercedes O. Chut for Respondent-Appellant.

McGEE, Chief Judge.

Respondent-Appellant Father ("Respondent") appeals from an order terminating his parental rights. This Court previously remanded this matter because the trial court failed to properly cite the applicable standard of proof in the adjudicatory portion of the termination order. *See In re B.M.A.,* ___ N.C. App. ___, 781 S.E.2d 718 (2016) (unpublished). On remand, the trial court entered a new order on 22 March 2016.

Background

Petitioner-Appellee Mother ("Petitioner") and Respondent were romantically involved and cohabiting in Transylvania County in 2013 when Petitioner learned she

was pregnant. When Petitioner was approximately eight months pregnant, she learned Respondent was having an affair with a mutual friend, Taylor Trantham ("Trantham"). Shortly thereafter, Respondent moved out of the home and relocated with Trantham to Wilmington. Petitioner gave birth to B.M.A. (or "the child") at Transylvania Regional Hospital on 17 December 2013. Petitioner did not notify Respondent when she went into labor, but sent Respondent a photo of the child by text message approximately ten minutes after the birth. Respondent replied to the text message about an hour later and indicated he had plans to travel to Transylvania County later in the week and would visit the child at that time. No father was listed on B.M.A.'s birth certificate.

Respondent visited Petitioner and the child at the home of Petitioner's mother three days later. Respondent did not bring any money, supplies, or presents for the child. He stayed less than one hour because Trantham, now Respondent's girlfriend, was waiting in the car and Respondent "didn't want to keep her waiting any longer." Respondent stayed in town for a week and a half, but did not visit B.M.A., despite being alerted that the child "had a . . . fever and was continuously throwing up." Petitioner testified that Respondent did ask once to see the child with his family, but due to the weather and because the child was sick, Petitioner did not want B.M.A. to leave the house. Petitioner also indicated she did not want Trantham present during

any visit. Although "[Respondent] ha[d] the ability to come to [Petitioner's] home," he did not visit the child.

Over the coming months, Petitioner and Respondent exchanged text messages regarding the child. Petitioner testified "it was [always] an option for [Respondent] to . . . come to [her] house if he was able to come alone because [Petitioner] didn't agree with other people seeing [the child] yet. And that wasn't an option [Respondent] was willing to take." According to Petitioner, Respondent continued to insist that Trantham come with him to visit the child, and told Petitioner "that if his girlfriend . . . could not see [the child], then he would not either."

Petitioner filed cyberstalking charges against Respondent in September 2014 due to "text messages that never seemed to stop coming [from Respondent] . . . after [Petitioner] asked him to stop." These charges were dropped in October 2014. Petitioner had no contact with Respondent after September 2014, but Respondent did give the child a Christmas gift that year. Petitioner never received any money, supplies, food, cards, pictures, or letters from Respondent.

Petitioner filed a petition to terminate Respondent's parental rights on 20 June 2014 on the grounds that Respondent: (1) neglected the child; (2) failed to establish paternity judicially or otherwise legitimate the child; (3) was incapable of providing for the proper care and supervision of the child, such that the child is a dependent juvenile; and (4) willfully abandoned the child. *See* N.C. Gen. Stat. §§ 7B-1111(a)(1),

(5-7) (2015). Respondent filed an answer in which he denied paternity of the child and requested court-ordered paternity testing. On 14 January 2015, the parties consented to private paternity testing, which ultimately determined that Respondent was the child's biological father.

The trial court conducted an evidentiary hearing on 25 March 2015. In an order filed 27 April 2015, the court concluded grounds existed to terminate Respondent's parental rights pursuant to (1) N.C.G.S. § 7B-1111(a)(5) (failure to establish paternity), and (2) N.C.G.S. § 7B-1111(a)(7) (willful abandonment). However, this Court vacated and remanded that order, because the trial court failed to articulate the applicable standard of proof in the adjudicatory portion of the order.[1] *See In re B.M.A.*, ___ N.C. App. ___, 781 S.E.2d 718, 2016 WL 224174 (2016) (unpublished).

The trial court convened a hearing on 8 March 2016 for the purpose of entering a new order consistent with this Court's directive. After making findings of fact based upon clear, cogent and convincing evidence, the trial court entered an order on 22 March 2016, again concluding that the foregoing two grounds existed to terminate Respondent's parental rights. The trial court also concluded it was in B.M.A.'s best interests to terminate Respondent's parental rights. Respondent appeals.

