

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-926

Filed: 18 June 2019

Rowan County, Nos. 16 JT 33-34

IN RE: T.H. & M.H.

Appeal by Respondents from order entered 1 June 2018 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 30 May 2019.

*Jane R. Thompson for Petitioner-Appellee Rowan County Department of Social Services.*

*Cranfill Sumner & Hartzog LLP, by Katherine Barber-Jones, for guardian ad litem.*

*Dorothy Hairston Mitchell for Respondent-Appellant Mother.*

*Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant Father.*

DILLON, Judge.

Respondents, Mother and Father of the minor children T.H. (“Tonya”) and M.H. (“Madeline”),<sup>1</sup> appeal from the trial court’s order terminating their parental rights to the children. We hold the trial court did not abuse its discretion in determining that termination of Mother’s parental rights was in the children’s best

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<sup>1</sup> Pseudonyms are used to protect the juveniles’ identities, *see* N.C. R. App. P. 42, and for ease of reading.

interests, and we hold it properly concluded grounds existed to terminate Father's parental rights based on neglect. We, therefore, affirm the trial court's order.

### I. Background

Respondents' history with the Rowan County Department of Social Services ("DSS") dates back to 2011 due to substance abuse and mental health issues and their lack of proper care and supervision of the children. In November 2011, Mother tested positive for methadone and amphetamines at Tonya's birth, and Tonya had to remain in the hospital for weeks due to significant withdrawal symptoms. From 2011 to 2016, DSS received multiple reports regarding the family due to drug abuse and supervision issues.

DSS most recently became involved with the family in early 2016 after receiving reports relating to Respondents' substance abuse and inappropriate living conditions. On 12 February 2016, DSS filed a juvenile petition alleging both juveniles to be neglected and dependent and took the children into non-secure custody.

A week later, Respondents entered into an Out of Home Family Services Agreement (OHFSA) in which they agreed to obtain and maintain appropriate housing, obtain and maintain employment, complete substance abuse and mental health treatment, complete a psychiatric evaluation, submit to random drug screens, complete a parenting education course, resolve all pending legal issues, and refrain from criminal activity.

Five weeks later, on 31 March 2016, the trial court entered a consent order, adjudicating the children neglected and dependent. The trial court found that Respondents had multiple pending criminal charges and continued to suffer from long-term, untreated substance abuse and mental health issues. The court also found that the children were living in an unsafe environment and were not receiving proper medical or dental care. The court ordered Respondents to comply with the components of their case plan. Over the next several months, however, both Mother and Father were in and out of jail.

On 2 June 2016, Mother completed her substance abuse assessment and was recommended to complete forty (40) hours of structured group therapy and to see a psychiatrist. Mother attended one group session in December 2016 but did not attend another session. On 23 January 2017, Mother was arrested for obtaining a controlled substance by fraud or forgery after attempting to fill her recently deceased mother's prescription for Alprazolam.

In June 2017, the trial court entered a permanency planning review order, changing the primary permanent plan to adoption with a secondary plan of reunification. The trial court found that Respondents had not made any progress on their case plans, finding that Respondents had not participated in any treatment recommendations, including any substance abuse or mental health services, that they had not engaged in any parenting education services, and that “[n]either parent

understands the severity of their [criminal] charges or the effect their criminal behavior and incarcerations have on their children.”

A month later, in July 2017, DSS filed a petition to terminate Respondents’ parental rights based on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress to correct the conditions which led to the children’s removal, and willfully failing to pay a reasonable portion of the children’s cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017).

Eleven months later, in June 2018, following two hearings on the matter, the trial court entered an order concluding that grounds existed to terminate Respondents’ parental rights based on neglect and willfully leaving the children in foster care without making reasonable progress, and that termination of Respondents’ parental rights was in the children’s best interests.

Accordingly, the trial court terminated Respondents’ parental rights to Tonya and Madeline. Respondents each filed timely written notice of appeal.

## II. Analysis

Mother and Father appeal, each bringing separate issues corresponding to termination of their individual parental rights. We address each respondent in turn.

