IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-924

Filed 01 August 2023

Guilford County, Nos. 21 JT 469–70

IN THE MATTER OF: E.M.E., M.T.E.

Appeal by Respondent-Father from orders entered 26 July 2022 by Judge Marcus Shields in Guilford County District Court. Heard in the Court of Appeals 13 July 2023.

No brief filed for Petitioner-Appellee Mother.

Hooks Law, P.C., by Laura G. Hooks, for Respondent-Appellant Father.

No brief filed by Guardian Ad Litem.

RIGGS, Judge.

In this private termination action, Appellant-Father ("Father"), appeals from the trial court's order terminating his parental rights to his twin minor children, E.M.E. and M.T.E.[1] Father argues that the trial court erred by concluding that his rights could be terminated based on willful abandonment and that the court abused its discretion by concluding that termination was in the children's best interests.

[1] Father's minor children E.M.E. and M.T.E., collectively, will be referred to as "the children."

After review, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Appellee-Mother ("Mother") is the biological mother of the children. On 8 April 2021, Mother filed two petitions seeking to terminate Father's parental rights to the children. With respect to E.M.E., Mother alleged three grounds for termination: abuse, failure to pay child support, and willful abandonment. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (4), and (7) (2021). With respect to M.T.E., Mother also alleged three grounds, substituting neglect for abuse under N.C. Gen. Stat. § 7B-1111(a)(1) and again alleging failure to pay child support and willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(4) and (7). To support these grounds, Mother pointed to the fact that Father had been convicted in April 2016 for two counts of sexually abusing E.M.E. and three counts of wrongfully possessing, producing, and distributing child pornography, including images of E.M.E., and sentenced to fourteen years of imprisonment; that he had no contact with either child since 2016 after agreeing to no visitation or contact with the children under a consent custody order; and that he failed to pay for the care, support, and education of the children for one year or more, even though he was required to provide support under the terms of the same consent order.

After a series of continuances, the trial court conducted a hearing on the termination petitions on 29 June 2022. Father was not present but participated in the hearing by telephone via WebEx. Only Mother testified during the adjudication

phase of the hearing. At the conclusion of her testimony, Father's counsel moved to dismiss the termination grounds alleged for each child. The trial court denied the motion.

At the close of all evidence, Father's counsel renewed her motion to dismiss the termination grounds. This time, the trial court granted the motion as to the grounds of abuse, neglect, and failure to pay child support and denied the motion as to willful abandonment. The case then proceeded to the best interests' phase, where Mother, the children's guardian *ad litem*, Father, and the paternal grandmother all testified.

On 26 July 2022, the trial court entered two orders terminating Father's parental rights. The court found that Father had willfully abandoned the children as defined by N.C. Gen. Stat. § 7B-1111(a)(7) and that termination was in the children's best interests. Father appeals.

II. WILLFUL ABANDONMENT

Father first contends that the trial court erred by concluding that his rights to the children could be terminated based on willful abandonment.

When assessing a challenge to the grounds for termination adjudicated by the trial court, this Court reviews whether the adjudicatory findings are supported by clear, cogent, and convincing evidence and whether the findings support the court's conclusions of law. *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation omitted). "Findings of fact not challenged by respondent 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). Conclusions of law are reviewed *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

The Juvenile Code provides that a parent's rights are subject to termination if "[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). "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 B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 752 (2020) (quoting *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997)). When "a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance," he has abandoned his child. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

"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 N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619, 810 S.E.2d 375, 378 (2018)), *overruled in part on other grounds by In re G.C.*, 384 N.C. 62, 65 n.3, 884 S.E.2d 658, 661 n.3 (2023). In this case, the termination petition was filed on 8 April 2021; therefore, the determinative six-month period runs from 7 November 2020 to 7 April 2021.

