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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-4

Filed: 5 November 2019

Alexander County, No. 17 JT 16

IN THE MATTER OF: T.J.S.

Appeal by Respondents from order entered 11 October 2018 by the Honorable Christine Underwood in Alexander County District Court. Heard in the Court of Appeals 18 September 2019.

Thomas R. Young for Alexander County Department of Social Services Petitioner-Appellee.

J. Thomas Diepenbrock for Respondent-Mother Appellant.

Garron T. Michael for Respondent-Father Appellant.

Alan D. Woodlief, Jr., for Appellee Guardian Ad Litem.

BROOK, Judge.

Respondent Mother and Respondent Father appeal the trial court's order terminating their parental rights to T.J.S. For the following reasons, we affirm.

I. Background

On 29 March 2017, the Alexander County Department of Social Services ("DSS") filed a neglect petition alleging that two-year-old T.J.S. was neglected based on Respondent Mother's substance abuse, Respondent Father's incarceration, and

domestic violence incidents between Respondent Mother and her then-boyfriend while T.J.S. lived in their home. DSS obtained non-secure custody of T.J.S. on 27 April 2017. T.J.S. was adjudicated neglected on 26 May 2017.

The trial court entered an initial disposition order on 8 June 2017 and set a primary plan for reunification. During the trial court's first 90-day review on 17 November 2017, the court found that Respondent Mother and Respondent Father had not made any significant steps towards their signed case plans with DSS. Respondent Mother did not have a verified address, she had tested positive for marijuana and non-prescribed Xanax, and she failed to obtain a court-ordered comprehensive clinical assessment. Respondent Father had been in jail at the start of the case, but DSS had explained the foster care process to him while he was incarcerated. However, his whereabouts were unknown following his release.

On 29 March 2018, the court conducted an additional review hearing and found that Respondent Mother continued to struggle to maintain her sobriety. Respondent Father was again incarcerated.

The court changed the case plan from reunification to a primary plan of adoption and a secondary plan of guardianship with a relative on 24 May 2018. DSS filed a motion to terminate parental rights on 11 June 2018 on the following grounds: (1) neglect and, (2) willfully leaving the juvenile in foster care for more than 12

months without showing reasonable progress to correct the conditions that led to removal.

The termination of parental rights hearing took place on 30 August 2018. At the start of the hearing, Respondent Mother's counsel made a motion to continue because Respondent Mother was not there, and DSS was requesting an Interstate Compact on the Placement of Children ("ICPC") home study on T.J.S.'s great-aunt as a potential placement.[1]

The trial court summarily denied the motion to continue. After the adjudication phase, the trial court concluded DSS had proven that termination of Respondent Mother's and Respondent Father's parental rights were supported by clear, cogent, and convincing evidence. During disposition, the trial court concluded that terminating the parental rights of both parents was in T.J.S.'s best interest and, as a result, proceeded to terminate.

Both Respondents filed written notices of appeal.

II. Standard of Review

As alluded to above, a proceeding for termination of parental rights involves two stages. *In re Huff*, 140 N.C. App. 288, 290, 536 S.E.2d 838, 840 (2000). At the

[1] T.J.S.'s great aunt had previously been considered as a placement in 2017, but DSS cancelled the ICPC after she called DSS and told them she was experiencing housing instability. Though T.J.S.'s great aunt said she would reach out to DSS if she obtained stable housing, she did not. A DSS social worker instead called her before the termination hearing to see if she could be a possible post-termination adoptive placement. She indicated that she would like to be considered.

adjudication stage, the petitioner must establish grounds exist warranting termination. *Id.* If such grounds exist, "then the court moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights." *Id.* at 290-91, 536 S.E.2d at 840. N.C. Gen. Stat. § 7B-1110 lays out the following criteria that the trial court must consider in its disposition:

> (1) The age of the juvenile[;]
>
> (2) [T]he likelihood of adoption of the juvenile[;]
>
> (3) Whether the termination of parent 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) (2017). The trial court must also make written findings of fact regarding the relevant factors. *Id.*

On appeal, the standard of review differs depending on which stage the respondent asserts error. If the respondent contends the trial court erred in determining that grounds existed for terminating parental rights, the standard of review is "whether the trial [court]'s findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law." *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174 (2001) (internal marks

and citation omitted). If, in the alternative, the respondent argues the trial court erred in concluding that termination of parental rights was in the best interests of the child, this Court will review for abuse of discretion. *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010). An "[a]buse 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." *In re S.Z.H.*, 247 N.C. App. 254, 258, 785 S.E.2d 341, 345 (2016) (citations omitted).