[1] Specifically, the trial court "did not expressly state that the allegations in the petition were proved by clear, cogent, and convincing evidence, the applicable standard of proof." *Id.*, 2016 WL 224174 at *1.

I. Standard of Review

A termination of parental rights comprises two stages, adjudication and disposition, and different standards of review apply to each stage. *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). During the adjudication phase, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam,* 359 N.C. 405, 610 S.E.2d 199 (2005). The court's focus is "whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). If the court determines that one or more grounds exist for terminating a parent's rights, it then proceeds to the disposition phase and makes a discretionary determination as to whether terminating the parent's rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2015).

> The standard of 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 [trial court's] conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child.

In re C.A.D., ___ N.C. App. ___, ___, 786 S.E.2d 745, 751 (2016) (citation and quotation marks omitted). A finding of fact is conclusive on appeal if it is supported by

competent evidence, even though there may be evidence to support a contrary finding. *In re Montgomery,* 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). Moreover, when a party does not challenge a finding of fact, it is presumed to be correct and supported by sufficient evidence. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). The trial court's conclusions of law are reviewable *de novo*. *In re S.N.,* 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). "The trial court's determination of [a] child's best interests lies within its sound discretion and is reviewed only for abuse of discretion." *In re J.A.P.*, 189 N.C. App. 683, 693, 659 S.E.2d 14, 21 (2008). "An abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re J.L.*, 199 N.C. App. 605, 608-09, 685 S.E.2d 11, 14 (2009) (citation and quotation marks omitted).

II. Willful Abandonment

Respondent first contends there was insufficient evidence to support the trial court's conclusion that he willfully abandoned B.M.A. We disagree.

Parental rights are terminable if the court concludes that a parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion [to terminate][.]" N.C.G.S. § 7B-1111(a)(7). "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 is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re H.D.*, ___ N.C. App. ___, ___, 768 S.E.2d 860, 865 (2015). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent . . . abandons the child." *Pratt v. Bishop,* 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

In support of its conclusion of law that Respondent willfully abandoned B.M.A., the trial court made the following findings of fact by clear and convincing evidence:[2]

> a. Prior to the Petition being filed, the Respondent/father had one visit with the minor child lasting less than an hour three days after her birth. This one visit is not sufficient to overcome the fact that all other actions taken together depict a man who abandoned his responsibilities to the child.
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> b. While Respondent/father testified that his attempts to see the minor child were thwarted by the Petitioner/ mother, the Guardian Ad Litem indicated that Respondent was "unwilling to compromise on the issue of the location of the visits, and whether his fiancé[e] could be present during [the] visit" and further found that the minor child was not his "main priority." The credible testimony is that the Respondent/father failed to take any personal responsibility for the creation of this infant, nor establishing a father-child bond.
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> c. The Court finds that the respondent/father's actions

[2] "It has long been held that [the 'clear, cogent and convincing' standard and the 'clear and convincing' standard] are synonymous." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

> depict a man who willfully refused to perform his natural and legal obligations to provide care and support for his child. By demanding that his girlfriend be present, and not seizing opportunities to bond with his child without his girlfriend's presence, [*sic*] he willfully withheld his love and the opportunity to display filial action [*sic*] to the child. In other words, he put his significant other's feelings over the necessary responsibility to his infant daughter. As a result, the respondent/father has no bond with the infant.
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> d. Even though the Petitioner/mother and child have remained in the same residence since the birth, Respondent made no efforts to assume moral or legal responsibility for his daughter.
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> e. Respondent/father's conduct over the six months [*sic*] period evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims.

Respondent argues these findings of fact are not supported by the evidence. He submits that, first, any finding in the adjudication portion of the order that is based upon the testimony and report of the guardian *ad litem* ("GAL") is not based upon competent evidence, because "[t]he GAL introduced his written report and testified only at the dispositional or 'best interest' phase." Thus, according to Respondent, the trial court improperly considered the GAL's testimony and report to support its evidentiary findings in the grounds phase. In the alternative, Respondent contends that, even assuming the GAL evidence was properly considered, the findings of fact do not support the conclusion of law that Respondent willfully abandoned the

child for at least six consecutive months prior to the filing of the petition to terminate his parental rights. These arguments are without merit.

