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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-326

Filed: 3 October 2017

Columbus County, Nos. 15 JT 58–59

IN THE MATTER OF: M.D.H., V.C.H.

Appeal by respondents from orders entered 31 January 2017 and 2 February 2017 by Judge William Fairly in Columbus County District Court. Heard in the Court of Appeals 31 August 2017.

*Assistant County Attorney David S. Tedder for petitioner-appellee Columbus County Department of Social Services.*

*Mercedes O. Chut for respondent-appellant mother.*

*N. Elise Putnam for respondent-appellant father.*

*Raleigh Divorce Law Firm (Williams Law Firm, PLLC), by Lauren Hinzey O'Malley, for guardian ad litem.*

DIETZ, Judge.

Respondents appeal from orders terminating their parental rights to their minor children Monica and Vince.<sup>1</sup> Respondent-mother contends that the trial court erred in finding there were sufficient facts to support grounds for termination. Both

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<sup>1</sup> We use pseudonyms to protect the identities of the juveniles and their relatives.

parents contend that the trial court erred in determining that termination was in the best interests of the children.

As explained below, we reject the Respondents' arguments. The trial court's findings are supported by clear, cogent, and convincing evidence and the court's best interests determination addressed the relevant factors required by statute and was not an abuse of discretion.

### **Facts and Procedural History**

On 25 December 2014, Respondent-mother called Betty, the children's paternal grandmother, and told her that Respondent-father was "strung out on heroin and he was shooting up." Respondent-mother told Betty that she was going to take Monica and her two other daughters to the maternal grandmother's house, and asked that Betty come pick up Vince. When Betty came to pick up Vince, she questioned the father about the mother's statements, and he admitted to "shooting up" and needing help.

Monica began living with Betty in mid-January 2015. At the end of February 2015, Respondent-mother took Monica and Vince and moved with the children to Myrtle Beach, South Carolina. Two weeks later, the mother called Betty and asked if she would take Monica and Vince back to her home. Respondent-mother and Respondent-father brought Monica and Vince to Betty's home on 15 March 2015.

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After returning to Betty's care, the children started acting out sexually. Referring to Monica, Betty stated that it was "28 to 30 times a day with either, you know, masturbation or putting her finger or fingers or small objects in her rectum." She also stated that "there was activity between the two children where – kissing with their tongues," and when she asked the children about this behavior, they responded that they were "playing mommy and daddy." Concerned with the children's behavior, Betty contacted the Columbus County Department of Social Services. The children told a DSS social worker that their mother "shot up with needles in between her toes," that their parents would get into arguments, and that they were sexually abused by their oldest sibling.

On 17 September 2015, DSS filed petitions alleging that the children were neglected and dependent. DSS obtained non-secure custody the same day. Following a hearing, the trial court entered an order adjudicating the children as neglected and dependent.

On 28 December 2015, both parents were tested for drugs. Respondent-mother tested positive for benzodiazepines, cocaine, THC, and opiates, and admitted to using heroin. Respondent-father tested positive for THC, cocaine, and opiates.

Following another hearing, the trial court ordered Respondents to submit to substance abuse and mental health assessments, submit to weekly random drug tests, and participate in parenting classes. Respondents were later arrested for first

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degree sexual exploitation of a minor, engaging a child under 18 for sexual performance, and incest.

On 20 April 2016, the trial court entered an order ceasing reunification efforts and changing the primary permanent plan from reunification to adoption with a secondary plan of guardianship or custody with a court-approved caretaker.

DSS later petitioned to terminate Respondents' parental rights on numerous grounds. On 2 February 2017, the trial court terminated Respondents' parental rights based on neglect and willfully leaving the children in a placement outside of the home for more than twelve months without showing reasonable progress in correcting the conditions that led to the removal. Respondents timely appealed.

