

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-868

Filed 05 July 2023

Buncombe County, No. 19-JT-140

In re: S.G.S.

Appeal by Respondent-Mother from order entered 19 August 2022 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 7 June 2023.

Connell & Gelb PLLC, by Michelle D. Connell, for Petitioners-Appellees.

Emily Sutton Dezio for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights to her minor child based on willful abandonment. Mother challenges several findings of fact pertaining to the element of "willfulness" as being unsupported by clear and convincing evidence.¹ We affirm.

¹ Although Mother challenges certain findings as not being supported by "clear and convincing evidence," the proper standard in this case is "clear, cogent, and convincing evidence," *In re D.C.*, 378 N.C. 556, 559, 862 S.E.2d 614, 616 (2021), and we review the findings under this standard.

I. Background

Mother is the biological mother of Susan,² a minor child born in 2017. Susan has lived with her paternal grandparents since her birth, with the exception of short periods of time during which Mother took Susan for visitation. Grandparents were granted primary custody of Susan “via a consent Memorandum of Judgment/Order” signed by Mother on 13 November 2017 when Susan was four months old.

Between 2019 and 2021, Grandparents filed a series of five Termination of Parental Rights (“TPR”) petitions to terminate Mother’s parental rights to Susan. Grandparents voluntarily dismissed the first two of those petitions. In October 2019, Grandparents filed a third TPR petition; the matter was heard in March 2020 and the trial court appointed a “Rule 17 guardian of substitution” for Mother. The trial court dismissed Grandparents’ petition for failing to show grounds for termination. Grandparents then filed a new TPR petition in May 2021. The trial court appointed a “Rule 17 guardian of substitution” for Mother in September 2021 based on the evidence before the trial court and because Mother “had gotten a guardian of the person, pursuant to a Chapter 35A action, which found her to be incompetent.” Grandparents then voluntarily dismissed that fourth petition.

On 29 October 2021, Grandparents filed a fifth petition to terminate Mother’s parental rights, alleging that she willfully abandoned Susan. Susan’s biological

² We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

father filed an affidavit in support of Grandparents' petition and agreed to relinquish his parental rights to Susan and consent to Grandparents adoption of Susan if Mother's parental rights were terminated. Grandparents caused summons to issue and attempted to personally serve Mother, but they were unable to do so as Mother was incarcerated in a California jail and "would not come out of her cell" to accept service. Grandparents moved to serve Mother by publication and the trial court held a hearing on their motion; the trial court ruled for Mother "to be served by publication [in Los Angeles] as she cannot be served by other means" and directed that Grandparents also serve Mother by certified mail and regular US mail. Service upon Mother was completed by Grandparents by publication on three separate dates spanning December 2021 through January 2022.

The trial court held a pretrial conference on the termination of Mother's parental rights on 15 March 2022. At this conference, Mother's provisional counsel asked to be appointed fully and then argued for the appointment of a "Rule 17 guardian of substitution" for Mother based on "the substantial concerns previously evident relating to [Mother's] ability to contribute to her defense" and also because Mother "has been found incompetent via a Chapter 35A action." The trial court took judicial notice of Mother's mental health records from various hospitals and psychiatric facilities, which indicated that Mother had "substantial mental health needs." The trial court determined that Mother's mental health conditions, which included bipolar disorder, suicidal ideations, depression, and PTSD, "are not

conditions which would easily remedy themselves and are . . . chronic in nature and not transitory.” Because of this, the trial court determined that Mother was not capable of adequately contributing to her defense and (1) appointed Mother’s provisional counsel as her full counsel and (2) appointed a “Rule 17 Guardian ad litem of substitution in this matter.”

The matter came on for an adjudicatory hearing on 18-19 May 2022 with Mother’s counsel and Rule 17 Guardian ad Litem of substitution present. The trial court requested that the parties submit legal briefs and proposed orders. At the hearing, Mother’s counsel made an oral motion to dismiss and argued that the willfulness prong of the grounds of “willful abandonment” had not been satisfied. The trial court determined that, notwithstanding her mental health diagnoses, there was clear, cogent, and convincing evidence that Mother had a “willful intent to abandon” Susan for the six months prior to the filing of the petition and that her “mental illness did not render her incapable of forming the intent to willfully abandon” Susan. The trial court adjudicated Susan willfully abandoned. The trial court entered an order containing its adjudicatory findings and denying Mother’s motion to dismiss on 19 July 2022.

