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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-701

Filed 2 April 2024

Cleveland County, No. 22 JT 15

IN THE MATTER OF: K.P.

Appeal by Father from order entered 3 May 2023 by Judge Justin Brackett in Cleveland County District Court. Heard in the Court of Appeals 21 February 2024.

*No brief filed for petitioner-appellee mother.*

*Sydney Batch for respondent-appellant father.*

MURPHY, Judge.

No clear, cogent, and convincing evidence exists in the record upon which the trial court could base the findings of fact supporting its conclusion that grounds existed to terminate Father's parental rights under N.C.G.S. § 7B-1111(a)(4) and (7).

**BACKGROUND**

On 24 May 2013, Ana<sup>1</sup> was born to Mother and Father, who had been involved in a romantic relationship since 2011. Throughout Mother and Father's relationship,

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<sup>1</sup> We use a pseudonym to protect the juvenile's identity and for ease of reading.

Father struggled with drug addiction, eventually culminating in his overdose. After Father's overdose, Mother ended their romantic relationship. However, Mother traveled to Ana's paternal grandmother's ("Grandmother") house every other weekend to bring Ana for visits with Father and Grandmother. Mother ceased these visits in 2017, after Ana's maternal grandmother brought Ana to Grandmother's house and neither Father nor Grandmother were home.

In 2018, Mother sought child support from Father, and, on 3 May 2018, Father was ordered to pay Mother \$199.00 each month. On 25 September 2018, Father was further ordered to pay Mother \$20.00 each month towards his arrears, until they were paid in full.

Soon after Father's last contact with Ana, he was incarcerated for drug-related offenses. Around or about October 2018, during Father's incarceration, Mother remarried, moved to a new home, and changed her telephone number. Mother did not provide Father, Grandmother, or any other members of Father's family with any contact information for herself or Ana, including her new address and telephone number. Upon his release in 2018, Father messaged Mother on Facebook and asked to see Ana. Mother did not respond to Father's message and blocked his Facebook account.

Some time in 2020, Father's sister wrote a letter to Mother, who did not respond. A few weeks after Mother received the letter, Grandmother appeared at Mother's home. Mother answered the door by opening it slightly and asking

Grandmother what she wanted. Grandmother indicated that she wanted to see Ana, but Mother refused, instructed Grandmother not to return to her home, and shut the door. On three different occasions, other members of Father's family reached out to Mother on Facebook to ask about Ana's wellbeing or request to see Ana. Mother ignored each of these messages and blocked each of Father's family members who attempted to contact her.

On 14 February 2022, Mother filed a petition to terminate Father's parental rights to Ana. At this time, Father was incarcerated. However, Father was released prior to the TPR hearing, which was scheduled for 1 March 2023. On the day of the hearing, Father's trial counsel requested a continuance, as Father reported being involved in an automobile accident. The trial court denied Father's motion to continue and proceeded in Father's absence.

At the termination hearing, Ana's Guardian ad Litem ("GAL") testified that Father expressed a desire to visit with Ana every other weekend. The GAL also testified that Father had a "good" job installing cellphone towers, but that this job required frequent long-distance travel. The GAL described Father's desire for biweekly visitation as "very realistic[,] as, "[g]iven his work schedule, . . . he wouldn't ever be able to have joint custody or anything of that sort." The GAL further indicated that Father had already reestablished visitation with Ana's half-brother, Father's 13-year-old son, and was emotional when talking about how he felt his absence from Ana's life might be affecting her. When the GAL asked Father why he did not file for

visitation or custody after 2017, Father stated that, prior to his recent release, he was in and out of prison; and, after his recent release, “he was trying to get his ducks in a row and . . . to buy a house and . . . get his life together first.”

At the end of the hearing, the trial court took judicial notice of Father’s child custody case and found that, as of the hearing date, Father “[had] paid 41.5 percent of the child support obligation that he should have paid from the time that the order was entered until [1 February 2023], meaning that he [had] not paid 58.5 percent of his child support obligation.” The trial court ultimately terminated Father’s parental rights to Ana pursuant to N.C.G.S. § 7B-1111(a)(4) and (7), which read as follows:

(a) The court may terminate the parental rights upon a finding of one or more of the following:

. . . .

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

. . . .

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to [N.C.G.S. §] 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C.G.S. § 7B-1111(a)(4), (7) (2023). Father appealed.

