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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1

Filed: 15 October 2019

Cleveland County, No. 18 JT 23

IN THE MATTER OF W.J.I.

Appeal by Respondent-Father from order entered 16 October 2018 by Judge Justin K. Brackett in Cleveland County District Court. Heard in the Court of Appeals 17 September 2019.

*No brief for Petitioner-Appellee.*

*Wagner Family Law, by Lisa Anne Wagner, for Respondent-Appellant.*

COLLINS, Judge.

Respondent-Appellant Father (“Father”) appeals from the trial court’s order terminating his parental rights to his minor child W.J.I. (“Jacob”)<sup>1</sup> pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) on the ground of willful abandonment. Father contends that the trial court erred by terminating his parental rights without finding that he

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<sup>1</sup> A pseudonym is used to protect the minor’s identity.

abandoned Jacob willfully. We vacate the trial court's order and remand for further proceedings.

### **I. Background**

Father and Petitioner-Appellee Mother ("Mother") engaged in a romantic relationship for a number of years, of which Jacob was born on 5 July 2014. The parties' relationship ended on or about 4 February 2017, following an incident of alleged domestic violence between the parties.

On 8 May 2017, the parties consented to the entry of a Domestic Violence Order of Protection that, *inter alia*, (1) precluded Father from contacting Mother, (2) granted Mother temporary custody of Jacob, and (3) granted Father supervised visitation with Jacob "as can be arranged through a 3<sup>rd</sup> party" for a period of one year (the "DVPO").

Mother filed a petition pursuant to N.C. Gen. Stat. § 7B-1103(1) asking the trial court to terminate Father's parental rights to Jacob (the "Petition") on 21 February 2018. In the Petition, Mother sought to terminate Father's parental rights because, in the six months immediately preceding the filing of the Petition, Father allegedly: (1) willfully neglected Jacob within the meaning of N.C. Gen. Stat. § 7B-1111(a)(1); and (2) willfully abandoned Jacob within the meaning N.C. Gen. Stat. § 7B-1111(a)(7). Specifically, Mother alleged that, during the year preceding the filing of the Petition, Father failed to provide any financial assistance to Jacob and failed to make any efforts to communicate with or visit Jacob. Father answered

the Petition on 9 April 2018 and denied Mother's allegations. The Petition came on for a pre-trial hearing on 2 May 2018.

On 23 May 2018, the trial court entered an order appointing Jacob a *guardian ad litem* ("GAL") *nunc pro tunc* to 2 May 2018. The GAL issued her report on 15 August 2018, reporting that Father had had no contact with Jacob since 4 February 2017 but had sent the GAL a letter dated 1 August 2018 "express[ing] his concern for [Jacob]'s health and well-being as well as his plans to raise and parent [Jacob]."

The trial court entered an order terminating Father's parental rights on 16 October 2018 (the "TPR Order"). In the TPR Order, the trial court found, *inter alia*, that (1) Father admitted to providing no financial assistance to Jacob since the entry of the DVPO other than \$123 in gifts, but (2) there was no child support order in place requiring Father to pay child support, and (3) Jacob was never placed in the custody of the Department of Social Services. The trial court accordingly dismissed Mother's N.C. Gen. Stat. § 7B-1111(a)(1) claim.<sup>2</sup>

The trial court also found, *inter alia*, that (1) Father had not visited Jacob "since the entry of that Order and the time since the separation of the parties[.]"<sup>3</sup>

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<sup>2</sup> That portion of the TPR Order has not been appealed, and therefore is not before us.

<sup>3</sup> Although it is not clear from the TPR Order (1) to which "Order" the trial court refers in this and other parts of the TPR Order or (2) the date the trial court found the parties to have separated, we understand the trial court to be referring to (1) the 8 May 2017 DVPO and (2) the 4 February 2017

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(2) Father had not attempted to visit Jacob with the exception of text messages sent by Father's mother to Mother's grandfather seeking visitation on 22 May and 3 June 2017; (3) Father had not contacted or communicated with Jacob since approximately 4 February 2017; and (4) in the six months preceding the filing of the Petition, there had been no efforts by Father or anyone acting on Father's behalf to exercise custody over Jacob with the exception of the \$123 in gifts. The trial court noted in the TPR Order that Father "claimed that he was under the mistaken belief that the [DVPO] prevented him from filing a custody action during the year of the case[.]" and found both that "the Court could see his confusion there" but that "[t]he Court does not believe that [Father's] reasoning for not pursuing a custody action is credible[.]" noting that Father had worked for eight months of the year preceding the filing of the Petition but had not made any efforts to pursue a custody action during that time.<sup>4</sup> Based on the foregoing, the trial court found that Father had "evidence[d] a settled purpose to forgo all parental duties and relinquish all parental claims" over Jacob, and that "by clear, convincing and cogent evidence there is a basis for termination of parental rights based on North Carolina General Statute § 7B-1111(a)(7) which is

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alleged domestic violence incident after which the parties' relationship ended. On remand, the trial court should clarify whether our understanding is correct.

<sup>4</sup> The trial court also noted a lack of evidence that Father had made any efforts to pursue a custody action after the Petition's filing, but such a consideration is not relevant to whether Father's parental rights could be terminated pursuant to the TPR Petition on willful abandonment grounds. N.C. Gen. Stat. § 7B-1111(a)(7) (noting the relevant time period as the "six consecutive months immediately preceding the filing of the petition").

abandonment for the six (6) month time period immediately preceding the filing of this action.” The trial court then “conclude[d] as a matter of law” that Father “ha[d] willfully abandoned the minor child” for the six consecutive months preceding the filing of the Petition, and because it also concluded that it was in Jacob’s best interest to do so, the trial court ordered that Father’s parental rights to Jacob be terminated. Father timely appealed.

