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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-507

Filed 07 February 2023

Henderson County, Nos. 11 JT 109-10, 11 JT 140

In the Matter of:

E.D.S., J.D.S., M.Q.D.A

Appeal by Respondent-Father from order entered 22 March 2023 by Judge Thomas McAvoy “Mack” Brittain, Jr., in Henderson County District Court. Heard in the Court of Appeals 10 January 2023.

*Sara Player for Petitioner-Appellee Henderson County Department of Social Services.*

*Fox Rothschild LLP, by Brian C. Bernhardt, for Guardian ad Litem.*

*Peter Wood for Respondent-Appellant Father.*

COLLINS, Judge.

Respondent-Father appeals from the trial court’s order terminating his parental rights to his children on the ground that he willfully left the children in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the trial court that reasonable progress under the circumstances had been made in correcting the conditions which led to the removal

of the children. Respondent-Father's appointed appellate counsel filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e)<sup>1</sup>. We affirm.

### **I. Background**

On 15 August 2011, the Henderson County Department of Social Services ("DSS") filed a petition alleging Ernie, Jerry, and Mark to be dependent because Father was incarcerated and their biological mother was homeless and had to be admitted to the hospital due to a high-risk pregnancy.<sup>2</sup> On 19 October 2011, following the death of the children's mother due to a drug overdose, DSS filed a supplemental petition. On 13 December 2011, the trial court adjudicated the children dependent and placed the children with maternal grandparents. On 20 September 2013, following a permanency planning hearing and after Father failed to complete the case plan, the trial court gave custody of the three children to their maternal grandparents and awarded Father supervised visitation weekly; the court then terminated jurisdiction and converted the action to a Chapter 50 civil custody action. Following entry of the civil custody order, Father did not have any supervised visitation with the children.

On 10 February 2020, DSS filed a petition alleging neglect and abuse by the

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<sup>1</sup> Father's brief is labeled "No-Merit Brief for [Father] submitted pursuant to N.C. R. App. P. 3.1(d)" and "requests review pursuant to N.C. R. App. P. 3.1(d)." However, Rule 3.1(d) pertains to expediting the filing of the record on appeal. N.C. R. App. P. 3.1(e) pertains to no-merit briefs and we review Father's no-merit brief under Rule 3.1(e).

<sup>2</sup> We use a pseudonym to protect the identities of the minor children. See N.C. R. App. P. 42.

maternal grandparents. On 7 April 2021, the trial court adjudicated the children to be neglected. On 22 November 2021, DSS filed a motion to terminate Father's parental rights, alleging that he (1) neglected the children and (2) willfully left the children in foster care or placement outside the home for more than 12 months without showing reasonable progress in correcting the conditions which led to the removal of the children. After a hearing in February 2022, the trial court terminated Father's parental rights on the second ground—that Father willfully left the children in foster care or placement outside the home for more than 12 months—and determined that it was in the best interests of the children to terminate Father's parental rights. The trial court entered the termination order on 22 March 2022, and Father timely appealed to this Court.

Father's appellate counsel was unable to locate Father or find an address for Father; he was thus unable to meet with him, provide him with copies of the brief, record, and transcript for the appeal, and could not advise him by letter of his right to file a pro se brief. Father's counsel filed a motion with this Court on 26 July 2022, entitled "Motion for Waiver of Service Requirement in No Merits Appeal," asking this Court to find that he exercised due diligence in locating Father and that filing of all documents with this Court constitutes service. This Court allowed the motion the following day.

## **II. Discussion**

Father's counsel filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e),

explaining that he “was unable to find any issues of merit to raise on appeal” and that the appeal would be frivolous, and directing this Court’s attention to relevant law in order to show why the issues lack merit or would not alter the result.

#### **A. Standard of Review**

A termination-of-parental-rights proceeding is a two-step process. *In re D.A.H.-C.*, 227 N.C. App. 489, 493, 742 S.E.2d 836, 839 (2013). “At the adjudicatory stage, the petitioner bears the burden of proving by ‘clear, cogent, and convincing evidence’ the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes.” *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (citing N.C. Gen. Stat. § 7B-1109(f)). If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent’s rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child. *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736-37 (2004). If, in its discretion, the trial court determines that it is in the child’s best interests, the trial court may then terminate the parent’s rights. *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 161 (2003).

