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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-196

Filed: 7 August 2018

Gates County, No. 17 JT 1

IN THE MATTER OF: K.S.C.

Appeal by respondent from orders entered 31 October 2017 and 30 November 2017 by Judge Meader W. Harriss, III in Gates County District Court. Heard in the Court of Appeals 26 July 2018.

*Brett Alan Lewis for petitioner-appellee mother.*

*Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant father.*

ZACHARY, Judge.

Respondent-father appeals from adjudication and disposition orders terminating his parental rights to K.S.C. (“Kyle”).<sup>1</sup> After careful review, we vacate and remand.

**I. Background**

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<sup>1</sup> A pseudonym is used to protect the identity of the juvenile and for ease of reading.

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Petitioner-mother (“petitioner”) and respondent-father (“respondent”) are Kyle’s biological parents. At the time of Kyle’s birth in March 2011, petitioner and respondent were married and lived in Sandston, Virginia. The parties lived together until petitioner and respondent separated in August 2012. After the separation, petitioner and Kyle moved to another residence in Sandston, Virginia. In December 2012, petitioner and respondent divorced, and petitioner and Kyle relocated to Gates County, North Carolina to live with petitioner’s present husband. Petitioner remarried in February 2013. Kyle has lived continuously with petitioner and his stepfather in Gates County, North Carolina since December 2012.

On 17 January 2017, petitioner filed a petition to terminate respondent’s parental rights to Kyle, alleging neglect and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (7) (2017). Petitioner claimed that respondent had provided no financial support for Kyle since the parties stopped living together in 2012, had not contacted Kyle since 2014, and had “simply been absent for almost the entirety of the minor child’s five (5) year old life.” On 26 January 2017, respondent was served with the petition at the Pamunkey Regional Jail where he was incarcerated. He filed an answer on 27 February 2017, denying the substantive allegations of the petition and requesting that the court award him visitation with Kyle.

Following a hearing, the trial court entered an adjudication order on 31 October 2017 concluding that “per N.C.G.S. § 7B-1111(7), the Respondent has

willfully abandoned the minor child” Kyle. After another hearing, the court entered a disposition order on 30 November 2017 terminating respondent’s parental rights after concluding that termination was in Kyle’s best interests. Respondent timely appealed.

## II. Analysis

Respondent argues that the trial court erred in concluding that grounds existed to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a)(7) because the court’s findings of fact do not support its conclusions of law. We agree.

“This Court reviews a trial court’s conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court’s findings of fact, and whether the findings of fact support the court’s conclusions of law.” *In re C.J.H.*, 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). Unchallenged findings of fact “are conclusive on appeal and binding on this Court.” *In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) (citations omitted). We review the trial court’s legal conclusions *de novo*. *In re A.B.*, 239 N.C. App. 157, 160, 768 S.E.2d 573, 575 (2015) (citation omitted).

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) (2017), the trial court may terminate parental rights where “[t]he parent has willfully abandoned the juvenile

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for at least six consecutive months immediately preceding the filing of the petition or motion[.]” “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) (citations and internal quotation marks omitted). Therefore, “termination based on abandonment requires findings that ‘show more than a failure of the parent to live up to [his or her] obligations as a parent in an appropriate fashion.’ ” *In re D.M.O.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 794 S.E.2d 858, 861 (2016) (alteration in original) (quoting *In re S.R.G.*, 195 N.C. App. 79, 87, 671 S.E.2d 47, 53 (2009)). “The findings must demonstrate that a parent has a purposeful, deliberative and manifest willful determination to forego all parental duties and to relinquish all parental claims to the child.” *Id.* (alterations, citation, and quotation marks omitted). “Although the trial court may consider a parent’s conduct outside the six-month window in evaluating a parent’s credibility and intentions, the ‘determinative’ period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition.” *In re D.E.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 810 S.E.2d 375, 378 (2018) (citation omitted).

The trial court made the following findings of fact to support its conclusion that respondent willfully abandoned Kyle:

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10. Except for one brief telephone communication in 2014, the minor child has not visited with the Respondent-father, or otherwise seen or heard from the Respondent-father, since Christmas 2013.

11. Respondent-father has never provided formal child support to the Petitioner-mother as there was never a child support order entered, and, except for a few instances in 2013, Respondent-father has never provided monetary support to the Petitioner-mother. Petitioner-mother has not received any monetary, or other material items, to support the minor child, since 2013.

12. The total amount of support Respondent-father has provided since the parties separated in 2012 totals less than \$200.00.

13. Petitioner-mother had provided Respondent-father with her current P.O. Box when she moved to Gates County, North Carolina in December 2012. Petitioner-mother had the same telephone number that she had before she and Respondent-father ended their relationship in 2012.

14. Petitioner-mother has resided in the same residence in Gates County, North Carolina, since December 2012. Petitioner-mother provided Respondent-father with a P.O. Box for the purpose of him communicating with the minor child. Petitioner-mother did not conceal where she resided, or where the minor child was residing, from the Respondent-father.

15. Prior to the Petitioner and Respondent separating in August 2012, they had in fact resided in the same house as Petitioner Mother's father, the minor child's maternal grandfather, . . . near Richmond, Virginia, when Respondent and Petitioner stopped residing together in 2012.

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16. The minor child's maternal grandfather continued to reside in that residence near Richmond, Virginia until after this petition was filed in January 2017.

17. The maternal grandfather's home is within ten (10) miles of where the Respondent resided in the years following his separation and divorce from the Petitioner.

18. Respondent never made any effort to reach out to the minor child's maternal grandfather for the purpose of inquiring as to the wellbeing of the minor child in the intervening years between Christmas 2013 and the present.