Here, the only finding of fact specifically connected to the GAL's testimony or report is the first sentence of finding (b), in which the court found that the GAL indicated Respondent was unwilling to compromise on certain visitation terms and that the child was not Respondent's main priority. However, even if this evidence was improperly considered by the trial court during the adjudicatory phase, the trial court's findings were supported by other evidence. "Where there is competent evidence to support the court's findings, the admission of incompetent evidence is not prejudicial." *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175, *disc. review denied,* 354 N.C. 218, 554 S.E.2d 341 (2001) (citation omitted). *See also In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (holding that when other findings of fact support an adjudicatory conclusion, "erroneous findings unnecessary to the determination do not constitute reversible error.").

Petitioner testified that Respondent left Transylvania County when Petitioner was eight months pregnant with B.M.A. and did not provide any financial support to Petitioner for the remainder of her pregnancy. Petitioner also testified that, except for a single visit that occurred three days after the child's birth, Respondent failed to visit B.M.A., and Respondent acknowledged he had visited the child only once. Within ten minutes of the child's birth, Petitioner transmitted a

photo of the child to Respondent, but Respondent did not come to visit immediately. Instead, Respondent delayed visiting until three days later, and then visited for less than one hour. Respondent curtailed his visit because he did not want to keep his girlfriend waiting in the car. Respondent stayed in town for a week and a half after the child's birth but did not visit the child. Respondent concedes that Petitioner "offered [him] supervised visits at her house[.]" However, Respondent was unwilling to visit the child unless Petitioner allowed his girlfriend to accompany him, or unless the visit occurred somewhere other than Petitioner's home. This evidence was sufficient to support the trial court's findings that Respondent was "unwilling to compromise" on visitation issues and that the child was not Respondent's "main priority."

Respondent cites evidence of his single visit with the child, and his attempts to arrange visits with the child, as precluding a finding or conclusion that he willfully forewent all parental rights and responsibilities for six consecutive months immediately preceding the filing of the petition. However, our Supreme Court has said that

> it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. If his conduct over the six months [sic] period evinces a settled purpose and a wilful [sic] intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been an abandonment within the meaning of the statute.

Pratt, 257 N.C. at 503, 126 S.E.2d at 609. *See also In re H.D.*, ___ N.C. App. at ___, 768 S.E.2d at 865 ("A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children."); *In re C.J.H.*, ___ N.C. App. ___, ___, 772 S.E.2d 82, 91 (2015) ("Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions.").

In *Pratt,* our Supreme Court rejected the father's contention that a visit with the child within the six-month period preempted a finding of abandonment. *Pratt,* 257 N.C. at 502-03, 126 S.E.2d at 609. In *Searle,* this Court held that a single payment of child support within the six-month period did not preclude a finding of willful abandonment. *Searle,* 82 N.C. App. at 276-77, 346 S.E.2d at 514. In *C.J.H.*, we upheld a conclusion that the father willfully abandoned the child based upon his failure, during the six-month period, to visit the child, make timely and consistent child support payments, and make a good faith effort to maintain a relationship with the child. *C.J.H.*, ___ N.C. App. at ___, 772 S.E.2d at 92. In the latter case, the respondent-father lived in Tennessee and refused the mother's offers to visit the child in North Carolina because he "[did] not think it [was] fair that he ha[d] to travel to North Carolina and [believed] that he should be able to bring the juvenile back to Tennessee with him." *Id.* at ___, 772 S.E.2d at 91. Although the respondent had

made several requests for visitation, the trial court found that he had failed to make a good faith effort to visit the child because he "never made a single trip to North Carolina to visit with the minor child." *Id.* Similarly, in the present case, despite making requests to visit B.M.A., Respondent uniformly refused to do so except on his own terms and conditions.

Respondent also argues his attempts to visit B.M.A. were frustrated by the fact that Petitioner had filed cyberstalking charges against him in September 2014 and "he thought it [was] unadvisable to contact [Petitioner]" thereafter. However, Petitioner testified that she dropped the charges one month later and that, since October 2014, nothing had legally prevented Respondent from contacting her.

Petitioner testified that, after Respondent moved out when she was eight months pregnant with his child, Respondent contributed nothing for Petitioner's care or for support of the child. When Respondent visited the child three days after the birth, Respondent brought no money, supplies, or gifts for the child. Other than giving B.M.A. a stuffed animal for Christmas in 2014 (six months after the petition to terminate was filed), Respondent has provided nothing for the care of the child, including money, bottles, or food. Respondent conceded he never filed a petition or any paperwork to establish paternity prior to the filing of the petition to terminate his parental rights. Moreover, even after a paternity test – performed at

Respondent's request – confirmed he was B.M.A.'s father, Respondent failed to financially support the child.

