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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-334

Filed 21 March 2023

Surry County, No. 20 JT 4

IN THE MATTER OF: E.J.M.

Appeal by respondents from orders entered 10 January 2022 by Judge William F. Southern, III, in Surry County District Court. Heard in the Court of Appeals 27 February 2023.

*Partin & Cheek, P.L.L.C., by R. Blake Cheek, for petitioner-appellee Surry County Department of Social Services.*

*Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for respondent-appellant mother.*

*Garron T. Michael for respondent-appellant father.*

*James N. Freeman, Jr., for Guardian ad Litem.*

ARROWOOD, Judge.

Respondent-mother and respondent-father (collectively “respondents”), the parents of the minor child E.J.M. (Elliot<sup>1</sup>), appeal from the trial court’s orders terminating their parental rights. Respondent-father’s counsel has filed a no-merit

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<sup>1</sup> A pseudonym is used to protect the juvenile’s identity and for ease of reading.

brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Respondent-mother argues that the trial court erred in finding grounds to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a). Respondent-mother, recognizing that her notice of appeal was untimely and does not convey jurisdiction to this Court, has also filed a petition for a *writ of certiorari* (“PWC”). In our discretion we allow respondent-mother’s petition but hold that the trial court did not err.

I. Background

On 30 December 2019, the Surry County Department of Social Services (“DSS”) received reports that one-day-old Elliot was born to respondents who were homeless, living out of their car, and without adequate supplies to care for a newborn. The reports also stated there were domestic violence issues between respondents, and that respondent-mother had mental health issues and she tested positive for methamphetamines at the time of Elliot’s birth.<sup>2</sup> DSS established a safety plan, under which Elliot and respondent-mother would leave the hospital and go to live with a third-party safety placement who would supervise respondent-mother’s interactions with Elliot. However, on 3 January 2020, respondent-father came to the safety placement for a visit and left with respondent-mother and Elliot to go “far away before [DSS] could assume custody of [Elliot].” Respondents took Elliot’s diaper bag, but left behind all of his infant formula.

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<sup>2</sup> On 9 January 2020, DSS filed an amended petition adding the allegation that Elliot’s umbilical cord tested positive for methamphetamines at birth.

DSS filed a petition alleging Elliot was a neglected juvenile on 7 January 2020. DSS took Elliot into nonsecure custody and placed him in a licensed foster home. Following a hearing on 28 February 2020, the trial court entered an order adjudicating Elliot as a neglected juvenile on 26 March 2020. The trial court also entered an order requiring respondents to enter into case plans. As part of their case plans, respondents were required to: (1) address their issues with mental health/substance abuse; (2) take parenting classes; (3) participate in a domestic violence assessment and follow all recommendations; (4) take life skills courses; (5) find appropriate housing; and (6) “obtain and maintain gainful employment[.]” When respondents entered into their case plans 3 March 2020, respondent-mother informed DSS she was pregnant with a second child.

On 17 December 2020, the court found respondents were making progress in their case plans. However, in May 2021, Elliot’s six-month-old “sibling tested positive for methamphetamines while the sibling was in the custody of [r]espondents” and DSS assumed custody. Respondent-mother admitted she was using methamphetamines again, which was confirmed by a positive drug screen. Respondent-father tested positive for amphetamines, carboxy THC, marijuana, and methamphetamines. Furthermore, respondents were residing in a motel where there were “multiple drug users[.]” domestic violence issues, and “extreme clutter[.]” The trial court also found that respondents needed to complete an additional domestic violence assessment as call logs from 911 showed law enforcement was called to

respondent's motel room for domestic violence issues "on at least two" occasions. Considering these setbacks and the fact that Elliot had been in DSS custody for sixteen months, the court adopted a new primary permanent plan of termination of parental rights and adoption with a secondary plan of reunification.

On 7 September 2021, DSS filed a motion to terminate respondents' parental rights. DSS alleged three grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(1)-(3) and it would be in Elliot's best interest for respondents' parental rights to be terminated. The matter came on for hearing in Surry County District Court on 3 November 2021, Judge Southern presiding.