**ANALYSIS**

On appeal, Father argues that the trial court erred by terminating his parental rights to his minor child Ana pursuant to N.C.G.S. § 7B-1111(a)(4) and (7) because (A) no clear, cogent, and convincing evidence supported the trial court’s finding that Father was able to pay towards the care of Ana during the statutory period of one year preceding the filing of the petition to terminate his parental rights and (B) no clear, cogent, and convincing evidence supported the trial court’s finding that Father “willfully abandoned” Ana.

Father explicitly challenges the trial court’s following findings of fact:

21. That [Father] only sent one message through Facebook to [Mother], requesting a visit and stating that he was clean. That [Mother] thereafter at some point blocked [Father] from Facebook. That was the last message of any kind that [Mother] received from [Father] regarding the minor child.

.....

24. That by [Father’s] admission to [K.P.’s] Guardian ad Litem, [Father] was aware of [Paternal Grandmother’s] contacts [with Mother at Mother’s home in 2020] and actually resides with [Paternal Grandmother] at this time. He states that he is unable and does not know how to contact [Mother]. The [trial] [c]ourt does not find what he stated to the Guardian ad Litem to be credible based on his own statements.

25. The [trial] court notes that[,] under N.C.G.S. [§] 7B-1111(a)(7), the relevant timeframe is 6 months immediately preceding the filing of a [p]etition [to terminate parental rights] for the [trial] [c]ourt to find whether or not [Father] had abandoned the minor child.

*Opinion of the Court*

This matter was filed [14 February] 2022, meaning that the operative time period would be from [14 August] 2021[] [until 14 February 2022]. That [Mother] testified that during that time period she received no phone calls, no communication whatsoever from [Father] to check on the minor child. To this date [Mother] has not received any calls, letters, gifts, or other support for [the] minor child from [Father]. That [Father] last saw the child in 2017.

....

28. The [trial] [c]ourt finds by clear, cogent and convincing evidence that [Father] has evidenced a settled purpose to willfully forgo all parental duties and relinquish all parental claims and therefore willfully abandoned the minor child that is subject to this action for at least 6 months immediately preceding the filing of this action.

29. The [trial] [c]ourt, therefore, finds by clear, cogent, and convincing evidence that there are grounds for termination of parental rights based upon N.C.G.S. [§] 7B-1111(a)(7), in that [Father] has willfully abandoned the minor child.

....

36. That while [Father] has been incarcerated, during [] part of the pendency of [the 25 September 2018 child support] order, other times he has been gainfully employed. That he stated to the Guardian ad Litem that he works in the telecommunications industry installing T-Mobile cell towers throughout the United States.

....

38. The [trial] [c]ourt finds that [Father] has failed to pay the amount established by the child support order during the relevant time frame[] [of one year preceding the filing of the petition to terminate parental rights].

39. The [trial] [c]ourt finds by clear[,] cogent and convincing evidence nothing to show that [Father] was unable to pay. That [Father] did have the ability to pay

and the [trial] [c]ourt therefore finds that his failure to pay was willful.

40. The [trial] court notes that[,] under N.C.G.S. [§] 7B-1111(a)(4), [] there are grounds to terminate [Father’s] parental rights, as [Father] has willfully failed, without justification, to pay for the care, support and education of the juvenile as ordered.

Father also challenges its conclusions of law 2 and 3:

2. There exist legal grounds as set forth above to terminate the [parental] rights of [Father], based upon N.C.G.S. [§] 7B-1111(a)(7), in that [Father] has willfully abandoned the minor child.

3. There exists legal grounds as set forth above to terminate the [parental] rights of [Father], based upon N.C.G.S. [§] 7B-1111(a)(4)[,] in that [Mother] has custody of the minor child and [Father], for a period of more than one year preceding the filing of the petition, willfully failed, without justification, to pay for the care, support and education of the juvenile as required by [judicial] decree.

#### **A. Willful Failure to Pay**

“At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of . . . grounds for termination under [N.C.G.S. § 7B-1111(a)].” *In re Z.G.J.*, 378 N.C. 500, 506 (2021) (quoting *In re A.U.D.*, 373 N.C. 3, 5–6 (2019)) (marks omitted). Thus, to demonstrate grounds for terminating Father’s parental rights to Ana, Mother must have “[proved] by clear, cogent, and convincing evidence,” *id.*, that Father “willfully failed without justification” for at least the period from 14 February 2021 until the filing of the petition on 14 February 2022 “to pay for the care, support, and education of [Ana], as

required by the [3 May 2018 and 25 September 2018 child support orders].”<sup>2</sup> N.C.G.S. § 7B-1111(a)(4) (2023). Father argues, and we agree, that Mother did not meet this burden.

