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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-233

Filed: 21 January 2020

Buncombe County, Nos. 13 JT 383-85

IN RE: X.E.R., N.W.R., B.A.R., Minor Juveniles

Appeal by respondents from orders entered 17 December 2018 by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Court of Appeals 21 January 2020.

John C. Adams for petitioner-appellee Buncombe County Department of Health and Human Services.

Richard Croutharmel for respondent-appellant father.

Edward Eldred for respondent-appellant mother.

Michael N. Tousey for guardian ad litem.

STROUD, Judge.

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Respondents, the father and mother of the juveniles X.E.R., N.W.R. and B.A.R. (“Xavier,” “Nick,” and “Bev”),¹ appeal from orders terminating their parental rights. After careful review, we affirm.

I. Background

On 7 August 2013, the Buncombe County Department of Health and Human Services (“BCDHHS”) received a Child Protective Services (“CPS”) report regarding respondents and the juveniles\ . The report alleged that respondent-father had thrown respondent-mother out of the door and onto the ground and shut the door. Father was arrested for assault on a female. Respondents acknowledged father had mental health issues, and a safety plan was put in place which provided father was to have no contact with the juveniles and not engage in physical altercations with mother in the presence of the juveniles.

On 14 October 2013, BCDHHS received another CPS report. This report alleged that mother had picked up Xavier by the arms, thrown him out the front door, and that Xavier had landed on his back and was kicking mother. The report further claimed that mother had slapped Xavier in the face, yelled and cursed at the juveniles, and both respondents were abusing drugs and engaging in domestic violence in the presence of the juveniles. A social worker interviewed Xavier, and

¹ Pseudonyms are used to protect the identities of the juveniles and for ease of reading.

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Xavier denied being thrown as described in the report. Xavier did not have any visible marks or bruises.

On 22 November 2013, BCDHHS received another CPS report regarding the family. The report alleged that during a scheduled home visit, the social worker observed Nick with a fresh red abrasion on the right side of his cheek. When asked how he received the injury, Nick indicated that father “pushed mommy into my face.” Further investigation confirmed that Nick had been injured when father had committed an act of domestic violence upon mother in Nick’s presence. Mother indicated she was afraid of father, but she was also afraid to call the police. Mother refused numerous options offered to ensure safety for her and the juveniles, including but not limited to taking them to shelters.

On 25 November 2013, BCDHHS filed petitions alleging that the juveniles were neglected or seriously neglected juveniles. In addition to the incidents outlined in the CPS reports, BCDHHS alleged that both respondents had a significant CPS history dating back to 2002, as well as a history of domestic violence, substance abuse, and mental health issues. Accordingly, BCDHHS obtained non-secure custody of the juveniles.

Following an adjudicatory hearing held on 18 December 2013, and based on stipulations made by the parties, orders were entered on 10 February 2014 adjudicating the juveniles as neglected. Custody of the juveniles was granted to

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BCDHHS, the juveniles were placed in foster care, and respondents were ordered to comply with case plans intended to affect reunification. The initial permanent plan for the juveniles was set as reunification with a concurrent plan of custody with a court-approved caretaker. However, on 12 May 2017, after finding the issues that brought the juveniles into BCDHHS's care still remained, the trial court changed the primary permanent plan to adoption, with a secondary plan of reunification.

On 12 June 2017, BCDHHS filed petitions alleging that grounds existed to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (2) (willful failure to make reasonable progress), and (6) (dependency) (2017). DSS also alleged as an additional ground for termination that father willfully failed to pay support for the juveniles. N.C. Gen. Stat. § 7B-1111(a)(3) (2017). On 17 December 2018, the trial court entered orders in which it determined grounds existed to terminate respondents' parental rights pursuant to the grounds alleged in the petitions. The trial court further concluded it was in the juveniles' best interests that respondents' parental rights be terminated. Accordingly, the trial court terminated their parental rights. Respondents timely appealed.

II. Petitions for Writ of Certiorari

Respondents have filed petitions for writ of certiorari because in their notices of appeal they improperly designated the Supreme Court of North Carolina as the court to which appeal was taken under the mistaken belief that they were required

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to do so. Effective 1 January 2019, parents appealing from an order terminating parental rights were required to appeal to the Supreme Court rather than the Court of Appeals. N.C. Gen. Stat. §§ 7A-27(a)(5), 7B-1001(a1)(1) (2019). But this requirement is for notice of appeal given after 1 January 2019, and respondents filed their notices of appeal on 20 December 2018. Therefore, their notices of appeal should have designated this Court as the court to which appeal would be taken. The trial court entered three separate orders, one for each child, and the three orders are substantially the same except for the decrees regarding termination of right as to the particular child. Respondents have not raised any arguments on appeal regarding the orders for termination of parental rights as to Xavier and Bev, so there is no need to allow respondents' petitions for certiorari as to review of these orders, and in our discretion, we deny the petitions for certiorari as to the order for Xavier and Bev. Respondents' arguments on appeal address only the order for termination of parental rights as to Nick, so in our discretion pursuant to North Carolina Rule of Appellate Procedure 21(a), we allow respondents' petition for writ of certiorari in order to review the trial court's order regarding Nick.