### A. Mother’s Appeal

Mother does not challenge the trial court’s adjudication that grounds existed to terminate her parental rights. Rather, Mother’s sole issue on appeal is that the

trial court abused its discretion in determining that termination of her parental rights was in the children's best interests.

After a trial court adjudicates the existence of at least one ground for termination, the court must then determine at disposition whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2017). The court must consider the factors listed in Chapter 7B-1110(a).

“The court’s determination of the juvenile’s best interest will not be disturbed absent a showing of an abuse of discretion.” *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010) (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Mother first argues the trial court failed to make the written findings required by Chapter 7B-906.2(b) of our General Statutes, which applies to “permanency planning hearing[s],” in order to cease reunification efforts. Specifically, Mother appears to view the requirements of Section 7B-906.2(b) as part of the court’s inquiry under Section 7B-1110(a)(3) in a termination determination. Mother argues that reunification remained the primary permanent plan at the time of the termination hearing, and thus the court was required to make the necessary findings under Chapter 7B-906.2(b) in order to cease reunification efforts. We disagree.

First, contrary to Mother's assertion, reunification was not the primary permanent plan at the time of the termination hearing. In a 30 June 2017 permanency planning order, the trial court changed the permanent plan to a primary plan of adoption with a secondary plan of reunification. Second, a hearing on a petition to terminate parental rights is not a permanency planning hearing. Section 7B-906.2 pertains to permanent plans that must be established at permanency planning hearings, while Chapter 7B, Article 11, the statute at issue here, provides for the judicial procedures for terminating parental rights. *See* N.C. Gen. Stat. § 7B-1100(1) (2017).

Mother relies on this Court's recent decision in *In re D.A.* to support her argument. However, *In re D.A.* was not an appeal from a termination order, but from a permanency planning order granting custody of the child to the foster parents and waiving further review hearings. *In re D.A.*, \_\_\_ N.C. App. \_\_\_, 811 S.E.2d 729 (2018). Mother has not cited any authority requiring the trial court to make the findings set forth in Section 7B-906.2(b) at a hearing for the termination of parental rights.

Here, the trial court found that terminating Respondents' parental rights "[was] necessary to accomplish the best permanent plan for the juveniles, which is adoption." Mother does not challenge this finding, and it is therefore binding on appeal. *In re D.L.H.*, 364 N.C. 214, 218, 694 S.E.2d 753, 755 (2010). Therefore, the

trial court made the appropriate finding addressing Section 7B-1110(a)(3), and Mother's first argument is overruled.

Mother next argues the trial court failed to consider three "other relevant considerations" under Section 7B-1110(a)(6) in determining termination was in the children's best interest. Mother contends the trial court failed to consider (1) her substantial progress toward her sobriety, (2) the bond the children shared with her and other maternal family members, and (3) DSS's failure to make reasonable efforts toward reunification. We disagree and address each in turn.

Mother first asserts the trial court failed to consider the progress she made toward her sobriety and self-sufficiency. The trial court's findings indicate that it did consider Mother's claim regarding her progress toward her sobriety, finding that mother "report[ed] that she [had] been sober for one year" and "that she tested negative on a drug screen administered by her probation officer yesterday." However, there was evidence that Mother was incarcerated for all but a few days of that year of her claimed sobriety. It is the trial "judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Thus, it was within the trial court's discretion to determine that Mother's years of unaddressed substance abuse issues outweighed her claim of recent progress.

Next, Mother argues the trial court failed to consider the children's bond with both her and the children's biological relatives. Contrary to Mother's assertion, the trial court *did* consider this bond and found that there was not a strong bond. Specifically, the trial court found that

There is not a strong bond between the children and their parents. [Tonya] does not have memories of being with [Mother] and [Father] other than sitting in front of a TV. [Tonya] was worried with adoption in the beginning as she thought if she loved [her foster parents, Mr. and Mrs. C,] then she would be betraying her parents. She does not want to be removed from Mr. and Mrs. [C's] home. [Madeline] loves her parents. She worries about them and remembers some of the things she was exposed to while in the care of her parents. [Madeline] does not feel like she is important to [Mother] and [Father]. [Madeline] has referred to her parents [by their first names]. [Tonya] and [Madeline] have not asked [Mr. and Mrs. C] to have contact with [Mother] and [Father].