Pursuant to N.C. Gen. Stat. § 7B-1111(a), a trial court may terminate parental rights upon a finding of one of eleven enumerated grounds. When reviewing the trial court’s adjudication of grounds for termination, we examine 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.” *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quotation marks and citations omitted). Any unchallenged findings are “deemed supported by competent evidence and are binding on appeal.” *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citations omitted). The trial court’s conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). Finally, we review a trial court’s dispositional decision that termination is in the best interests of the child for abuse of discretion and will reverse only where the trial court’s decision is “manifestly unsupported by reason.” *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted).

## **B. Adjudication**

When a trial court terminates parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), the trial court must determine that, as of the time of the hearing, the parent has not made “reasonable progress under the circumstances to correct the conditions which led to removal of the child.” *In re O.C.*, 171 N.C. App. 457, 465, 615 S.E.2d 391, 396 (2005). The trial court may consider evidence of reasonable progress made by a parent “until the date of the termination hearing.” *In re J.G.B.*, 177 N.C. App. 375, 385, 628 S.E.2d 450, 457 (2006) (citation omitted). A parent’s “prolonged inability to improve [their] situation, despite some efforts in that direction, will support a finding of willfulness regardless of [their] good intentions[.]” *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004) (quotation marks and citation omitted).

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The trial court made extensive findings of fact regarding Father's failure to complete the various requirements that were prerequisite to him regaining custody or placement of the children:

27. A disposition hearing was held on March 11, 2021, after which the Court placed certain requirements on the father. The prompt fulfillment of these requirements by the father was a prerequisite to the father regaining custody or placement of the juveniles. A formal order was signed by the Court on April 7, 2021.

28. The legal father was ordered to complete the following reunification requirements in the April 7, 2021 Disposition Order:

- a. Father shall obtain a Comprehensive Clinical Assessment from a certified provider acceptable to HCDSS, provide the assessor with truthful and accurate information, and follow and successfully complete all the recommendations of the assessment.
- b. Father shall complete parenting classes by a provider acceptable to HCDSS, which addresses the ability to identify age-appropriate behaviors, needs and discipline for the juveniles.
- c. Father shall engage in family therapy when recommended by a therapist for one of the juveniles.
- d. Father shall submit to random drug screens.
- e. Father shall cooperate with and pay Child Support through the Child Support Enforcement Agency in an amount consistent with the guidelines.
- f. Father shall cooperate and/or ensure that the juveniles' medical, dental, developmental evaluations and treatment needs are met and comply with recommendations.
- g. If the juveniles are returned to the father's care, ensure that the juveniles attend daycare/school in

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the absence of a valid medical excuse, or in fulfillment of any provision of this order.

h. Father shall visit with the juveniles as allowed by the Court and demonstrate the ability to provide appropriate care for the juveniles.

i. Father shall obtain stable income that is sufficient to meet the family's basic needs. Income includes financial support from employment, public benefits such as Food Stamps, WIC, Medicaid, Work First, Social Security, Rent Assistance Programs or Unemployment Benefits.

j. Father shall obtain and maintain an appropriate and safe residence for the juveniles.

k. Father shall maintain face-to-face contact with the Social Worker as requested, including but not limited to Child & Family Team Meetings and Permanency Planning Meetings.

l. Father shall provide the Social Worker with a physical residence address, a mailing address if different from the residence address, a current and an operational telephone number. Father shall promptly update this information with the Social Worker upon any changes.

m. Father shall sign and keep current any and all releases of information necessary to allow the exchange of information between HCDSS and the providers.

29. A permanency planning and review hearing was held on September 30, 2021 to evaluate the progress, or lack thereof, of the father towards those requirements.

30. During the September 30, 2021 permanency planning and review hearing, the Court adopted the recommendations of HCDSS and the guardian *ad litem* to change the primary plan for the juveniles to termination of parental rights, with subsequent adoption.

31. Subsequently, SW Rector caused to be filed a Motion in the Cause for Termination of Parental Rights on November

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24, 2021.

32. The Motion in the Cause sought to terminate the parental rights of the legal father as to these juveniles, upon the following grounds:

a. He has neglected the juveniles within the meaning of Chapter 7B of the General Statutes, and there is a probability that such neglect would recur if the juveniles were in the care of the father.

b. He has willfully left the juveniles in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles.

33. The father has not made any progress on his reunification requirements.

34. The father has not completed a Comprehensive Clinical Assessment.

35. He has not enrolled in parenting classes.

36. He has not engaged in meaningful substance use treatment.

37. The father was arrested for multiple counts of felony possession of schedule II-controlled substances and misdemeanor drug paraphernalia in 2018 and was housed at the Henderson County Detention Center ("HCDC") at the time the petition was filed by HCDSS on February 10, 2020.