III. Analysis

Respondents do not challenge the findings made by the court at the adjudication stage. Respondent Mother and Respondent Father instead claim the trial court erred at the disposition stage of proceedings. As all of the litigants acknowledge, this determination is reviewed for abuse of discretion. We proceed accordingly.

A. Respondent Mother

A review of the proceedings below makes plain that the trial court did not abuse its discretion in terminating Respondent Mother's parental rights. The trial court's findings of fact both reflect consideration of the requisite statutory factors and support for its conclusion that termination of Respondent Mother's parental rights was in the best interests of T.J.S. For example, the trial court found as follows:

> 42. [T.J.S.] is placed in a therapeutic foster home in Lenoir, NC. He has been willing to provide care for the child until

an adoptive placement is found. They are a long-term placement, but not an adoptive placement. []

43. There is a high likelihood of adoption. [T.J.S.] is a sweet, caring boy. He is easy going. He has no significant behavioral issues.

. . .

44. TPR would assist in effectuating the permanent plan of care which presently encompassed Adoption, as it would allow his profile to be more effectively circulated on the various adoptive networks maintained by DSS.

. . .

46. [T.J.S.] calls his current foster mother "momma." During [Respondent Mother's] last visit this upset [her] and she yelled at him for calling his foster mother "momma." [T.J.S.] frequently exhibits behavioral problems following visits with his mother. This behavior, which includes throwing chairs, usually lasts for a day or two. [T.J.S.] has a tangible bond with his foster parents. He calls the foster parents' house "home," and will tell the social worker if she has made a wrong turn while driving him "home." These facts lead the court to suspect that the child is capable of forming a bond with prospective adoptive parents when they are located.

47. The minor child is not closely bonded with his mother. During his last couple of visits, the Respondent Mother has struggled to get [T.J.S.] to play with her. He is more interested in the toys than in any interaction with her. [T.J.S.] is shy about calling his biological mother "mom."

. . .

49. [T.J.S.] exhibits characteristics that make him a likely candidate for adoption. He has a good demeanor and gets along well with others.

> 50. The DSS has thus far not identified an individual who is appropriate to adopt the minor child. However, the Court is confident that given the child's age (his birthday today makes him 4 years of age) and his personality that it will not be hard for him to be adopted.
>
> 51. While the Court would certainly prefer there be a prospective adoptive parent so the court could determine the quality of the relationship between the child and the adoptive parent before terminating the parents' parental rights, the facts remain that there is no biological parent available currently to parent this child. The mother is not even present at this hearing . . . [T.J.S.] does not ask for his biological mother between visits. . . . There is little possibility that holding out the possibility of reunification with either parent would comport with the child's wishes or best interests.

Respondent Mother does not challenge any of these findings; they are thus binding on appeal. *See Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). These findings, unfortunately, provide ample support for concluding that terminating Respondent Mother's parental rights was in T.J.S.'s best interests, touching as they did on T.J.S.'s age, bond with his mother, likelihood of adoption, and whether termination would aid in accomplishing a permanent placement for T.J.S. *See* N.C. Gen. § 7B-1100 (1)-(4) (2017).

Respondent Mother asserts that the trial court did not make adequate written findings regarding "other relevant considerations" as required by N.C. Gen. Stat § 7B-1110(a)(6). Specifically, she argues the court below did not sufficiently consider that DSS wished to do an ICPC relating to a potential placement of T.J.S. with his great-

aunt. She claims a positive ICPC could have supported the court appointing T.J.S.'s great-aunt as his guardian and made it unnecessary to terminate Respondent Mother's parental rights, and, thus, the trial court committed reversible error in its disposition.

"[E]nsuring . . . the best interests of the juvenile [is] of paramount consideration" in the Juvenile Code. N.C. Gen. Stat. § 7B-100(5) (2017). Respondent Mother focuses on the importance of familial cohesion, but the Code also emphasizes "juveniles' need for safety, continuity, and permanence." *Id.* at § 7B-100(3). Thus, "when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time." *Id.* at § 7B-100(5).

The trial court plainly considered each of these equities. In regards to familial cohesion, the trial court weighed the possibility of placing T.J.S. with his great aunt. It found:

> 45. The child's great aunt, who lives in Connecticut, is interested in being a placement for the child. The DSS is requesting a court order to do an Interstate Compact Home Study on the maternal great aunt. No other individuals have come forward seeking placement of the child.