During the hearing, foster care supervisor Jade Wiggington ("Ms. Wiggington") testified on behalf of DSS. Ms. Wiggington testified that in May 2021, after respondents tested positive for illegal substances, they were both referred to get new substance abuse assessments. As of the date of the hearing, respondent-father did not complete the new substance abuse assessment, nor had he completed the recommendations from the previous assessment in September 2020, and respondent-mother never completed the assessment and declined to participate in rehab, despite having the opportunity to do so and her acknowledgment that she was "actively using methamphetamine." Respondent-father refused to participate in any drug screens since April 2021, although requested by DSS at least nine times, and throughout the life of the case completed only six of the thirty-two requested screenings. Likewise, respondent-mother completed seven out of twenty-six requested drug screens.

Ms. Wiggington also testified respondents were also unable to financially support Elliot. Although respondent-father was under a \$55.00 a month child support obligation, between March 2021 and September 2021 he had only paid \$8.20 and besides that had only made one other payment during the duration of the case. Similarly, respondent-mother only made one payment and other than that has provided no other financial support to Elliot. Furthermore, respondents never obtained stable or appropriate housing and never found employment that could be confirmed by DSS.

Respondent-mother also testified during the adjudication. She denied there were any domestic violence incidents between her and respondent-father; stated she only missed a few visits with Elliot and the rest were missed due to DSS; denied she had only completed seven drug screens and only made one child support payment; and stated she had not entered rehab because DSS did not help. Furthermore, respondent-mother testified she did make child support payments using her daughter's disability money. Respondent-mother also testified she was "a user [her] entire pregnancy with [Elliot][,]" and insisted her daughter's positive methamphetamine test was from a "skin-to-skin transfer because [she] had gone out partying once."

Ms. Wiggington also testified at the best interest stage of the hearing. Ms. Wiggington testified Elliot had been in foster care with the same family since he entered into the care of DSS and "he was doing very well in this placement[,]" and

called his foster parents mom and dad. Ms. Wiggington also testified Elliot’s foster parents expressed a desire to adopt him and she opined that terminating respondent’s parental rights would aid in achieving the permanent plan of adoption.

Following the hearing, the trial court terminated respondents’ parental rights in open court and in an order filed 10 January 2022. Although the trial court acknowledged respondents made some early progress in their case plans, the court still found there was “clear, cogent, and convincing evidence” respondents neglected Elliot and did not make reasonable progress in correcting the circumstances which led to his removal. Furthermore, the trial court found it was in Elliot’s best interest to terminate respondents’ rights. Respondents appealed.

## II. Discussion

On appeal, respondent-mother argues that the trial court erred in finding grounds existed to terminate her rights under N.C. Gen. Stat. § 7B-1111(a). Respondent-father’s counsel filed a no-merit brief under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We address each respondent’s argument in turn.

### A. Respondent-Mother’s Appeal

As an initial matter, we address our jurisdiction to hear respondent-mother’s appeal. Under N.C. Gen. Stat. § 7B-1001, notice of appeal from termination orders “shall be made within 30 days after entry and service of the order[s] . . . .” N.C. Gen. Stat. § 7B-1001(b) (2022). In this case, the trial court entered its termination orders

on 10 January 2022. Respondent-mother first filed a notice of appeal on 24 January 2022, but she concedes that notice was deficient because it incorrectly identified a singular “judgment” terminating her parental rights as the order being appealed from, rather than the two orders entered by the trial court. *See* N.C.R App. P. 3(d) (requiring a notice of appeal to “designate the judgment or order from which appeal is taken”). On 10 February 2022, respondent-mother filed an amended notice of appeal which identified both the adjudication and disposition orders which together terminated her parental rights, but “did not include a certificate of service[.]”

Recognizing this amended notice of appeal was untimely and therefore does not convey jurisdiction to this Court, respondent-mother had also filed a PWC. In light of respondent-mother’s good faith attempts to appeal and the serious consequences of the trial court’s orders, in our discretion, we allow respondent-mother’s petition and consider her appeal on its merits.