After determining that the ground of willful abandonment existed upon which to terminate Mother’s parental rights, the trial court proceeded to the dispositional hearing. After considering all of the factors regarding the best interests of the minor child, the trial court concluded that termination was in Susan’s best interests and

terminated Mother's parental rights. The trial court took judicial notice of the 19 July 2022 order and fully incorporated its adjudicatory findings of fact and conclusions of law into its TPR Order. Written notice of appeal from the TPR Order was filed on 14 September 2022.

II. Discussion

Mother argues that (1) the trial court's adjudicatory findings of fact are not supported by clear and convincing evidence and (2) the actions of a mother with severe mental health issues cannot be willful.

"Termination of parental rights involves a two-stage process." *In re L.H.*, 210 N.C. App. 355, 362, 708 S.E.2d 191, 196 (2011) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes." *In re D.C.*, 378 N.C. at 559, 862 S.E.2d at 616 (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 H.N.D.*, 265 N.C. App. 10, 13, 827 S.E.2d 329, 332 (2019) (citation omitted). 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 adjudication of grounds for termination, this Court must “determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law” that one or more grounds for termination exist. *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). “If clear, cogent, and convincing evidence supports a trial court’s findings which support its determination as to the existence of a particular ground for termination of a respondent’s parental rights, the resulting adjudication of the ground for termination will be affirmed.” *In re J.R.F.*, 380 N.C. 43, 47, 867 S.E.2d 870, 874 (2022) (citation omitted). Unchallenged findings are “deemed supported by competent evidence and are binding on appeal.” *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court’s conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

A trial court may terminate parental rights 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[.]” N.C. Gen. Stat. § 7B-1111(a)(7) (2022). “To find that a parent has willfully abandoned his or her child, the trial court must find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety.” *In re A.L.L.*, 376 N.C. 99, 110, 852 S.E.2d 1, 9 (2020) (quotation marks and citation omitted). “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 Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quotation marks and citation omitted). “[T]he ‘determinative’ period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition.” *In re B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021) (quotation marks and citations omitted).

A. Challenged Findings of Fact

Mother challenges portions of the trial court’s adjudicatory findings of fact 45-48 as being unsupported by clear and convincing evidence.

1. Adjudicatory Finding of Fact 45

Adjudicatory finding of fact 45 states:

45. That the competent, credible and uncontroverted evidence supports that [Mother] has suffered from mental illness for much of her adult life, but was still able to participate in the civil custody case, participate in the special proceeding case, and to visit at least semi-regularly with the minor child, including bringing small gifts for the minor child for almost three years, until [Mother] ceased those efforts in January of 2020[.]

Mother challenges only the portion that states that Mother “ceased those efforts in January of 2020.” Andrea Robles, a client service coordinator with the Family Visitation Center (“FVC”), set up supervised visitations between Mother and Susan. Robles testified at the adjudicatory hearing that Mother last visited Susan on 28 January 2020. This testimony supports the challenged portion of finding 45

that Mother ceased efforts to visit with Susan in January 2020.

Moreover, unchallenged findings of fact 35 and 44 support the finding that Mother ceased efforts to visit with Susan in January 2020. Finding 35 states, “[S]ince January, 2020, to the date of this hearing, . . . Mother has not phoned, emailed, written a letter, sent a message, sent any holiday and/or birthday gifts, provided to the minor child any love/affection/nurture or support, or even inquired of [Grandparents] about the minor child in any manner.” Finding of fact 44 states, in relevant part, that case notes from the FVC “reflect that [Mother] visited at the FVC from November 2018 until January 28, 2020. . . . [Mother’s] last visit with the minor child at the FVC was on January 27, 2020.” These unchallenged findings are deemed supported by competent evidence and support that Mother ceased efforts to visit Susan in January 2020.

2. *Adjudicatory Finding of Fact 46*

Adjudicatory finding of fact 46 states:

46. That the competent and credible evidence supports that [Mother] was able to make the necessary arrangements to leave the State of North Carolina subsequent to her incompetency proceedings in the spring of 2020 and to travel to the State of California, where she remained during the relevant time period. That [Mother] may have chosen to leave North Carolina due to open warrants pending in Buncombe County, North Carolina, but regardless of her reason, was clearly able to form and carry out a plan to depart North Carolina.