III. Termination

Respondents' sole argument on appeal is that the trial court abused its discretion when it determined termination of their parental rights was in Nick's best interests. We are not persuaded.

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After an adjudication that one or more grounds for terminating a parent's rights exist, the trial court must determine whether terminating the parent's rights is in the juvenile's best interests by considering the following criteria:

- (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) (2017). This Court reviews the trial court's best interests determination for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "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).

In the dispositional portion of each of its orders, the trial court made the following findings of fact concerning the factors set forth in N.C. Gen. Stat. § 7B-1110(a):

1. [Nick] is ten years old; [Xavier] is nine years old; and [Bev] recently turned seven [years old]. There is no indication that age would be an impediment to adoption. For the past five years they have been [in] placements while attempts were made to work with the parents

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towards reunification. Extending lack of permanency would be detrimental for these juveniles.

2. [Xavier] and [Bev] are likely to be adopted by their present pre-adoptive placement providers.

3. The minor child [Nick] is a child that is going to require a significant amount of mental health services for years to come, if not his entire life. He is in a highly structured therapeutic foster home where he is the only foster child and he continues to struggle on a daily basis with normal daily activities. [Nick] is very vulnerable and seems to entice danger. At the last visit he was reported by the visitation coach to be running around the playground screaming, "I wish mommy was dead." Both respondent parents have regularly opined that all [Nick] needs to do, to be alright, is just return home. . . . There are persons interested in adopting [Nick], but the process of introduction is still in an early stage. They are familiar with his history, behavior, and special needs, and have expressed that his issues would not deter them from adoption.

4. The primary plan for all three children is adoption. Neither parent has shown any willingness to relinquish parental rights, so the only way the permanency plan can be accomplished for all three of the minor children is through terminating the parental rights of respondents.

5. The parents and the juveniles have a bond, although the lack of consistent, recent contact has weakened this bond. Throughout the life of this case the respondent mother has regularly visited with the minor children. However, the respondent father has missed many visits, offering various excuses for the missed visits; has been unable to control his anger during some visits in the presence of the minor children, and on one occasion his conduct was so severe that one of the minor children told him to "stop." [Nick's] bond is stronger than that of the other two juveniles. [Xavier] and [Bev] have expressed a desire for a forever

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home with their present foster parents. They have not expressed similar wishes for the biological parents. The minor children [Xavier] and [Bev] have stated to the [social worker] and the [guardian ad litem] that they do not desire to return to the home of the respondent parents. [Xavier] has indicated to the [social worker] that he no longer wants to visit with the respondent parents.

6. The relationship of [Xavier] and [Bev] with their placement parents is healthy and strong, as shown by the juveniles desire to live in the placement permanently. [Nick] has expressed wishes of being in a “forever” home where he would like to be an only child. At the time of the hearing he had only been in his current placement for five weeks so the relationship is still developing.

...²

7. The [juveniles’ guardian ad litem] reports that the respondent parents have had innumerable opportunities to engage with the Department, and have had an enormous amount of resources provided [to] them. However, despite this, there has not been much real progress at all in this case. Both respondent parents still cannot understand how their behavior, their unstable relationship, and the ongoing verbal abuse and violent behavior damage[s] their children; and, that at this point, it is injurious to the minor children to remain in the system, and is definitely not in their best interest to be reunited with the respondent parents.

8. The [juveniles’ guardian ad litem] further reports that [Nick] would like to remain in his new placement and have visits with his siblings, and that [Xavier] and [Bev] are happy where they are currently placed, and want to be adopted by their foster family, as soon as possible.

² There are two findings of fact number six in each of the trial court’s orders.

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The trial court's dispositional findings are binding on appeal if they are supported by competent evidence. *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007). Dispositional findings of fact not specifically challenged by respondents are also binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Furthermore, we address only those challenges to the dispositional findings of fact necessary to support the trial court's conclusion that termination of respondents' parental rights was in the best interests of the juveniles. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[W]e agree that some of [the challenged findings] are not supported by evidence in the record. When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.").