A. Finding of Fact 10 (E.M.E.)

The trial court's two termination orders are nearly identical. However, E.M.E.'s order includes one additional finding of fact, which Father challenges as unsupported by the evidence: "10. Father admitted that there were grounds to terminate his parental rights with regard to this minor child, however Father acknowledged that this Court must make an independent determination of the existence of grounds." Father notes that in his answer to the termination petition, he admitted to abuse as a potential ground for termination but denied the existence of failure to pay child support and willful abandonment as termination grounds. Thus, Father contends that to the extent the trial court relied on this finding to support its adjudication of willful abandonment, it did so in error.

The trial court's challenged finding is consistent with a statement made by Father's counsel before the termination hearing began: "I will tell Your Honor I do anticipate getting to disposition because we are not contesting grounds as to one of the minor children. And while I understand that we cannot stipulate to that, we'll [sic] not be contesting as to [E.M.E.]." Counsel's statement provides the clear, cogent, and convincing evidence necessary to support the court's finding. Moreover, the record reflects the trial court followed the law and did not rely on counsel's concession when it conducted a full adjudicatory hearing and made its own independent determination of the grounds for termination at the conclusion of that hearing. *See In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992). Had the court relied on counsel's concession, it would not have dismissed abuse under N.C. Gen. Stat. §

7B-1111(a)(1) and failure to pay child support under N.C. Gen. Stat. § 7B-1111(a)(4) as grounds for terminating Father's parental rights to E.M.E. Father's argument is overruled.

B. Willfulness

Father also argues that the trial court erred by concluding he willfully abandoned his children under N.C. Gen. Stat. § 7B-1111(a)(7). The court made the following unchallenged findings as to this ground in both termination orders:

> 7. [Father] was convicted of two counts of sexual abuse of [E.M.E.] in violation of Article 120b of the Uniform Code of Military Justice, and three counts of wrongful possession, production, and distribution of child pornography which included acts (sic) images of [E.M.E.]. [Father] was sentenced to 14 years['] imprisonment on April 21, 2016 and is still incarcerated.
>
> 8. [Father] entered into a consent order in case 2016-CVD-2160, in the Superior Court of Lowndes County, Georgia, that was entered on September 21, 2018 wherein he agreed to have "no visitation or contact with the minor children, of any kind, unless and until the [Father] petitions the Court and the Court grants visitation and/or communication with the minor children. Under no circumstances is the [Father] to contact . . . [Mother] and the minor children". At no time since the entry of the order in 201[8] has [Father] sought to establish any visitation rights or permission to contact the minor child by petitioning the Court.

Based on these findings, the trial court concluded:

> 4. The Court finds by clear and convincing evidence that there are grounds to terminate [Father's] parental rights Pursuant to the North Carolina General Statute N.C.G.S. 7B-1111(a)(7). [Father] has abandoned the minor child by withholding his presence, his love, and care from the minor

> child for at least six months immediately preceding the filing of this action. The custody order entered in 2018 that [Father] consented to provided him with the option to seek contact and/or visitation with the minor child, but [Father] never attempted to do so. At the time of the filing of this Petition, [Father] had no contact with the minor child for at least five years.

Father does not dispute that he had no contact with the children during the relevant six-month period, but he contends this lack of contact was not willful. In making this argument, Father focuses on two specific impediments that interfered with his ability to contact the children: (1) the terms of the consent custody agreement entered in 2018 and (2) his incarceration.

The custody order, which Father agreed to in September 2018 while he was incarcerated, provided:

> **[FATHER] VISITATION AND CONTACT WITH MINOR CHILDREN**: [Father] shall have NO visitation or contact with the minor children, of any kind, unless and until . . . [Father] petitions the Court AND the Court grants visitation and/or communication with the minor children. Under no circumstances is . . . [Father] to contact . . . [Mother] and the minor children.

The order also included a restraining order which forbid Father from having "any contact, direct, indirect, or through another person with the minor children, by telephone, pager, fax, e-mail, or any other means of communication," along with a similar restriction regarding Mother.