38. While at HCDC, the father consistently participated in classes for substance abuse and transitioning back to society, as well as a general support group. These programs were put on pause because of the COVID-19 pandemic, which began in March of 2020.

39. He also maintained contact with the HCDC social worker Tina Lafoy, who spoke positively of the father.

40. Corrections officers also spoke positively of the father to SW Rector. The father served as a peer mentor to new



inmates.

41. The father participated in several virtual meetings with HCDSS to discuss the juveniles.

42. SW Rector met with him at the HCDC several times. During these visits, the father expressed his love for the juveniles. SW Rector advised the father about working his case plan when he was released. SW Rector provided the father with her contact information and instructed him to contact her when he was released.

43. The father was ultimately convicted of those charges in March 2021 and spent approximately three (3) months serving an active sentence at the N.C. Department of Corrections (“DOC”) after getting credit for time already served at HCDC. He was released on supervised parole on or about June 24, 2021.

44. While legal father initially maintained contact with HCDSS while at the HCDC awaiting trial and would inquire about the juveniles’ well-being, he did not maintain contact after he was sent to DOC.

45. After his release from DOC on June 24, 2021, the father did not meet with SW Rector to go over his case plan, nor did he ask about how to begin having supervised visitation with the juveniles.

46. The father contacted SW Rector one time after his release from DOC on June 24, 2021. The father went to HCDSS around 5:00PM when the building was closed. He then left a voicemail and provided a phone number for a third party that she could use to contact him. SW Rector reached out to that number but did not receive further contact from the father.

47. After his release from DOC on June 24, 2021, he continued to engage in substance use and has been unable to provide a safe, stable home for the juveniles.

48. The father’s conduct since his release from DOC has been a barrier to reunification with the juveniles.

49. He was arrested four (4) times after being placed on supervised parole. These charges are pending in

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50. He was arrested on July 19, 2021 for a parole violation and was later released from the HCDC on July 26, 2021.

51. He was arrested on August 3, 2021 for interfering with his electronic monitoring device which is required for his supervised parole. He was released from jail on September 2, 2021.

52. He was arrested for a third time on September 9, 2021 for possession of a schedule II controlled substance. He was released on October 19, 2021.

53. He was arrested for a fourth time since his release from DOC on November 5, 2021 for possessing methamphetamine, attempting to break or enter a building, resisting a public officer, and a probation violation.

54. He did not report obtaining a source of income to meet the family's basic needs, nor a safe residence for the juveniles.

55. He did some landscaping work but was unable to obtain a more permanent job due to the above arrests. He did not provide any verification to HCDSS of this work, including the name of his employer or his hours.

56. During the periods he was not at HCDC, the father went to the local free clinic each week to take advantage of substance abuse classes.

57. The father has not had in-person visitation with the juveniles since 2013. He was permitted supervised visitation with the juveniles pursuant to the Chapter 50 civil custody order that was entered.

58. However, these visits did not occur. The father reported that the maternal grandparents prevented the visitations from taking place.

59. The father made no efforts to contact HCDSS for assistance with the visitations, nor did he file any kind of motion to bring the matter back into court.

60. While incarcerated in jail or prison, the father has not

been permitted to have face-to-face contact with the juveniles.

61. Family therapy has not been recommended by any of the juveniles' individual therapists. The father has made no efforts to connect with any of the juveniles' therapists, nor has he inquired about attending any therapy sessions.

62. Since February 10, 2020, the father has written a total of three (3) letters to the juveniles. The letters were positive and appropriate, and the juveniles enjoyed receiving them. The father would send the letters to SW Rector who read them to determine appropriateness and then emailed copies to the juveniles' foster parents. He encouraged the juveniles to do well in school and be good citizens in the community.

63. The father wrote a fourth letter right before [Ernie] and [Ernie's] birthday on September 13, 2021. He wrote in the letter that he was thinking about the boys and wanted to wish them a happy birthday. He gave the letter to a corrections officer at HCDC, but it did not get to SW Rector. The father did not write subsequent letters due to the loss of this letter.

64. The juveniles have not received a letter from the father since approximately March 2021.

65. The father has not provided financially for the juveniles since custody was awarded to the maternal grandparents in 2013.

66. He has not sent birthday cards or gifts of any kind.

67. SW Robertson took over the foster care case after SW Rector was promoted to a supervisor position on November 8, 2021.