Mother asserts that “there is no evidence about any arrangements [Mother]

made to leave the State of North Carolina.” However, the record evidence shows that Mother traveled to and was incarcerated in Los Angeles, California. The evidence also shows that, in the “Order on Application for Appointment of Guardian” for Mother, the trial court found that Mother could, *inter alia*, communicate her personal needs, spend small amounts of money, and make her own decisions regarding “social activities.” This evidence supports that Mother was able to form and carry out a plan to leave North Carolina. Additionally, this finding is supported by evidence from Mother’s case worker, who testified that Mother “was in several locations” during their time working together. The case worker testified that Mother lived “in Oakley . . . and then she was living in West Asheville for a period of time. She did end up in California for a period of time and came back[.]” This testimony further supports that Mother was able to make arrangements to leave North Carolina.

Moreover, adjudicatory findings of fact 38 and 40, which Mother does not challenge, support the challenged finding. Adjudicatory findings of fact 38 and 40 state:

38. . . . [Mother] understands conversation and communicates personal needs, can make decisions about when and what to eat, did not need any assistance with personal hygiene, can make and communicate choice in regard to employment and demonstrates skills required to work, and can look for and find a job, further that [Mother] has the capacity to make decisions concerning social activities.

. . . .

40. Notwithstanding her mental health diagnosis, in the decretal provisions of the May 22, 2020 Order the Court determined that [Mother] could vote, make decisions regarding her employment, take care of minor health problems, contact service providers and handle small amounts of money and maintain personal property exclusive of investment funds. Though this same Order called for a further hearing, none was held and no subsequent Orders were entered by the assistant Clerk of Court.

These findings further support that Mother was able to make the necessary arrangements to leave North Carolina.

3. *Adjudicatory Finding of Fact 47*

Adjudicatory finding of fact 47 states:

47. That based on the credible, competent and uncontroverted evidence before the Court, at the time of this hearing, [Mother] has been in a California county jail since approximately October, 2021 being held on charges of burglary and of giving a false identity. That this would support that [Mother] had at minimum, been deemed to have the requisite mental capacity to be charged with engaging in some alleged criminal activities. It is significant to the Court that [Mother] has remained jailed and has not been transferred to a mental health facility by the California Court.

Mother argues that this finding is unsupported by the evidence because it was based on testimony, which was objected to as hearsay and for which the trial court sustained the objection, and that the trial court struck the evidence from the record.

At the adjudicatory hearing, the following exchange occurred:

[The Court]: Where do you understand [Mother] is at this time?

[Grandparent]: The LA County Correctional Jail, in LA.

[The Court]: And have you tried to take or stay informed of what's going on with [Mother] or what has been going on with [Mother's] criminal charges that are pending?

[Grandparent]: I mean, I've looked it up online and there was a pretrial hearing yesterday. Some kind of burglary charge. I don't know anything about it beyond that.

[Mother's Attorney]: I'm going to object as to hearsay and move to strike.

[The Court]: Sustained. Stricken.

The trial court then took judicial notice of Mother's certified criminal record from Buncombe County, North Carolina showing her order for arrest; her attorney did not object to the trial court's taking judicial notice. We agree, and Grandparents concede, that the portion of testimony stating that Mother was in jail for "some kind of burglary charge" was objected to and stricken from the record, and that there is no record evidence to support that portion of the finding. However, there is sufficient testimonial evidence to support that Mother had been charged with criminal offenses in California and that she was being held in a California jail. Additionally, there is sufficient record evidence, in the form of a prior court order, which states that Mother was being held "in the Los Angeles (L.A.) County jail facility in Compton, California" and that, per the L.A. County Sheriff's office, Mother "was deemed hostile and not allowed out of her cell." This evidence supports that Mother had not been transferred from a California jail to a mental health facility.