Our appellate courts have recognized that court orders limiting or prohibiting contact and a parent's incarceration can both be relevant to whether a parent has

willfully abandoned their children. *See, e.g.*, *In re I.R.L.,* 263 N.C. App. 481, 484, 823 S.E.2d 902, 905 (2019) ("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 child]."); *In re A.J.P.*, 375 N.C. 516, 532, 849 S.E.2d 839, 852 (2020) ("[A] parent's options for showing affection while incarcerated are greatly limited[.]" (citation omitted)). With respect to incarcerated parents, our Courts have repeatedly emphasized that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017).

While recognizing the limitations placed upon incarcerated parents, our Supreme Court has also made clear that "a parent will not be excused from showing interest in his child's welfare by whatever means available." *In re A.J.P.*, 375 N.C. at 532, 849 S.E.2d at 852 (2020) (cleaned up). "As a result, our decisions concerning the termination of the parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children." *In re A.G.D.*, 374 N.C. 317, 320, 841 S.E.2d 238, 240 (2020).

Father suggests that it is notable, in light of the limitations placed on him, that the trial court's orders do not include the word "willful" in adjudicating abandonment.

However, our Supreme Court has held that the omission of "willful" is not reversible error, if, "when read in context, the trial court's order makes clear that the court applied the proper willfulness standard to determine that respondent willfully abandoned the child under N.C.G.S. § 7B-1111(a)(7)." *In re N.M.H.*, 375 N.C. 637, 643, 849 S.E.2d 870, 875 (2020). Following *In re N.M.H.*, we cannot conclude the trial court's adjudication of abandonment is fatally defective based on the absence of the word willful in the termination orders where it is clear here that the trial court applied the proper willfulness standard.

Further, the lack of conflicting evidence on the issue of willfulness distinguishes this case from cases cited in Father's brief where our Courts have remanded to the trial court for additional findings regarding willfulness when the parent's lack of contact was attributable, at least in part, to court orders or incarceration. *See, e.g. In re N.D.A.*, 373 N.C. at 78, 833 S.E.2d at 774 (vacating and remanding an adjudication under N.C. Gen. Stat. § 7B-1111(a)(7) for additional findings on willfulness where "respondent-father's unchallenged testimony tended to show that he had unsuccessfully attempted to work out arrangements under which he could visit with [his child] . . . on at least fifteen occasions"); *In re I.R.L.,* 263 N.C. App. at 484, 823 S.E.2d at 905 (vacating and remanding an adjudication under (a)(7) when the respondent was subject to a domestic violence protective order forbidding contact with his child's mother and the respondent filed for custody during the six-month period); *In re D.M.O.*, 250 N.C. App. 570, 580, 794 S.E.2d 858, 866 (2016)

(vacating and remanding an (a)(7) adjudication to resolve conflicts in the evidence regarding "whether and to what extent respondent-mother called, texted, and mailed letters during the relevant period; whether and to what extent respondent-mother was able to participate in exercising parental duties on account of her periodic incarceration at multiple jails; and whether and to what extent petitioner-father hindered respondent-mother from communicating with [the child] or exercising visitation"). Here, there is no conflict in the evidence presented regarding Father's lack of contact; the trial court's binding findings reflect that Father made no attempt to modify the consent custody order by petitioning the court for permission to contact the children.

The only evidence presented, which is reflected in the trial court's unchallenged findings, was that Father, while incarcerated, consented to a custody order that forbid any contact with the children unless and until Father petitioned the court, and the court granted, visitation or other contact. In the two-and-a-half years between the entry of this consent order and the filing of the termination petition, it is undisputed that Father never "sought to establish any visitation rights or permission to contact the minor child by petitioning the Court," as he could have done under the terms he agreed to in the consent custody order. To be sure, given his incarceration and the consent no contact order, Father had very limited options to demonstrate his interest in parenting the children: essentially, his only option was to seek to modify the consent agreement. But under these circumstances, by failing to