19. Besides a couple of emails that Respondent-father sent to an email address in June 2016 that Petitioner-mother no longer had access to, Respondent-father made no effort to contact the minor child except for a visit at Christmas in 2013 and one phone call in 2014 prior to the filing of this petition.

20. In September 2016, Petitioner provided the Respondent-Father's sister . . . with the P.O. Box she has had for several years. [Respondent-father's sister] testified that she did not provide Respondent with the P.O. Box until after he was released from prison.

21. The Respondent did not write letters, or otherwise attempt correspondence with the minor child, until after this petition was filed.

22. Respondent-father has never provided Christmas or birthday gifts to the minor child.

23. Respondent-father has never inquired as to the health, wellbeing, education and care of the minor child.

. . . .

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27. Respondent-father has contributed nothing—monetarily, emotionally, educationally, spiritually, *et al.*—to the care and wellbeing of the minor child since Christmas 2013.

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31. Respondent-father has willfully abandoned the juvenile for at least six (6) consecutive months immediately preceding the filing of the petition.

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34. While the Respondent-father has struggled with substance abuse, particularly opioid abuse, and been in and out of jail for several years, the culmination of having absolutely no contact, and providing no support to the minor child for over three (3) years preceding the filing of this petition evidences that his abandonment of the minor child was willful, to wit: Respondent knew where the Petitioner's father resided; Petitioner's father resided within ten (10) miles of where Respondent lived; Petitioner has resided in the same residence since 2012; Petitioner provided Respondent with her P.O. Box in 2012 and never received correspondence from Respondent until after this petition was filed; Petitioner[s] current phone number precedes the parties' separation; and Petitioner never attempted to hide her whereabouts or the whereabouts of the minor child.

Because respondent does not challenge any of these findings, they are binding on appeal. *See S.C.R.*, 198 N.C. App. at 532, 679 S.E.2d at 909 (citation omitted). However, these findings are inadequate to support the court's conclusion that respondent willfully abandoned Kyle.

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First, the court’s findings do not specifically address respondent’s behavior during the determinative six-month period immediately prior to the filing of the petition, as required to adjudicate willful abandonment. Because the petition was filed on 17 January 2017, the determinative six-month period was between 17 July 2016 and 17 January 2017. While finding 20 directly references the relevant six-month period, it does not describe any conduct by respondent. Therefore, because the findings do not specifically address respondent’s behavior between 17 July 2016 and 17 January 2017, they are inadequate to support a conclusion that he willfully abandoned Kyle “for at least six consecutive months immediately preceding the filing of the petition[.]” N.C. Gen. Stat. § 7B-1111(a)(7) (2017); *see D.E.M.*, \_\_\_ N.C. App. at \_\_\_, 810 S.E.2d at 378 (remanding for further fact finding in part because “the trial court’s findings [did] not specifically address [father’s] behavior within the relevant six-month period”).

Second, the court’s current evidentiary findings are insufficient to support its ultimate conclusion that respondent’s abandonment of Kyle was willful. Respondent contends that he was incarcerated for the entirety of the relevant six-month period. He further argues that during those six months, his sister obtained Kyle’s mailing address from petitioner at his request, but she withheld that information from him until after he was released from prison. Thus, respondent asserts that his sister “didn’t give him the choice” to contact Kyle.



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“Incarceration, standing alone, neither precludes nor requires a finding of willfulness on the issue of abandonment, and despite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child.” *D.M.O.*, \_\_\_ N.C. App. at \_\_\_, 794 S.E.2d at 862 (alterations, internal citations, and quotation marks omitted). “However, the circumstances attendant to a parent’s incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited.” *Id.* at \_\_\_, 794 S.E.2d at 862-63. Nevertheless, an incarcerated parent “‘*will not be excused from showing interest in his child’s welfare by whatever means available.*’” *D.E.M.*, \_\_\_ N.C. App. at \_\_\_, 810 S.E.2d at 378 (quoting *In re J.L.K.*, 165 N.C. App. 311, 318-19, 598 S.E.2d 387, 392, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004)).

Here, respondent’s unchallenged testimony was that he was imprisoned from 15 July 2016 to 1 February 2017—a period of time encompassing the entire determinative six months. Although the court found that respondent had “been in and out of jail for several years,” the order is silent regarding respondent’s incarceration status during the relevant six months. Further, the trial court did not make any findings regarding respondent’s ability to provide financial support or gifts for Kyle; to contact Kyle, petitioner, or petitioner’s father; or to take any action to establish a relationship with Kyle while he was incarcerated. Without any findings

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that respondent “made any effort, had the capacity, or had the ability to acquire the capacity, to perform” those actions during his incarceration, the trial court’s findings do not establish that he abandoned Kyle willfully. *D.E.M.*, \_\_\_ N.C. App. at \_\_\_, 810 S.E.2d at 379 (quotation marks and citation omitted) (vacating and remanding in part because “the trial court here made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated”). While we express no opinion as to whether the evidence introduced at the hearing could support a finding that respondent willfully abandoned Kyle within the relevant six-month period, we conclude that the trial court’s current findings are inadequate to support its conclusion that grounds existed to terminate respondent’s parental rights under N.C. Gen. Stat. § 7B-1111(a)(7).

Accordingly, we vacate the trial court’s 31 October 2017 adjudication order and remand to the trial court for further findings related to respondent’s conduct during the relevant six-month period and whether his abandonment of Kyle was willful. Because we vacate the trial court’s adjudication order, the court’s subsequent disposition order is also vacated. *See* N.C. Gen. Stat. § 7B-1110(a) (2017) (“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.”). “We leave to the discretion of the trial court whether to hear additional

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evidence.” *In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009). In light of our disposition, we decline to address respondent’s remaining argument on appeal.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).