Mother does not challenge this finding, and therefore it is binding on appeal. *In re D.L.H.*, 364 N.C. at 218, 694 S.E.2d at 755.

Mother also contends the court failed to consider the bond the children have with their biological relatives, namely their maternal aunt and uncle and maternal grandfather, and argues that terminating her parental rights threatens to destroy the bonds the children have with the maternal family members. However, the trial court did make findings in this regard, for instance, specifically finding that the children visit with their maternal grandfather and their maternal aunt and uncle. Therefore, we find no merit to Mother's contention.



Lastly, Mother argues the trial court failed to consider DSS's failure to make efforts toward reunification. She argues DSS only contacted her once a month while she was incarcerated and made no efforts to achieve reunification. She contends that, once she was incarcerated, DSS gave up on its reunification efforts, and that the court's failure to consider this factor was an abuse of discretion.

However, "[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered" when determining its disposition under Section 7B-1110. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005). While the trial court must consider all of the factors in Section 7B-1110(a), it only is required to make written findings regarding those factors that are relevant. *In re D.H.*, 232 N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014). A factor is relevant if there is conflicting evidence concerning the factor such that it is placed in issue. *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015).

There was no conflicting evidence concerning DSS's efforts in contacting Mother during her incarceration. The only evidence regarding DSS's reunification efforts comes from a social worker's "previously-provided sworn testimony" during the adjudication phase which was incorporated without objection during the disposition phase. Because this factor was not "placed in issue[.]" no findings regarding DSS's efforts toward reunification were required. *Id.* Mother has not

provided any indication that the trial court failed to consider this information in making its determination.

Additionally, to the extent Mother attempts to excuse her failure to make reasonable progress by claiming DSS failed to make efforts toward reunification, Mother did not challenge the trial court's adjudication that she willfully failed to make reasonable progress under Section 7B-1111(a)(2). By arguing that the trial court "failed to appreciate" DSS's alleged failure to make reunification efforts, Mother essentially contends this evidence was not given sufficient weight by the trial court. However, "[i]t is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

In sum, we see no indication that the trial court failed to consider any "relevant consideration" under the catch-all provision of Section 7B-1110(a)(6). A court is entitled to give greater weight to certain factors over others in making its determination concerning the best interest of a child. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709-10 (2005) (explaining that, though mother emphasized her bond with the child, "[t]he trial court was, however, entitled to give greater weight to other facts that it found"), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006) (affirming the majority opinion). The trial court's order reflects that it properly considered the required factors and made

a reasoned determination that termination was in the children's best interests. Accordingly, we hold the trial court did not abuse its discretion in determining that termination of Mother's parental rights was in the best interests of the children, and we affirm the order terminating her parental rights.

B. Father's Appeal

Father's counsel has filed a "no-merit" brief on his behalf in which they state that, after a conscientious and thorough review of the record on appeal and transcripts, they were unable to identify any issue of merit on which to base an argument for relief. Pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, they request that this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(e).

In accordance with Appellate Rule 3.1(e), appellate counsel wrote Father a letter advising him of (1) counsel's inability to find error; (2) counsel's request for this Court to conduct an independent review of the record; and (3) Father's right to file his own arguments directly with this Court while the appeal is pending. Counsel attached to the letter a copy of the record, transcript, and no-merit brief. Father, however, has not submitted written arguments of his own to this Court.

As such, we are not required to conduct a review as neither Father nor his counsel has brought forth any issue for our consideration. *In re L.V.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 814 S.E.2d 928, 928-29 (2018). That is, the no-merit brief provision in Rule

3.1(e) promulgated by our Supreme Court, which does not contain any such requirement, should not be conflated with the requirements set forth by the United States Supreme Court where no-merit briefs are filed in a criminal appeal. *In re L.V.* is based on the following reasoning, as found in the concurring opinion in *State v. Velasquez-Cardenas*, \_\_\_ N.C. \_\_\_, 815 S.E.2d 9 (2018).