1. Termination Orders

On appeal, respondent-mother argues that the trial court erred in finding grounds existed to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(1)-(a)(3). Our appellate courts “review a trial court’s adjudication of grounds to terminate parental rights ‘to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.’” *In re I.J.W.*, 378 N.C. 17, 21, 859 S.E.2d 148, 151 (2021) (citation omitted). “The trial court’s conclusions of law are reviewable de novo on appeal.” *In re C.B.C.*,

373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted). “Findings of fact not challenged by respondent 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) (citation omitted).

The trial court can terminate parental rights “upon a finding of one or more” of the factors listed in N.C. Gen. Stat. § 7B-1111(a). The relevant portion of the statute allows termination if:

- (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.
- (2) The parent has willfully left the juvenile in foster care or placement outside the home for more than 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 juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.
- (3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(1)-(a)(3) (2022). “In termination of parental rights



proceedings, the trial court’s finding of any one of the . . . enumerated grounds is sufficient to support a termination.” *In re N.T.U.*, 234 N.C. App. 722, 733, 760 S.E.2d 49, 57 (citation and internal quotation marks omitted), *disc. review denied*, 763 S.E.2d 517 (2014). “Thus, on appeal, if we determine that any one of the statutory grounds enumerated in [N.C. Gen. Stat.] § 7B-1111(a) is supported by findings of fact based on competent evidence, we need not address the remaining grounds.” *Id.* (citation omitted). Accordingly, we limit our review to N.C. Gen. Stat. § 7B-1111(a)(1) (“subsection (a)(1)”).

Under subsection (a)(1), the court may terminate a parent’s rights if “[t]he parent has abused or neglected the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(1). A “neglected juvenile” is, among other things:

Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does any of the following:

a. Does not provide proper care, supervision, or discipline.

. . . .

e. Creates or allows to be created a living environment that is injurious to the juvenile’s welfare.

*Id.* § 7B-101(15)(a), (e) (2022).

When a child has been out of the parent’s custody for a significant period of time by the point at which the termination proceeding occurs, neglect may be established by a showing that the child was neglected on a previous occasion and the presence of the likelihood of future neglect by the parent if the child were to be returned to the parent’s

care.

*In re J.D.O.*, 381 N.C. 799, 810, 874 S.E.2d 507, 517 (2022) (citation omitted).

“[E]vidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect — is admissible in subsequent proceedings to terminate parental rights,” but “[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child at the time of the termination proceeding.”

*In re J.R.F.*, 380 N.C. 43, 48, 867 S.E.2d 870, 874 (2022) (citation omitted).

On appeal, respondent-mother contends the trial court improperly determined “the likelihood of repetition of neglect in the future is significant if the minor child were to be returned to the parents’ care.” Respondent-mother contends that she “substantially completed her case plan, paid child support despite having no income, and improved her housing situation within her means[,]” such that there “could and should be no likelihood of future neglect.” We disagree.

The trial court’s adjudication order acknowledges that respondent-mother initially made progress on her case plan, including completing a substance abuse assessment on 1 September 2020 and two domestic violence assessments, none of which led to further recommendations. She also completed her parenting and life skills classes on 25 September 2020. However, the trial court expressed “great concern regarding credibility” of respondents, and “concerns regarding what exactly was stated to those providers when [these initial] assessments were performed.”

Still, some progress toward the case plan is not determinative. A “case plan is not just a checklist,” and “a parent’s compliance with his or her case plan does not preclude a finding of neglect.” *In re R.L.R.*, 381 N.C. 863, 869, 875, 874 S.E.2d 579, 586, 589 (citations omitted). “The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.” *Id.* at 870, 874 S.E.2d at 586 (emphasis in original) (citations and internal quotation marks omitted).

By the time of the termination hearing, respondent-mother had regressed, particularly with respect to her issues with substance abuse. She and Elliot’s sister tested positive for methamphetamines in May 2021, approximately thirteen months after Elliot entered DSS custody, and the sister was removed from respondents’ home as a result. The same day as her positive result, respondent-mother testified in court “that she was actively using methamphetamine[s].” Respondent-mother subsequently missed nine of the ten drug screens requested by DSS between her positive May 2021 test and the termination hearing.<sup>3</sup> This was a significant issue with respondent-mother as she had participated in only seven of the twenty-six requested drug screens throughout the life of the case.

