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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-787

Filed 19 March 2024

Forsyth County, No. 21 JT 89

IN THE MATTER OF:

K.M.S.

Appeal by respondent from order entered 1 June 2023 by Judge Thomas W. Davis V in District Court, Forsyth County. Heard in the Court of Appeals 20 February 2024.

Ms. Theresa A. Boucher, for the appellee-petitioner Forsyth County DSS.

Ms. Deborah S. Stern, for the appellee-respondent GAL.

Mr. Richard Croutharmel, for the appellant-respondent Mother.

STADING, Judge.

Respondent appeals from an order terminating her parental rights to her adopted minor child. For the reasons below, we affirm the termination order.

I. Background

On 2 August 2019, the Forsyth County Department of Social Services (“DSS”) placed two minor children, “Kajik” and “Kell,”¹ into the foster care of respondent.

¹ Pseudonyms are used to protect the juveniles’ identities. See N.C. R. App. P. 42..

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Kajik and Kell are biological siblings who were removed from their birth parents' custody due to neglect and physical abuse. On 21 April 2021, Kajik and Kell were adopted by respondent. Forty-seven days later, Kell died from blunt force trauma to his head. An autopsy was conducted, and Kell's death was ruled a homicide.

Kajik was evaluated by a physician who determined that he had "severe and extensive skin findings of bruises, abrasions, lacerations, scars, and burns that are consistent with severe child physical abuse." The attending physician concluded that Kajik's right arm was fractured and healed, that his right rib was fractured and healed, that his elbow was swollen, and that he was suffering from traumatic brain injury. Given the nature of the injuries and the varying degrees of healing, the attending physician expressed concern that Kajik was suffering from repeated episodes of abuse.

Respondent's explanations for the injuries sustained by the children contradicted the medical findings. *In re K.M.S.*, No. COA22-238, 2022-NCCOA-721, at ¶ 2 (N.C. Ct. App. Sept. 20, 2022). Ultimately, respondent was charged with first degree murder of Kell and felony intentional child abuse causing serious bodily injury to Kajik. Since then, respondent has been incarcerated and held without bond at the Forsyth County Detention Center.

On 7 June 2021, DSS filed a juvenile petition alleging that Kajik was an abused and neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101 (2023). That same day, DSS gained non-secure custody of Kajik and placed him into a foster home. The

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adjudication hearing took place on 29 November 2021, and the trial court found that Kajik was abused and neglected by clear and convincing evidence. At the disposition hearing, the trial court held that “reunification efforts should stop and [that] Kajik would remain in DSS custody” due to the presence of aggravating factors. DSS was “immediately [] relieved of the requirement to make reunification efforts with [respondent].” Respondent appealed to this Court, contending that DSS did not comply with the statutory requirements set out for relative placement. *In re K.M.S.*, No. COA22-238, 2022-NCCOA-721, at ¶ 7 (N.C. Ct. App. Sept. 20, 2022). Upon review, this Court affirmed the trial court’s holding. *Id.*

The trial court held three permanency planning hearings. The first permanency planning hearing was held on 10 December 2021, and the trial court changed Kajik’s permanent plan to adoption, with the secondary plan being guardianship via court approval. In addition, the trial court found that respondent “was acting in a manner inconsistent with the health and safety of the child and that she has acted contrary to her constitutionally protected status and is unfit to care for Kajik.” Notably, respondent did not attend this permanency planning hearing, nor did she request a continuance. The second permanency planning hearing occurred on 6 June 2022. Again, respondent did not appear for the hearing, and she requested that she not be transported to attend. The third and final permanency planning hearing was on 5 December 2022. Again, respondent did not attend the hearing.

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On 20 March 2022, DSS petitioned to terminate respondent's parental rights to Kajik. This hearing took place on 20 February 2023. Upon review, the trial court found three grounds for termination by clear, cogent, and convincing evidence: (1) abuse and neglect, (2) dependency, and (3) murder or voluntary manslaughter of a sibling of the juvenile or assault inflicting serious bodily injury to the juvenile. The trial court found that it was in the child's best interest to terminate the parental rights of respondent. On 12 June 2023, respondent timely filed notice of appeal.