Our State Constitution provides that our “Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division.” N.C. Const. Art. IV, sec. 13(2). Pursuant to its exclusive authority, our Supreme Court has promulgated Rule 28(a), which limits *the right* of an appellant to a review by our Court to those issues raised in its brief, though *in our discretion* we can waive Rule 28(a) by invoking Rule 2 of our Rules of Appellate Procedure in order to review *other* issues not raised in the briefs. N.C. R. App. P. 2; N.C. R. App. P. 28(a).

Rule 28(a)’s limited right to review, however, is qualified somewhat by the United States Supreme Court decision in *Anders v. California*, in which that Court determined that a criminal defendant has the right to a review by an appellate court of issues *not* raised in his brief *in certain circumstances*. *Anders v. California*, 386 U.S. 738, 744 (1967). *Anders*, however, only applies to the *first* appeal of right in criminal cases, not to parental rights appeals. Specifically, in *Anders*, that Court held that indigent criminal defendants are entitled under our federal constitution to certain procedures during a first appeal of right, where appointed counsel fails to

discern a non-frivolous appellate issue. *Id.* These procedures include (1) the defendant's right to file a brief when his attorney has filed a "no merit" brief and (2) the defendant's right to a full search of the record by the appellate court, even if no meritorious issues were raised by the defendant or his attorney.

In a later case, the U.S. Supreme Court held that, under our federal constitution, an indigent defendant is *not* entitled to *Anders* procedures on *subsequent* post-conviction appeals even where state law provides such defendants a right to counsel for that appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987).

This present matter is not criminal in nature; therefore *Anders* does not apply. Our General Assembly, however, has provided parents the right to an appeal where their parental rights are terminated and a right to counsel for that appeal. Our General Assembly, though, has not provided these parties the right to all *Anders* procedures, such as the right to a full *Anders* review of issues not raised in the briefs. Neither our State Constitution nor the federal constitution provides this right. And our Supreme Court has not provided for such a right by appellate rule or otherwise. Rather, our Supreme Court has restricted the right of review in all appeals to those raised in the briefs. N.C. R. App. 28(a).

The Supreme Court had the opportunity to create a right to an *Anders*-type review in parental rights cases, but that Court has not done so. Specifically, in 2007, we held that an indigent parent with a statutory right to counsel had no right to

*Anders* procedures; but we urged “our Supreme Court or the General Assembly to reconsider this issue.” *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). The General Assembly has not responded. Our Supreme Court did respond by promulgating Rule 3.1(e), creating a right to *some Anders*-type procedures in the termination of parental rights context. Specifically, where a party typically has no right to file a separate brief when represented by counsel, our Supreme Court created a right for an indigent parent to raise issues in a separate brief where that parent’s counsel has filed a “no-merit” brief. N.C. R. App. 3.1(e). However, our Supreme Court, in Rule 3.1(e), has *not* created any right for that parent to receive an *Anders*-type review of the record by our Court for consideration of issues not explicitly raised by the parent or that parent’s counsel.

Therefore, until our Supreme Court, by rule or holding, or our General Assembly, by law, creates a right to an *Anders*-type review of issues not raised by the parties or their counsel, we must follow our Supreme Court’s Rule 28(a), which limits *the right* of appellants to a review of issues actually raised in the briefs.

This is not to say that we cannot exercise our discretion, pursuant to Rule 2, to consider issues not properly raised in the briefs, which we do here.

In our discretion, we have reviewed the transcript and record. Based on our review, we are unable to find any prejudicial error in the trial court’s order terminating Father’s parental rights. The termination order contains sufficient

findings of fact supported by clear, cogent, and convincing evidence to support the conclusion that grounds exist to terminate Father's parental rights based on neglect. The trial court's findings demonstrate that the children were previously adjudicated neglected, and that Father did not take any steps to correct the conditions that led to the children being removed from his care, but instead absconded from his probation with Mother. *See In re M.J.S.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 810 S.E.2d 370, 373 (2018) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect."). The trial court also made appropriate findings in determining that the termination of Father's parental rights was in the children's best interests. *See* N.C. Gen. Stat. § 7B-1110(a).

AFFIRMED.

Judges TYSON and BERGER concur.