Based on her positive test in May 2021, DSS referred respondent-mother for a new substance abuse assessment on 23 June 2021, but she failed to obtain this

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<sup>3</sup> Respondent-mother submitted to one drug screen on 17 September 2021, and it was negative.

assessment or any other substance abuse treatment before the November termination hearing despite having the opportunity to do so. At the hearing, respondent-mother acknowledged that she still needed treatment and was planning to enter a rehabilitation facility the following week. Thus, respondent-mother had still not resolved the substance abuse issues that led to Elliot's removal from her custody and the probability of a repetition of neglect was evident considering a different child in the care of respondent-mother also tested positive for methamphetamines thirteen months after Elliot was taken out of respondent-mother's custody for the same issue.

Moreover, respondent-mother was never able to obtain stable and appropriate housing, as her housing situation was inconsistent as the case progressed and inadequate as of the time of the termination hearing. During the duration of the case, respondent-mother "had relocated on eight (8) different occasions." When the termination petition was heard in November 2021, respondents had been living for more than eleven months at the Starlite Motel, which respondent-mother acknowledged was not "a proper place to raise a child[.]" The trial court found the motel to be "inappropriate and unsafe housing for the minor child."

Thus, at the time of the termination proceeding, respondent-mother had not addressed her ongoing substance abuse issues and was living in inadequate and unsafe housing. Based on these factors, the trial court properly determined that there was a significant likelihood of repetition of neglect if Elliot was returned to

respondent-mother's care. The trial court's findings are supported by clear, cogent, and convincing evidence, and these findings support the trial court's conclusion that grounds existed to terminate respondent-mother's parental rights. Accordingly, the court did not err.

After concluding that termination grounds existed, the trial court further concluded in a disposition order that termination of respondent-mother's rights was in Elliot's best interest, and she does not challenge this conclusion. Consequently, we affirm the trial court's finding that termination of respondent-mother's parental rights was in Elliot's best interest.

B. Respondent-Father's Appeal

Respondent-father's appellate counsel, finding no merit on which to base an argument for relief, has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Although respondent-father was advised of his right to file his own brief with the Court, he has failed to do so. In the no-merit brief, respondent-father's counsel raised two issues: (1) whether the trial court properly concluded that grounds existed to terminate respondent-father's parental rights, and (2) whether the trial court properly concluded that termination of respondent-father's parental rights was in Elliot's best interest.

This Court must "conduct an independent review of the issues set out in the no-merit brief filed by respondent's counsel[.]" *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Our appellate courts "review a trial court's adjudication of

grounds to terminate parental rights ‘to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.’ ” *In re I.J.W.*, 378 N.C. at 21, 859 S.E.2d at 151 (citation omitted). “The trial court’s conclusions of law are reviewable de novo on appeal.” *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695 (citation omitted). “The trial court’s assessment of a juvenile’s best interest at the dispositional stage is reviewed only for abuse of discretion.” *In re Z.L.W.*, 372 N.C. 432, 435, 831 S.E.2d 62, 64 (2019) (citations omitted).

Based upon our independent review of the issues identified in the no-merit brief and our consideration of the entire record, we find the trial court’s termination of respondent-father’s parental rights was supported by clear, cogent, and convincing evidence and the trial court did not abuse their discretion in finding termination of respondent-father’s parental rights was in Elliot’s best interest. Accordingly, we affirm the trial court’s orders terminating respondent-father’s parental rights.

### III. Conclusion

For the foregoing reasons, we affirm the trial court’s orders terminating respondents’ parental rights.

AFFIRMED.

Judge ZACHARY concurs.

Judge MURPHY concurs in part as to respondent-father and would deny respondent-mother’s Petition for *Writ of Certiorari*.

IN RE: E.J.M.

*Opinion of the Court*

Report per Rule 30(e).