At trial, Mother testified that “[Father] just went back [to prison] like recently” and, “at the time that [she] filed this action, he was actually incarcerated in the Department of Corrections[.]” Mother further testified that Father had since been released, “last year in October [of 2022] maybe”; and, since this release, “[she] received a \$200[.00] payment in October of [2022] and [in] December [of 2022], . . . a payment of about, I think, [\$200.00] . . . .”

The GAL testified that, during their meeting, “[Father] didn’t report having made any voluntary payments” towards child support, but he did report that he was currently employed. No further evidence of Father’s dates of incarceration or dates of employment was presented. Furthermore, no evidence was presented as to Father’s ability to pay during these unknown periods of incarceration and employment. In fact, during its dispositional findings, the trial court “[made] note of the fact that [it] at this point is unaware as to whether or not [Father] received any credit [towards his child support obligation] for his period of incarceration.”

To demonstrate grounds for termination under N.C.G.S. § 7B-1111(a)(4), the petitioner must show that the respondent “for a period of one year or more *next*

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<sup>2</sup> Father concedes on appeal that Mother “proved by clear and convincing evidence the existence” and validity of these child support orders.



*preceding the filing of the petition*” willfully failed to pay for the child’s care without justification. N.C.G.S. § 7B-1111(a)(4) (2023) (emphasis added). In its challenged findings of fact 36, 38, and 39, the trial court found, based on the testimony of Mother and the GAL, that Father was incarcerated for some period of the pendency of the child support order and was gainfully employed for some other period of the pendency of the order, though it did not make reference to any specific dates of incarceration or employment. It further found that Father willfully failed to pay towards Ana’s care for the relevant “period of one year or more next preceding the filing of the petition[,]” *id.*, because there was “nothing to show that [Father] was unable to pay[,]” and, therefore, he “did have the ability to pay . . . .” The dissent would hold that “[t]hese findings, along with Father’s stipulation of the existence of a valid support order, are sufficient to support a conclusion that Father has ‘willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.’” *Dissent* at 3 (quoting N.C.G.S. § 7B-1111(a)(4) (2023)).

However, the child support order was entered on 3 May 2018. Mother failed to meet her burden of proof to demonstrate by clear, cogent, and convincing evidence—and the trial court made no findings—that Father willfully failed to pay during the *relevant* time period of one year *next preceding the filing of the petition*—14 February 2021 through 14 February 2022. In the absence of clear, cogent, and convincing evidence of any specific dates of employment or incarceration, the trial court could only make a finding that Father had been employed for some period of

time since 3 May 2018 and had been incarcerated for some period of time since 3 May 2018. This finding does not support the trial court's conclusion of law 3, that grounds existed to terminate Father's parental rights under N.C.G.S. § 7B-1111(a)(4).

We hold that Mother failed to meet her burden of proof under N.C.G.S. § 7B-1111(a)(4); and, accordingly, the trial court's findings of fact 36, 38, 39, and 40 and conclusion of law 3 are unsupported. The trial court erred by concluding grounds existed to terminate Father's parental rights under N.C.G.S. § 7B-1111(a)(4), and we proceed to determine whether the trial court could nevertheless terminate Father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

### **B. Willful Abandonment**

“To find abandonment, the trial court must find that the parent's conduct ‘manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]’ but the relevant inquiry is limited to the statutory period of six months.” *In re E.Q.B.*, 290 N.C. App. 51, 55-56 (2023) (quoting *In re C.B.C.*, 373 N.C. 16, 19, 22 (2019)).

Here, the relevant 6-month time period extended from 14 August 2021 until 14 February 2022. Father was incarcerated as of 14 February 2022; however, as previously noted, no evidence in the record indicates for how long he had been incarcerated prior to that date, and the trial court could not, in its determination of willfulness, weigh how this incarceration might have impacted Father's ability to contact Ana, if at all.