Father challenges the portion of finding of fact number 3 that: "[t]here are persons interested in adopting [Nick] but the process of introduction is still in an early stage. They are familiar with his history, behavior, and special needs, and have expressed that his issues would not deter them from adoption."³ Father notes that the guardian ad litem's report to the court stated that Xavier and Bev's foster parents were "not closed to the idea" of adopting Nick, but "[t]hey do not yet know him and cannot make any promises of any sort at this time." Thus, based on this evidence, father contends that there were not any persons interested in adopting Nick who were

³ Mother does not challenge this finding in her brief.

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familiar with and undeterred by his special needs. But the report cited by father was dated 28 August 2017, which was prior to the start of the termination hearing. At the termination hearing, on 23 October 2018, a foster care social worker testified that Xavier and Bev's foster parents had knowledge of Nick's special needs and were willing to adopt him. And on 26 October 2018, the guardian ad litem testified that if Nick "gets down to a Level 1 and stabilizes there, they are willing to consider bringing him in." While the chances of Nick's adoption may not be as high as the other children, and father may disagree with the weight the trial court gave to the evidence of his potential for adoption, 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." *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Accordingly, we conclude there was sufficient competent evidence in the record to support the trial court's finding of fact.

Respondents next argue that the trial court failed to make a sufficient finding of fact regarding whether Nick was likely to be adopted. *See* N.C. Gen. Stat. § 7B-1110(a)(2). They note there was controverted evidence on this issue and cite Nick's special needs, multiple mental health issues, behavioral problems, numerous prior placements, and his desire to remain with his parents as factors weighing against adoptability.

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Here, while the trial court's finding did not explicitly state that Nick was likely to be adopted, it is apparent the trial court addressed this statutory factor, and the likelihood of Nick's adoption was implicit in the trial court's findings. The trial court's findings carefully weighed each of the factors and took into consideration the potential barriers to Nick's adoption, as indicated by the trial court's finding that while it was still early in the process there were persons interested in adopting Nick, and they were not deterred by his history, behavior, or special needs.

We further conclude that *In re J.A.O.* is distinguishable from the instant case. 166 N.C. App. 222, 601 S.E.2d 226 (2004). In *In re J.A.O.*, the juvenile had "a history of being verbally and physically aggressive and threatening, and he ha[d] been diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension." *Id.* at 228, 601 S.E.2d at 230. The juvenile had "been placed in foster care since the age of eighteen months and ha[d] been shuffled through nineteen treatment centers over the last fourteen years." *Id.* at 227, 601 S.E.2d at 230. As a result, the guardian ad litem argued at trial that the juvenile was unlikely to be a candidate for adoption and termination was not in the juvenile's best interest because it would "cut him off from any family that he might have." *Id.* Despite this evidence, and despite finding that there was only a small possibility that the juvenile would be adopted, the trial court concluded that it was in the juvenile's

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best interests that the mother's parental rights be terminated. *Id.* at 228, 601 S.E.2d at 230. On appeal, this Court reversed. This Court balanced the minimal possibilities of adoption "against the stabilizing influence, and the sense of identity, that some continuing legal relationship with natural relatives may ultimately bring" and determined that rendering *J.A.O.* a legal orphan was not in his best interests. *Id.*

Here, while the trial court found that Nick has serious issues that will require a significant amount of mental health services, the severity of his issues does not appear to reach the same level as the juvenile in *In re J.A.O.* The juvenile in *In re J.A.O.* was fourteen at the time of the termination hearing and was sixteen at the time this Court issued its opinion. *Id.* at 227, 601 S.E.2d at 229. Nick was only ten at the time of his termination hearing and is currently eleven. Furthermore, unlike the juvenile in *In re J.A.O.*, there was evidence of a prospective adoptive family for Nick. Most importantly, we note the guardian ad litem testified that "with the right parents, [Nick is] *very adoptable*." (Emphasis added.) Additionally, while the mother in *In re J.A.O.* had made reasonable progress towards correcting the conditions which led to the removal of her son from her care, respondents here failed to make such progress. Instead, the trial court found that respondents still do not understand how their abuse and violent behavior harmed their children.

IV. Conclusion

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We conclude the trial court appropriately considered the factors stated in N.C. Gen. Stat. § 7B-1110(a). We therefore hold the trial court's conclusion that termination of respondents' parental rights was in Nick's best interests did not constitute an abuse of discretion. Accordingly, we affirm the trial court's order terminating respondents' parental rights.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).