68. SW Robertson met with the father at the HCDC. The father was appropriate and respectful during their meeting.

69. Ms. Lafoy at the HCDC informed SW Robertson that the father was taking steps towards enrolling in an inpatient substance abuse treatment program. However SW Robertson was not aware of any concrete plans for that

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to take place as of the hearing date.

70. The father denies misusing controlled substances for the past three or four years, although he is working to attend rehab.

71. Transportation has been an issue for the father which made it difficult for him to work.

72. The father reports he has a place to stay, and a job lined up at Golden Corral for when he is released from jail. However, he did not provide specifics as to either and HCDSS has been unable to verify.

73. During the times the father was out of custody from June 2021 until November 2021, the father did not contact HCDSS or otherwise take steps to engage in his case plan.

Upon our review of the whole record, we determine that clear, cogent and convincing evidence supports the trial court's findings of fact. *In re E.H.P.*, 372 N.C. at 392, 831 S.E.2d at 52. Thus, the trial court's findings of fact provide ample support for the trial court's conclusion that Father "willfully left the juveniles in foster care or placement outside the home for more than twelve (12) months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juveniles" under N.C. Gen. Stat. § 7B-1111(a)(2).

### **C. Disposition**

In determining whether termination of parental rights is in the children's best interest, the trial court must consider the following relevant 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

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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) (2022). The trial court has discretion when weighing these factors, and it may assign more weight to one or more factors over others. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709-10 (2005).

The trial court made the following findings of fact relevant to its best interests determination:

1. The juveniles [Ernie] and [Jerry] turned thirteen (13) on September 13, 2021. The juvenile [Mark] turned ten (10) on August 8, 2021.

2. This Court has previously adopted a permanent plan of adoption for these juveniles, and termination of the parental rights as ordered herein will aid in the accomplishment of this plan.

3. The likelihood of the juveniles' adoption is high, given their ages. While the juveniles are not currently in pre-adoptive placements, each of the juveniles has expressed a desire to be adopted by a loving family. None of the juveniles have expressed any desire to live with their father. The juveniles wish to have permanence and to be in a safe, stable home. All the juveniles' foster parents have enjoyed the juveniles and the juveniles have bonded to their foster parents.

4. Each juvenile has a concept of who the father is, but the juveniles do not have a strong bond with the father. [Mark] was less than two months old when he last saw the father, so he has no active memories of him. The twins [Ernie] and

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[Jerry] have only vague memories. SW Rector gave the boys a photo of them with their father and that sparked memories of going to the park where DSS supervised visits when they were first in custody.

5. While the father loves the juveniles and cares about their well-being, he has not seen the juveniles in almost a decade. The bond between the juveniles and their father has been damaged over the years as the father has been in and out of jail and has not had much contact with the juveniles. The father last saw the juveniles on or about July 2013.

6. [Mark] does not ask about his father. [Ernie] asks for updates, specifically how his father is and when he is getting out of jail. [Ernie] is quite anxious, and it helps him to know what each day will hold. [Jerry] occasionally asks about his father.

7. The juveniles have enjoyed receiving the letters written by the father. However [Jerry] was particularly distressed about the father not responding to his letter that he wrote in response to one of the father's letters. The juveniles have not received a letter since March 2021.

8. Each of the juveniles is currently in a therapeutic foster home and are engaged in intensive therapies to address the trauma they have endured. The three juveniles were initially placed together but are currently in separate homes. The goal is to get all three juveniles together if possible. The juveniles were recommended to be separated due to animosity between the twins and [Mark] as [Mark] was the favored child in the home of the maternal grandparents and got his older brothers in trouble.

9. [Mark] is currently in an Intensive Alternative Family Treatment (IAFT) foster home in Rutherford County and is the only child in the home. [Ernie] and [Jerry] were together but their foster home in Haywood County elected not to renew their license, so the twins were moved in November 2021. Due to [Ernie's] escalating behaviors, he was moved to a separate home.

10. The father has been unable to demonstrate stability outside of the confines of jail.

These findings show that the trial court considered and made findings on each of the statutory criteria required by N.C. Gen. Stat. § 7B-1110(a). As such, we cannot say that the trial court abused its discretion by determining that it was in the children's best interests to have Father's parental rights terminated. *In re S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59.

### **III. Conclusion**

After careful review of Father's no-merit brief and examination of the record as a whole, we conclude that there are no non-frivolous issues on which to base an argument for relief and we dismiss Father's appeal.

DISMISSED.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).