utilize that option plainly available to him, Father failed to "show[] interest in his child[ren]'s welfare by whatever means available," *In re A.J.P.*, 375 N.C. at 532, 849 S.E.2d at 852, such that the trial court could properly conclude that he willfully abandoned the children. *See In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53 (upholding an adjudication under N.C. Gen. Stat. § 7B-1111(a)(7) where the evidence reflected that a no-contact provision in a temporary custody judgment prevented the respondent from contacting his children during the relevant six-month period, but the respondent, who was incarcerated for five of those six months, made no attempt to modify the terms of the temporary custody judgment); *In re I.R.M.B.*, 377 N.C. 64, 72, 855 S.E.2d 498, 504 (2021) (upholding an adjudication under (a)(7) where "the findings of fact show[ed] that respondent was aware of his ability to seek legal custody and visitation rights as [his child]'s father and how to obtain such relief despite the limitations of the restraining order and his incarceration"). Accordingly, the trial court properly concluded that Father's rights could be terminated for willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). Father's argument is overruled.

III. BEST INTERESTS

Father argues that the trial court abused its discretion when it determined that termination of his parental rights was in the children's best interests. Under N.C. Gen. Stat. § 7B-1110, a court making a best interest determination, "shall consider the following criteria and make written findings regarding the following that are relevant:"

> (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.

N.C. Gen. Stat. § 7B-1110(a) (2021). This Court reviews the trial court's assessment of a child's best interest for an abuse of discretion. Under this standard, "we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re A.K.O.*, 375 N.C. 698, 701, 850 S.E.2d 891, 894 (2020) (cleaned up).

The trial court's termination orders both include the same unchallenged findings addressing each of the relevant factors under N.C. Gen. Stat. § 7B-1110(a):

> a) The juvenile is currently 8 years old.
>
> b) There is a high likelihood that the minor child would be adopted by [Mother's] fiancé if they should marry.
>
> c) Termination of [Father's] parental rights would help [Mother] facilitate a permanent plan for the minor child in the event that something should happen to [Mother] as well as facilitate the adoption of the minor children if [Mother] and her fiancé marry.
>
> d) There is no bond between the minor child and [Father] due to the age of the child when [Father] was

> incarcerated and complete lack of communication since then.
>
> e) There is a positive bond between the minor child and [Mother] as well as [Mother's] fiancé. The minor child has a positive support group that also includes the paternal grandparents who have visitation under the terms of the custody order.
>
> f) [Father] is still incarcerated and he receives sex offender treatment but still must register as a sex offender upon release. His risk of offending is presently considered marginal.

Based on these findings, the trial court concluded that it was "in the best interest[s] of the minor child[ren] that the parental rights of [Father] . . . be terminated . . . ."

Father argues that the trial court abused its discretion by permanently severing the legal bonds between him and the children when there was no clear need to do so. He contends that termination of his rights was unreasonable because Mother presented no evidence that Father's reintroduction into the children's lives would harm the children presently or in the future and because there was not a concrete plan for Mother's fiancé to adopt the children. Father also speculates about various potential future harms that could result from the termination of his rights: termination could deprive him and the children of the chance to reestablish their relationship (through the assistance of professionals) if they desire to do so in the future, "clos[ing] a chapter which was never allowed to be opened[;]" termination could interfere with the children's ability to participate in therapy "they may need and desire to do with" him; and termination risks severing the "important"

relationship between the children and their paternal grandparents.

In essence, Father seeks to have this Court reweigh the trial court's best interest determination in order to reach a different conclusion, and we decline to do so. *See In re A.J.T.*, 374 N.C. 504, 514, 843 S.E.2d 192, 199 (2020) ("Respondents essentially ask this Court to do something it lacks the authority to do—to reweigh the evidence and reach a different conclusion than the trial court."). The trial court made all the required findings regarding the relevant dispositional factors in N.C. Gen. Stat. § 7B-1110(a) and reached a reasoned decision based on those factors. Father fails to show an abuse of discretion by the trial court, and his argument is overruled.

IV. CONCLUSION

The trial court's findings of fact supported its conclusion that Father's parental rights could be terminated based on willful abandonment. The court did not abuse its discretion by concluding that termination was in the children's best interests. Accordingly, we affirm the orders terminating Father's parental rights.

AFFIRMED.

Judges TYSON and FLOOD concur.

Report per Rule 30(e).