**Analysis**

**I. Petitions for writs of certiorari**

Respondents both petitioned this Court for writs of certiorari to permit appellate review in the event that their respective notices of appeal are defective. The alleged defects in the parties' notices of appeal are technical in nature; this Court is unable to discern any prejudice to DSS that could have resulted from these errors. Moreover, Respondents have a statutory right to counsel in this proceeding and, to the extent these errors deprived the Court of appellate jurisdiction, it would give rise to claims of ineffective assistance of counsel. *See State v. Phifer*, 165 N.C. App. 123, 131, 598 S.E.2d 172, 177–78 (2004) (failure to file an appeal can constitute ineffective

assistance of counsel). Thus, in our discretion, we allow the petitions for writs of certiorari and deny DSS's corresponding motions to dismiss as moot.

## **II. Respondent-mother's issues on appeal**

Respondent-mother first contends that the trial court erred by terminating her parental rights because certain findings by the trial court were not supported by the evidence. As explained below, we reject this argument.

"The standard for review in termination of parental rights cases is whether the court's findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law." *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). Respondent-mother first challenges one of the court's findings that allegedly contains a typographical error because it references the date "December 2, 2015" when the applicable date should be "December 28, 2015." We agree that the correct date should be 28 December 2015, as indicated by other portions of the trial court's order that reference the correct date. We also hold that this typographical error has no impact of the sufficiency of the trial court's ultimate findings.

Respondent-mother next challenges the finding that she "failed to participate in substance abuse, mental health and parenting classes" since December 2015. Respondent-mother contends there was no evidence regarding her circumstances after she was incarcerated on 3 March 2016, so the trial court could not find that she

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did not engage in services after that time. We disagree. When asked to describe Respondents' progress in completing these remedial programs, the DSS worker responded that "[t]he only thing that was completed was [Respondent-father] was employed at one time at the beginning of the case." Later, the trial court asked the DSS worker directly whether Respondents had obtained a substance abuse assessment or mental health assessment or attended a parenting course since being ordered to do so in the dispositional order, and the DSS worker testified that they had not. Respondent-mother did not introduce evidence contradicting this testimony. The DSS worker's testimony is sufficient evidence from which the trial court could find that Respondent-mother had "failed to participate in substance abuse, mental health and parenting classes" since being ordered to do so by the trial court.

Respondent next challenges the finding of fact which states that the children had been in "foster care in excess of twelve months." We agree that this is an incorrect statement because the children were placed with their paternal grandmother, not in a "foster care" placement. But as Respondent-mother concedes, placement with the grandmother is a "placement outside the home" for purposes of N.C. Gen. Stat. § 7B-1111(a)(2), which includes both foster care and placement with a relative. Accordingly, the mistaken reference to "foster care" has no impact of the trial court's ultimate findings.

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Next, Respondent-mother challenges the trial court's overall finding that her failure to make progress on the conditions that led to the children's removal from her care was "willful." See N.C. Gen. Stat. § 7B-1111(a)(2). Specifically, Respondent argues that she was incarcerated for much of this time and her failure to address the conditions identified by the trial court during this period was beyond her control and thus not willful.

We reject this argument because "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd*, 360 N.C. 360, 625 S.E.2d 779 (2006). Respondent-mother contends there was no evidence at the hearing indicating that there were services available to her while incarcerated that would have permitted her to address the trial court's conditions. But the record also indicates that Respondent-mother never contacted DSS while she was incarcerated. To show efforts at addressing the court's conditions, Respondent must at least have made attempts to contact DSS while incarcerated. If it were otherwise, Respondent's period of incarceration would absolve her of any responsibility to comply with the trial court's order. Simply put, Respondent-mother's failure to make any progress before her incarceration, combined with her failure to maintain contact with DSS once she was incarcerated, is sufficient clear, cogent, and convincing evidence to support the court's

finding that Respondent-mother willfully failed to make reasonable progress toward correcting the conditions that led to the children's placement outside the home.

**III. Issues raised by both respondents**

**a. Due process argument**

Next, Respondents both contend that the trial court violated their procedural due process rights by refusing to permit them to question witnesses about the implications of guardianship versus adoption. Respondents did not assert this constitutional argument in the trial court at the time the trial court excluded this testimony. This Court cannot address constitutional arguments "not raised and passed upon at trial." *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011). Accordingly, this argument is waived on appeal.