4. Adjudicatory Finding of Fact 48

Adjudicatory finding of fact 48 states:

48. That [Mother] has withheld her love and nurture from the minor child and she has not participated in the minor children's [sic] life in any way whatsoever since January, 2020. That her mental health condition was not so severe as to prevent her from being able to travel across the country or require that she be moved from the regular jail population in California to a mental health facility. That even under the incompetency proceedings, [Mother] was left with one of the most sacred rights, the right to vote, evidencing that she was deemed capable of making some very important decisions. That [Mother] was allowed the right to seek and engage in employment and associate freely with others, clearly demonstrating that at that time, she was not so mentally impaired as to forfeit all her rights.

Mother challenges the portion of this finding that states that her "mental health condition was not so severe as to prevent her from being able to travel across the country or require that she be moved from regular jail population in California to a mental health facility." As discussed above, there is sufficient record evidence to support that Mother had not been transferred from the regular jail population in California to a mental health facility and that Mother left North Carolina and traveled across the country to California. Moreover, adjudicatory findings 38 and 40 support that Mother was able to make the necessary arrangements to leave North Carolina to travel to California.

B. Willful Abandonment

In addition to the challenged adjudicatory findings of fact, the trial court made the following relevant unchallenged adjudicatory findings of fact as to Mother's

abandonment of Susan:

28. That [Grandparents] have had primary custody of the minor child via a consent Memorandum of Judgment/Order (MOJ) signed by themselves as Intervenors, and the Respondent parents and entered by the Court on November 13, 2017. Said MOJ being found in Buncombe County File Number 17-CvD-4341.

29. That a second Memorandum of Judgment/Order was entered into, signed again by [Grandparents] as Intervenors and the respondent parents on April 17, 2018 and in which the parties once more agreed that primary custody of the minor child would be placed with [Grandparents], with supervised visitation to [Mother].

....

31. That the minor child has remained in the primary care, custody, and control of [Grandparents], with the exception of short periods of time in which [Mother] took the minor child for visitation, since the minor child's birth starting from when the minor child first came home from the hospital to live with [Mother] and [Grandparents], at the residence of [Grandparents].

....

33. That [Grandparents] last communication with [Mother] was on September 22, 2018, via email.

34. That during the times when [Mother] did visit with the minor child she brought the occasional gifts of a toy or an article of clothing.

35. That since January, 2020, to the date of this hearing, which includes the six month time period prior to the filing of this action in October of 2021, [Mother] has not phoned, emailed, written a letter, sent a message, sent any holiday and/or birthday gifts, provided to the minor child any love/affection/nurture or support, or even inquired of [Grandparents] about the minor child in any manner.

36. The [Grandparents] have maintained the same phone numbers and email addresses since the last communication with [Mother] in 2018.

....

38. That included in the Order on Application for Appointment of Guardian, entered by the assistant Clerk of Court on May 22, 2020, . . . [regarding Mother's] incompetency proceedings, that the judicial official in that Court found *inter alia* . . . that [Mother] understands conversation and communicates personal needs, can make decisions about when and what to eat, did not need any assistance with personal hygiene, can make and communicate choice in regard to employment and demonstrates skills required to work, and can look for and find a job, further that [Mother] has the capacity to make decisions concerning social activities.

39. Records obtained during [Mother's] incompetency proceeding . . . reflect that [Mother] had various mental health diagnosis, including schizoaffective disorder with paranoid features, a borderline personality disorder, post-traumatic stress disorder, bipolar disorder, and anxiety.

40. Notwithstanding her mental health diagnosis, in the decretal provisions of the May 22, 2020 Order the Court determined that [Mother] could vote, make decisions regarding her employment, take care of minor health problems, contact service providers and handle small amounts of money and maintain personal property exclusive of investment funds. Though this same Order called for a further hearing, none was held and no subsequent Orders were entered by the assistant Clerk of Court.

....

44. The Court received testimony from Andrea Robles from the Family Visitation Center ("FVC"). The FVC was agreed to by the parties in the civil custody litigation, as

being the agency to oversee [Mother's] supervised visits. Ms. Robles began working there two years ago, having succeeded Mr. Jay Wilson. Mr. Wilson's notes reflect that [Mother] visited at the FVC from November 2018 until January 28, 2020. Per Mr. Wilson's notes, [Mother's] last visit with the minor child at the FVC was on January 27, 2020. The FVC files reflect that Mr. Wilson sent [Mother] an undated and unsigned letter discharging her from the visitation program on September 4, 2020, because the FVC was unable to contact her.