Respondent acknowledged he had a total income of $34,000.00 in 2014 and that he could have contributed to the child's support but, at best, only made one payment of $20.00 to Petitioner in late December 2013 or early January 2014. Respondent conceded he could have mailed checks to pay for the child's needs, but did not. Respondent also acknowledged he could have visited the child upon request but demurred exercise of this privilege unless visitation was under his terms and conditions.

We conclude the evidence supports the court's findings of fact, and the findings in turn support the court's conclusion of law that Respondent willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition to terminate his parental rights. "A valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights." *In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986) (citation omitted). Having affirmed the existence of one ground, we need not consider Respondent's arguments concerning the other ground determined to exist. *In re P.L.P.,* 173 N.C. App. 1, 9, 618 S.E.2d 241, 246 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

III. Best Interests

Respondent next contends the trial court abused its discretion by finding it would be in B.M.A.'s best interests to terminate Respondent's parental rights. He argues the court failed to make findings of fact regarding all of the factors listed in N.C.G.S. § 7B-1110(a) in determining whether termination of parental rights is in the juvenile's best interests. This statute provides:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. The court may consider any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
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> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. While the court must consider all of these factors, it is required to make written findings of fact regarding only those factors that are relevant. *In re D.H.*, 232 N.C.

App. 217, 221, 753 S.E.2d 732, 735 (2014). A factor is relevant if there is conflicting evidence concerning the factor such that it is placed in issue. *In re H.D.*, ___ N.C. App. at ___, 768 S.E.2d at 866.

According to Respondent, the trial court erred by failing to address the bond between Respondent and B.M.A., as required by N.C.G.S. § 7B-1110(a)(4). This factor was relevant, Respondent submits, because "[t]he court heard evidence at disposition as to the relationship between [B.M.A.] and [Respondent]." **(Resp. br. at 29)** Notably, Respondent fails to identify any specific evidence in support of this argument, and we find none.

Respondent offered no evidence of an existing bond with B.M.A. During the adjudicatory portion of the hearing, Respondent testified only that he "would love to *have been* in [B.M.A.'s] life and still would to this day." *See In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) (holding trial court may consider evidence that was heard or introduced throughout the adjudicatory phase in making best interests determination). As the trial court's findings in the adjudication portion of the order state, Respondent has "not seiz[ed] opportunities to bond with [B.M.A.] . . . [and] [a]s a result, . . . [he] has no bond with the [child]." On the other hand, there was ample evidence tending to show the lack of bond between Respondent and B.M.A. It is undisputed that Respondent visited the child only once, for less than one hour, three days after her birth. When asked whether B.M.A. "know[s] who [Respondent]

is," Petitioner testified: "No. She's never seen him other than when she was three days old, which would be no memory of that at her age." Petitioner also testified that "[B.M.A. has] never said the word daddy and she wouldn't recognize [Respondent] as daddy." As the record is devoid of any evidence that a bond existed between Respondent and B.M.A., we conclude the trial court was not required to make written findings on that issue in the dispositional portion of its termination order. *Compare with In re J.L.H.*, 224 N.C. App. 52, 58, 741 S.E.2d 333, 337 (2012) (holding trial court was required to make written findings where "there was testimony at the hearing and evidence in the record relevant to the bond between [the] respondent and [the juvenile].").

"As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000). In the present case, the court's findings show that B.M.A. is two years old and has resided with Petitioner for her entire life. Petitioner has a close, loving relationship with B.M.A. The child is bonded to Petitioner and relies upon Petitioner for love, support, general welfare and upbringing. Petitioner's family lives in the same community and provides a support network for Petitioner and the child. Petitioner holds two jobs and has provided all financial support for the child. Petitioner has a last will and has a plan for the child in the event of Petitioner's death. In contrast, Respondent has

not been consistent in his employment and tends to go from job to job. Respondent has another child, a thirteen-year-old son, with whom Respondent has not maintained consistent, reliable contact.

These findings are supported by competent evidence. We find no abuse of discretion, and we affirm the order terminating Respondent's parental rights.

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).