**b. Findings concerning relevant statutory factors**

Respondents next contend that the trial court failed to make proper findings concerning the best interests of the children. The statutory provision governing the court's best interests determination sets out an enumerated list of criteria and instructs the court to make written findings regarding "relevant" criteria. N.C. Gen. Stat. § 7B-1110(a). While consideration of all these factors is mandatory, "the court must enter written findings in its order concerning only those factors that are relevant." *In re D.H.*, 232 N.C. App. 217, 220–21, 753 S.E.2d 732, 735 (2014). "A

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relevant factor is one that has an impact on the trial court's decision." *In re S.Z.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 785 S.E.2d 341, 349 (2016).

Respondent-father contends that the trial court failed to address whether the plan of guardianship would have been more appropriate for the children, further arguing that guardianship "would have achieved permanence for [the children] without taking the severe action of terminating [respondent-father's] rights." But Respondent's argument focuses on the impact termination has on *him*, without directing this Court to any evidence in the record suggesting the difference between guardianship and termination impacted the interests of *his children*. The best interests analysis turns solely on the children's interests, even if those interests conflict with the interests of the parents. N.C. Gen. Stat. § 7B-1100(3). Because Respondent has not pointed to any specific evidence in the record that rendered this factor relevant under the statute, the trial court did not err by declining to make a specific finding addressing it.

Respondent-mother argues that the trial court erred by failing to consider guardianship as opposed to termination, failing to address the relationship and need for contact between the children and relatives other than the paternal grandmother, and failing to consider whether the paternal grandmother is going to protect the children from their biological father.

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We acknowledge that some of the factors Respondent-mother identifies are among the criteria listed in N.C. Gen. Stat. § 7B-1110(a). But this Court has held that the statute does *not* require that the trial court “make written findings with respect to all six factors; rather, as the plain language of the statute indicates, the court must enter written findings in its order concerning only those factors that are relevant.” *In re D.H.*, 232 N.C. App. at 221, 753 S.E.2d at 735.

Our review of the record indicates that the trial court properly considered all the statutory factors applicable in this case. In addition, in its findings, the court addressed the factors that had an impact on its analysis, and thus were relevant to the court’s decision. *In re S.Z.H.*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 349. Specifically, the trial court found that during the two years that the children were under the care and supervision of their paternal grandmother, they had benefited from speech therapy, mental health counseling, as well as other therapeutic services. The court also found that the grandmother intended to follow through with adoption of the children. Finally, the court found that the paternal grandmother’s bond with both children has fully developed into a parental relationship, while the children’s bond with their biological parents was limited and difficult to ascertain due to lack of contact.

We hold these findings sufficient to address the relevant factors under N.C. Gen. Stat. § 7B-1110(a) given the evidence at the hearing. To be sure, the court did

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not make findings on every conceivable factor identified in the statute. But it is not required to do so. The court properly examined the evidence and made specific findings on the factors that were relevant to its best interests determination. That is all the statute requires.

**c. Best interests determination**

Finally, Respondents argue that the trial court erred in its best interests determination. We review that determination for abuse of discretion. *In re J.A.P.*, 189 N.C. App. 683, 693, 659 S.E.2d 14, 21 (2008).

As explained above, the trial court found that the children developed a parental bond with the grandmother while they lived with her and that she consistently provided for the emotional and physical needs of the children. The court also found that, under their grandmother's care, in addition to providing for their regular medical needs, the children benefited from speech therapy, mental health counseling, and other types of therapeutic services. The court found that neither of the children expressed any desire to maintain a relationship with their biological parents. Finally, the trial court found that the grandmother's income is sufficient to care for the children and that she has provided a sufficient home for the children in which they each have their own rooms.

Respondents do not challenge these findings of fact, and they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In light of

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these findings—which address specific statutory criteria set out in N.C. Gen. Stat. § 7B-1110(a)—the trial court’s best interests determination was well within its sound discretion.

**Conclusion**

We affirm the trial court’s orders terminating Respondents’ parental rights.

**AFFIRMED.**

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).