## **II. Discussion**

Plaintiff contends that the trial court erred because the TPR Order does not contain a finding that Father abandoned Jacob willfully during the relevant time period. We agree.

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). In the initial adjudication phase, the petitioner has the burden to “show by clear, cogent and convincing evidence that a statutory ground to terminate exists” under N.C. Gen. Stat. § 7B-1111. *Id.* (quotation marks and citation omitted). If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent’s rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004). If, in its discretion, the trial court determines that it is in the child’s best

interests, the trial court may then terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

In reviewing a trial court's order terminating parental rights, a reviewing court must first determine, with respect to the adjudication phase, whether the "findings of fact are supported by clear, cogent and convincing evidence[.]" *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 58 (2008) (quotation marks and citation omitted). "Clear, cogent and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt," and requires "evidence which should fully convince." *In re Mills*, 152 N.C. App. 1, 13, 567 S.E.2d 166, 173 (2002) (quotation marks and citations omitted); *see also In re I.R.L.*, 823 S.E.2d 902, 904 (N.C. Ct. App. 2019) ("When the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." (internal quotation marks and citation omitted)). If satisfied that the record contains clear, cogent, and convincing evidence supporting the findings of fact, the reviewing court must then determine whether the findings of fact support the trial court's conclusions of law. *In re S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 58-59. This Court reviews the trial court's legal conclusions *de novo*. *Id.* Finally, with respect to the disposition phase, this Court reviews a trial court's decision that termination is in the best interests of the child for abuse of discretion, and will reverse only where the trial court's decision is

“manifestly unsupported by reason.” *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

N.C. Gen. Stat. § 7B-1111(a)(7) sets forth that a trial court “may terminate the parental rights upon a finding . . . [that 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) (2018) (emphasis added). By the express terms of the statute, then, a trial court must make a finding that the parent not only abandoned the child, but that the parent did so willfully, or else the court lacks the statutory authority to terminate the parent’s rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7).

The TPR Order does not contain a finding that Father *willfully* abandoned Jacob during the relevant time period. This Court has held that the lack of a finding of willfulness requires vacation of an order terminating parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). *In re T.M.H.*, 186 N.C. App. 451, 455, 652 S.E.2d 1, 3 (vacating order because “[t]he order before us contains no findings of willfulness. In the absence of a finding of willfulness, the trial court’s order does not establish grounds for termination.”), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007); *In re I.R.L.*, 823 S.E.2d at 905 (vacating order because it “fails to address the willfulness of Father’s conduct . . . . Without a finding of willfulness, we conclude that the trial court failed to enter adequate findings of fact and conclusions of law to demonstrate

that grounds existed pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) to terminate Father’s parental rights.”).

The trial court did find that Father’s actions “evidence a settled purpose to forgo all parental duties and relinquish all parental claims” to Jacob, which is similar language to that found in many cases discussing what is required to terminate a parent’s rights for willfully abandoning a child pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). *See, e.g., In re E.H.P.*, 831 S.E.2d 49, 52 (N.C. 2019) (“We have held that 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.” (internal quotation marks, brackets, and citations omitted)). We conclude, however, that this finding is inadequate to terminate Father’s parental rights.

In our recent decision in *In re I.R.L.*, we vacated an order terminating the respondent’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) because the order lacked a finding of willfulness. *In re I.R.L.*, 823 S.E.2d at 906. In the opinion in that case—which involved facts remarkably similar to the facts in the instant case—we said: “The finding of willfulness was especially important given that the court found that during the entirety of the relevant six month period, Father was subject to a DVPO, in which he was ordered to stay away from and have no contact with Mother, who had custody of” the subject child. *Id.* at 905. So here, where Father was subject for the entirety of the relevant period to a court order preventing him



from coming into contact with the person who had legal custody of the child,<sup>5</sup> a finding of willfulness is crucial, and its absence renders the TPR Order fatally deficient.

Based upon the foregoing, we conclude that the TPR Order lacks findings of fact necessary to support its conclusion of law that Father willfully abandoned Jacob within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7), the sole ground upon which termination was based, and that the TPR Order must accordingly be vacated.

### **III. Conclusion**

Because we conclude that it lacks necessary findings of fact to support its legal conclusions, we vacate the TPR Order and remand to the trial court with instructions to make appropriate findings of fact regarding whether Father's abandonment of Jacob was willful within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7). On remand, we leave in the trial court's discretion the decision of whether to take additional evidence.

VACATED AND REMANDED.

Judges BRYANT and YOUNG concur.

Report per Rule 30(e).

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<sup>5</sup> On remand, the trial court should consider whether the supervised visitation provisions in the DVPO's Temporary Child Custody Addendum—which plainly fail to “specify the person or agency providing supervision, [and] the location, frequency, and length of visitation” as prescribed in the Addendum—are sufficient to render Mother's allegation that Father failed to visit Jacob during the six-month period immediately preceding the filing of the Petition relevant as an indicium of willful abandonment within the meaning of N.C. Gen. Stat. § 7B-1111(a)(7). *See* N.C. Gen. Stat. § 50B-3(a1)(3) (2018) (“If the court grants visitation, the order *shall* specify dates and times for the visitation to take place or other specific parameters or conditions that are appropriate.” (emphasis added)).