....

49. That the Court does not find, based on the competent and credible evidence before it, that [Mother] was so mentally impaired as to not understand that she had a child and that she was responsible as a parent to, at minimum, inquire as to the minor child's wellbeing, which she did not do for the six months prior to the filing of this petition.

50. That [Mother's] behavior in this matter demonstrates that her failure to maintain at least some contact with the minor child within the six months prior to the filing of this petition, was her conscious choice, in that her mental state did not preclude her from reaching out in some way to at least inquire about the minor child and that her failure to do so did display a purposeful, deliberate intent to forego all parental duties and was not a specific consequence of her mental illness. That the competent and credible evidence does not support that [Mother's] mental health rendered her unable to meet at least the minimum of her obligations as a parent such as making some inquiry or initiating some communication regarding the minor child.

....

52. That the Court does not find, that the mere appointment of a Rule 17 GAL of substitution to a Respondent parent, is enough to negate the Court's ability to make any further inquiry as to the willfulness of a Respondent parent's behavior pursuant to N.C.G.S. §

7B-1111(a)(7).

53. That neither [Mother's] attorney nor GAL have any indication of what [Mother] wants to do in this case regarding the October 29, 2021 Petition, as [Mother] has never had contact with them or otherwise expressed her wishes during the pendency of this action.

54. That there was no credible evidence before the Court that [Mother's] incarceration in any way precluded her ability to communicate with her counsel and GAL, or to even communicate with the maternal grandmother, who was her prior guardian in the incompetency proceeding and who was also served with notice of these proceedings as reflected in the Court file.

.....

56. That the evidence was not sufficient to support that during the six months before this petition was filed, that [Mother's] mental illness was such that she was incapable of sending cards, gifts or letters to the minor child, or inquiring about the minor child. Therefore her abandonment of the minor child was purposeful, deliberative and evidences the intent to "forego all parental duties and relinquish all parental claims to the child."

57. That based on the totality of the clear, cogent and convincing evidence, [Grandparents] have met the criteria set forth in the North Carolina Supreme Court case *In re A.L.L.* (379 N.C. 99, 2020), in that the competent and credible evidence supports that [Mother's] mental illness did not render her incapable of forming the intent to willfully abandon the minor child, given that for most of [Mother's] life as a mother and while dealing with her previously diagnosed mental health issues, she was still able to meet some minimal standard of understanding her role as a parent and to participate in the minor child's life such as visiting the minor child, bringing small gifts or inquiring about the minor child, and that all these attempts at parenting were willfully abandoned by [Mother] prior to the six months before this Petition was

filed. Therefore the Court finds, based on the totality of the competent and credible evidence, that [Mother's] behavior in abandoning the minor child for the six months preceding the filing of the October 29, 2021 Petition, is a product of her willful intent, and not a symptom of her diagnosed mental illness.

These unchallenged findings, in addition to the challenged findings of fact and portions thereof for which there is clear, cogent, and convincing evidentiary support, show that Mother: repeatedly forfeited custody of Susan to Grandparents beginning shortly after Susan's birth; failed to communicate with Grandparents, Susan's custodians, since 2018; failed to send Susan an email, text, letter, card, or gift since January 2020; failed to "inquire [about Susan] . . . in any manner" since January 2020; and failed to provide Susan with "any love/affection/nurture or support" since January 2020. Moreover, the findings show that, while Mother's mental illness impacted her ability to parent Susan, her mental illness is not so severe as to preclude Mother from knowing that she has a child and knowing that she has an obligation to at least make an inquiry as to Susan and Susan's wellbeing. Accordingly, the findings of fact support the trial court's conclusion that Mother willfully abandoned Susan for the six months preceding Grandparents' filing of the petition to terminate Mother's rights.

III. Conclusion

The trial court's challenged findings of fact and portions thereof that are supported by clear, cogent, and convincing evidence, together with the unchallenged

IN RE: S.G.S.

Opinion of the Court

findings of fact, support the trial court's conclusion of law that Mother willfully abandoned Susan for the six months preceding Grandparents' filing of the petition to terminate Mother's rights. We thus affirm the TPR Order.

AFFIRMED.

Judges DILLON and HAMPSON concur.

Report per Rule 30(e).