Furthermore, the uncontroverted evidence demonstrates that Mother severed all contact with Father by ceasing visitation, remarrying, moving to a new home, and changing her telephone number. Mother also took measures to prevent Father from communicating with her or Ana by blocking his Facebook account, blocking his relatives' Facebook accounts, prohibiting Grandmother from seeing Ana, instructing Grandmother not to return to her home, and ignoring Ana's paternal aunt's letter. Father argues that the trial court could not find by clear, cogent, and convincing evidence that Mother "received no phone calls[] [and] no communication whatsoever from [Father] to check on the minor child" because, given this uncontroverted evidence, "[Mother] would be unaware of his attempts to reach her during the relevant timeframe because she intentionally blocked him from contacting her via social media, changed her phone number and moved without telling him."

Without any findings addressing Father's ability to contact Ana during the relevant time period, the trial court could not properly conclude that Father "willfully" abandoned Ana as required under N.C.G.S. § 7B-1111(a)(7). Furthermore, the uncontroverted evidence indicates that Mother took several measures to prevent Father from contacting Ana, and no clear, cogent, and convincing evidence exists to demonstrate that Father knew how to contact Mother or Ana in the existence of these circumstances.

"To remand this case for further findings" as to Father's periods of incarceration and employment, his ability to pay, and his willfulness or lack thereof

to relinquish his constitutionally-protected parental rights—where Mother “failed to offer any evidence bearing upon the point[s][—]would be futile.” *See Arnold v. Ray Charles Enterprises, Inc.*, 264 N.C. 92, 99 (1965) (“To remand this case for further findings, however, when [the] defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile.”).

**CONCLUSION**

Mother failed to present clear, cogent, and convincing evidence that Father willfully failed without justification to pay towards Ana’s care or, alternatively, that Father willfully abandoned Ana, to permit termination under N.C.G.S. § 7B-1111(a)(4) or (7). Furthermore, Mother failed to present any evidence upon which the trial court could make findings of fact to support its conclusion that these grounds existed, and remand for further findings of fact would be futile.

REVERSED AND VACATED.

Judge WOOD concurs.

Judge TYSON dissents by separate opinion.

Report per Rule 30(e).

No. COA23-701 –*In re K.P.*

TYSON, Judge, dissenting.

Clear, cogent, and convincing evidence supports the trial court’s findings of fact. These findings of fact, in turn, support the trial court’s conclusions of law. The trial court’s conclusions of law are properly affirmed. I vote to affirm the trial court’s order and respectfully dissent.

### I. Standard of Review

This Court properly reviews a trial court’s “adjudication [to terminate parental rights] under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.” *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and internal quotation marks omitted); see N.C. Gen. Stat. § 7B-1111 (2023).

In a termination of parental rights hearing, “[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence.” N.C. Gen. Stat. § 7B-1109(f) (2023). When a challenged finding of fact is not necessary to support a trial court’s conclusions, those findings “need not be reviewed on appeal.” *In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

The trial court’s supported findings are “deemed conclusive even if the record contains evidence that would support a contrary finding.” *In re L.D.*, 380 N.C. 766,

770, 869 S.E.2d 667, 671 (2022) (citation and internal quotation marks omitted). Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” (citations omitted)).

Our Supreme Court recently held “an adjudication of any single ground for terminating a parent’s rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. . . . [I]f this Court upholds the trial court’s order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds.” *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

## II. Analysis

Petitioner argues the trial court correctly terminated Father’s parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(4):

(a) The court may terminate the parental rights upon a finding of one or more of the following:

.....

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has *for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and*

*education of the juvenile, as required by the decree or custody agreement.*

N. C. Gen. Stat. § 7B-1111(a)(4) (2023) (emphasis supplied).

Father concedes in his brief Mother “proved by clear and convincing evidence the existence” and validity of these child support orders.

While the trial court found Father was incarcerated for some period during the pendency of the child support order, it also found he was gainfully employed for other periods during the pendency of the order and failed to support his child. The trial court further found that Father “did have the ability to pay” and “therefore . . . his failure to pay was willful” because there was “nothing to show that he was unable to pay.”

These findings, along with Father’s stipulation of the existence of a valid support order, sufficiently support a conclusion that Father has “willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.” N.C. Gen. Stat. § 7B-1111(a)(4) (2023).

### **III. Conclusion**

“Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re T.N.H.*, 372 N.C. 403, 412, 831 S.E.2d 54, 62 (2019) (citations omitted). The trial court’s findings are supported by sufficient evidence. These findings support the conclusion that Father failed to pay to support his child “as required by the decree or custody agreement” to terminate his parental rights *Id.*

IN RE K.P.

*Tyson, J., dissenting*

The trial court's order is properly affirmed. I respectfully dissent.