And, in fact, the trial court ordered the great aunt's home study to go forward. But the trial court also found that T.J.S. had been in foster care for more than a year. It found, with evident regret, that "[t]here is little possibility that holding out the

possibility of reunification with either parent would comport with the child's wishes or best interests." And it ultimately found that terminating the parents' rights would increase the chances for T.J.S.'s adoption, surely consistent with a juvenile's "need[] for safety, continuity, and permanence." N.C. Gen. Stat. § 7B-100(3) (2017).

The trial court's disposition was guided by a reasoned assessment of the law and the facts. One need not agree with its ultimate conclusion to nonetheless hold the trial court did not commit an abuse of discretion. *See State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (reviewing for abuse of discretion "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record").

B. Respondent Father

Respondent Father also argues the trial court abused its discretion in determining that terminating his parental rights was in the best interests of T.J.S. For many of the reasons stated above, *see supra* Section III.A, we must conclude the trial court's findings do not reflect a result "so arbitrary that it could not have been the result of a reasoned decision," *In re S.Z.H.*, 247 N.C. App. at 258, 785 S.E.2d at 345.

The trial court found:

> 18. During [a] visit by the social worker with the Respondent Father in jail on June 27, 2018, the Respondent Father made no request for information about the minor child and only on the prompting of the social

worker was the topic brought up. This Court finds this omission on the part of the Respondent Father significant for two reasons. First, it indicates that the minor child was a relatively low priority for [Respondent Father]. The Respondent Father's interest in the minor child was so minimal that he only bothered to visit with the child on one occasion during the time the child was in the custody of the department of social services, to wit, on 5/25/2017. This one visit occurred despite the fact the Court had ordered the DSS to make arrangements to allow the father to visit with the child weekly for two hours each visit, supervised for a minimum at the department. During the one visit [Respondent-Father] had with his child, there was minimal interaction that took place between the father and son, [T.J.S.] being noticeably uncomfortable during the visit. The omission was significant for a second reason as well raises the second reason: the Respondent Father has little to no bond with the child.

. . .

21. While the Respondent Father has been in prison, he has taken no steps to try to improve his situation or put himself in a better position to provide the minor child a safe and appropriate home. Neither has he sent the child cards or correspondence during the child's time in foster care. He has sent no gifts to the child, and has paid no child support. Rather, the Respondent Father has engaged in activity which has caused him to accrue four infractions while he was incarcerated, something which normally would lead to a longer period of incarceration.

. . .

40. Though the Respondent Father has spent much of the time during the pendency of the underlying case in the custody of the local sheriff or the North Carolina Department of Adult Corrections, he did not make efforts to address the issues which brought the child into care during the time he was not incarcerated. During his

incarceration, [Respondent Father] did not make inquiries about the welfare of his child or attempt to send cards or other correspondence to the child. As the Court found before, [Respondent Father]'s absence from the household when the Department first became involved with the family contributed to the inability of the parents to provide a safe and stable home for the child. He has willfully continued to be absent from the life of his child. This is evident to the Court from his lack of communication regarding the welfare of his child and his lack of attempted correspondence with his child, which is available to him despite his incarceration.

. . .

42. [T.J.S.] is placed in a therapeutic foster home in Lenoir, NC. He has been willing to provide care for the child until an adoptive placement is found. They are a long-term placement, but not an adoptive placement. []

43. There is a high likelihood of adoption. [T.J.S.] is a sweet, caring boy. He is easy going. He has no significant behavioral issues.

44. TPR would assist in effectuating the permanent plan of care which presently encompassed Adoption, as it would allow his profile to be more effectively circulated on the various adoptive networks maintained by DSS.

. . .

48. The Respondent Father and the child do not have a bond. [T.J.S.] does not seem to be aware of the identity of his biological father. He did not acknowledge his mother when she attempted recently during a visit to discuss his biological father.

49. [T.J.S.] exhibits characteristics make him a likely candidate for adoption. He has a good demeanor and gets along well with others.

> 50. The DSS has thus far not identified an individual who is appropriate to adopt the minor child. However, the Court is confident that given the child's age (his birthday today makes him 4 years of age) and his personality that it will not be hard for him to be adopted.
>
> 51. While the Court would certainly prefer there be a prospective adoptive parent so the court could determine the quality of the relationship between the child and the adoptive parent before terminating the parents' parental rights, the facts remain that there is no biological parent available currently to parent this child. . . . the Respondent Father is serving a prison sentence, with no plan for providing a suitable home for the child following his release . . . [T.J.S.] does not ask for his father. There is little possibility that holding out the possibility of reunification with either parent would comport with the child's wishes or best interests.

With the exception of Finding of Fact 51,[2] Respondent Father does not challenge any of these findings; they are thus binding on appeal. *See Pennington*, 210 N.C. App. at 13, 707 S.E.2d at 733. Again, these findings sufficiently support the trial court's conclusion that terminating Respondent Father's parental rights was in T.J.S.'s best interests by citing T.J.S.'s age, bond with his father, likelihood of adoption, and whether termination would aid in accomplishing a permanent placement for T.J.S. *See* N.C. Gen. § 7B-1100 (1)-(4) (2017).

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[2] Respondent Father challenges Dispositional Finding of Fact 51 as not supported by credible evidence. However, according to testimony from DSS Social Worker Christy Markham, Respondent Father never obtained suitable and safe housing during the periods he was released from jail or prison. Furthermore, DSS visited Respondent Father while incarcerated, and he did not indicate that he had a plan to provide housing for T.J.S. This evidence was thus competent and sufficient to support the challenged finding.

Respondent Father asserts the trial court did not sufficiently consider "[t]he bond between the juvenile and the parent" as required by N.C. Gen. Stat. § 7B-1100(4). He first contends that the trial court inappropriately held his incarceration against him when assessing the father-son bond, and his projected release date would have removed the barrier preventing bonding. But Respondent Father's incarceration was not the sole basis for the trial court finding that there was no bond between T.J.S. and Respondent Father; the trial court's unchallenged findings state that not only did Respondent Father fail to facilitate a bond while incarcerated but also after his release despite options available for him to do so.

Second, Respondent Father contends that the trial court failed to consider the lack of a bond between T.J.S. and an adoptive placement. This Court, however, has held "the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014). We have further noted that "where there is currently no proposed candidate to provide permanent placement, a trial court would not be able to make any findings with regard to subpart (5), since there would be no relationship bond to assess in its decision-making process." *Id.* Thus, the failure to make findings on point was not error, let alone an abuse of discretion.

We hold the trial court made the requisite findings under N.C. Gen. Stat. § 7B-1110(a) and that these findings adequately support the trial court's disposition.

IV. Conclusion

We hold the trial court made the necessary and relevant findings in determining that terminating the parental rights of Respondent Mother and Respondent Father was in T.J.S.'s best interests. The trial court did not abuse its discretion in the challenged dispositions. We affirm.

AFFIRMED.

Judge DILLON concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

No. COA19-4 – *In re: T.J.S.*

TYSON, Judge, concurring in part and dissenting in part.

The majority's opinion affirms the termination of parental rights of both Respondent-Father and Respondent-Mother to T.J.S. I concur with the majority's holding to terminate Respondent-Father's parental rights under a deferential abuse of discretion standard of review and analysis. I vote to reverse and remand the trial court's order terminating Respondent-Mother's rights to T.J.S. and respectfully dissent.

I. Standard of Review

The majority's opinion asserts the conclusion that terminating parental rights was in the best interests of the child is reviewed by this Court as an abuse of discretion. *See In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010). This standard of review is improperly applied and incorrect for reviewing Respondent-Mother's assertion of error under the facts and ruling before us in her appeal.

The standard of review on appeal is determined by the statutes as interpreted by our Supreme Court, this Court, and their precedents. Contrary to the majority's assertion, a party cannot consent to a standard of review.

The proper standard of review for the Respondent-Mother's appeal of the "termination order is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of

law" and not for abuse of discretion, which is applied under the "best interests" determination. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000) (citations omitted), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

This passage of *Huff*, provides Respondent-Mother's standard of review for her appeal of the adjudication stage of the termination proceeding. Our Supreme Court has addressed this Court's responsibility when faced with two arguably inconsistent opinions from separate panels: we must follow the earlier opinion. *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) (citing *In re Civil Penalty*, 324 N.C. 373, 385, 379 S.E.2d 30, 37 (1989)). In *Jones,* our Supreme Court held that when faced with two or more inconsistent panel opinions on an issue, this Court must follow the earliest opinion, as one panel of this Court cannot overrule another. *Id.*

II. Analysis

In re Huff correctly applies the law. The statutes stress the importance of maintaining the family autonomy and cohesiveness. N.C. Gen. Stat. § 7B-100 (2017) states the purposes and policies underlying the Abuse, Neglect, and Dependency statutes and provides:

> (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
>
> (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family;

> (3) To provide for services for the protection of juveniles by means that *respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence;* and
>
> (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
>
> (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be *placed in a safe, permanent home* within a reasonable amount of time. (emphasis supplied).

N.C. Gen. Stat. § 7B-100 articulates our State's policy and preference for maintaining the constitutional rights of and preference for family autonomy and cohesiveness in a safe and permanent home. *See id.*

The facts here are analogous to *In re L.L.*, 172 N.C. App. 689, 703, 616 S.E.2d 392, 400 (2005), *abrogated on other grounds by In re T.H.T.*, 362 N.C. 446, 665 S.E.2d 54 (2008), where the trial court did not give consideration to placement with a relative, because the court-ordered home study did not arrive timely. This court remanded the matter for the trial court to "give first consideration to placement" with L.L.'s relatives. *Id* at 704, 616 S.E.2d at 400. Here, the court-ordered home study was pending and not completed by the time of the termination proceeding. "[The right to family autonomy and the juveniles' needs for safety, continuity, and permanence" for

the juvenile to remain with their family members was not properly weighed by the trial court. N.C. Gen. Stat. § 7B-100(3)(2017).

The trial court's found in its dispositional findings of fact:

> 46. [T.J.S.] calls his current foster mother "momma." During R[espondent Mother]'s last visit, this upset [Respondent Mother] and she yelled at him for calling his foster mother "momma." [T.J.S.] frequently exhibits behavioral problems following visits with his mother. This behavior, which includes throwing chairs usually lasts for a day or two. [T.J.S.] has a tangible bond with his foster parents. He calls the foster parents' house "home," and will tell the social worker if she has made a wrong turn while driving him "home." These facts lead the court to suspect that the child is capable of forming a bond with *prospective adoptive parents when they are located* (emphasis supplied).

This finding is not based on the clear, cogent, and convincing evidence presented to the trial court. In fact, it is wholly speculative in nature.

Additionally, the dispositional findings of fact contain findings that are inconsistent with each other. In finding of fact fifty-one, the trial court found:

> 51. While the Court *would certainly prefer there be a prospective adoptive parent so the court could determine the quality of the relationship between the child* and the adoptive parent before terminating the parents' parental rights, the facts remains that there is no biological parent available currently to parent this child. The mother is not even present at this hearing, and the Respondent Father is serving a prison sentence, with no plan in place for providing a suitable home for the child following his release. [T.J.S.] does not ask for his father. There is little possibility that holding out the possibility of reunification with either parent would comport with the child's wishes

> or best interests (emphasis supplied).

Finding of fact fifty-one is in tension with finding of fact forty-five which provides:

> 45. The child's great aunt, who lives in Connecticut, is interested in being a placement for the child. The DSS is requesting a court order to do an Interstate Compact Home Study on the maternal great aunt. No other individuals have come forward seeking placement of the child.

These finding of facts are for the adjudicative and not for the dispositional "best interests" stage of a termination proceeding.

The trial court should have continued the proceeding or deferred ruling on the termination to allow the court-ordered home study with a family member to be completed. The juvenile was in foster care and was not placed with any prospective adoptive parent at the time of the hearing. No prospective adoptive parent had been identified then or by DSS pending appeal. Additionally, if the trial court was concerned about any further delays, it could order an expedited home study. *See e.g.,* N.C. Gen. Stat. § 48-3-301 (2017).

Even applying the abuse of discretion review in the majority's opinion, the trial court's decision to terminate Respondent-Mother's parental rights is not supported under the plan or the statute. DSS had requested, and the court had ordered, a pending home study for placement with a relative, and no prospective adoptive parent had been identified. N.C. Gen. Stat. § 7B-100(3).

III. Conclusion

Termination of parental rights impacts the rights of and preferences for the juvenile's entire family. In light of the magnitude and permanence of this decision on Respondent-Mother's appeal, this Court should simply remand to allow the study to be completed and returned and its findings considered. This action is consistent with the statute's preference for family placement and the court's approved plan of guardianship with a relative.

Applying the proper standard of review, upholding the text and purpose of the statute, and consistent with the court's stated plan, I respectfully dissent from the termination of Respondent Mother's parental rights.