II. Jurisdiction

This Court has jurisdiction to hear respondent's appeal under N.C. Gen. Stat. §§ 7A-27(b)(2), 7B-1001(a)(7) (2023).

III. Analysis

In the brief submitted by respondent's attorney, three issues were identified that could arguably support an appeal, but also concedes that each of those issues lacks merit. Those issues presented are (1) whether the trial court reversibly erred by not allowing respondent to meaningfully participate in the case before DSS petitioned to terminate parental rights; (2) whether the trial court reversibly erred by concluding the existence of the termination of parental rights grounds; and (3) whether the trial court abused its discretion in terminating parental rights. Counsel for respondent requests no merits review pursuant to N.C. R. App. 3.1(e) as counsel was "unable to identify any issues with sufficient merit on which to base an argument for relief on appeal." For the reasons below, this Court concludes the trial court did

not err with respect to the first two issues. Further, we hold that the trial court did not abuse its discretion in its order terminating respondent's parental rights.

A. Meaningful Participation

Respondent submits that she was not permitted to meaningfully participate in the case given that she was incarcerated during the period of time leading up to the termination hearing. Assuming *arguendo* that the issue was properly preserved for appeal, respondent's assertion remains unmeritorious. "Our precedents are quite clear—and remain in full force—that incarceration standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (internal quotation marks and citations omitted). "Although a parent's options for showing affection while incarcerated are greatly limited, a parent will not be excused from showing interest in [the] child's welfare by whatever means available." *In re C.B.C.*, 373 N.C. 16, 19-20, 832 S.E.2d 692, 695 (2019) (citation omitted). Put another way, "our decisions concerning the termination of parental rights of incarcerated persons require that courts recognize the limitations for showing love, affection, and parental concerns under which such individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children." *In re A.J.P.*, 375 N.C. 516, 532, 849 S.E.2d 839, 852 (2020) (citation omitted).

Even though incarcerated, respondent had many opportunities but voluntarily chose not to participate before the termination hearing. On 10 December 2021, the

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first permanency planning hearing was held, and respondent did not attend, nor did she request a continuance. And on 6 June 2022, respondent did not appear for the second permanency planning hearing. Moreover, respondent voluntarily requested that she not be transported to the second hearing. The third and final permanency planning hearing took place on 5 December 2022, and yet again respondent did not attend. Additionally, prior to the termination hearing, respondent did not contact DSS to inquire about Kajik's wellbeing. She did not send cards, letters, or anything of the sort to Kajik, nor did she attempt to participate in the DSS process to aid him. *See In re C.B.C.*, 373 N.C. at 19-20, 832 S.E.2d at 695 ("Although a parent's options for showing affection while incarcerated are greatly limited, a parent will not be excused from showing interest in [the] child's welfare by whatever means available").

Respondent offers two prior decisions from this Court, claiming they support her position that she was denied a meaningful opportunity to participate in the case. In *H.D.F.*, at trial, a father was determined to not be an appropriate placement for his child following his failure to appear and advocate. *In re H.D.F.*, 197 N.C. App. 480, 495-96, 677 S.E.2d 877, 886-87 (2009). However, on appeal, this Court determined that his failure to appear was because he was never properly noticed following his attorney's withdrawal from the matter. *Id.* Thus, this Court reversed the adjudication and disposition as the father did not have "a meaningful opportunity to participate." *Id.* In *Shermer*, a father's child was adjudicated a neglected juvenile while he was incarcerated. *In re Shermer*, 156 N.C. App. 281, 282, 576 S.E.2d 403,

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405 (2003). Thereafter, DSS petitioned to terminate his parental rights. *Id.* While still incarcerated, the father contacted DSS, notifying them that he did not want his parental rights terminated. *Id.* at 282-83, 576 S.E.2d at 405. Upon his release from incarceration, the father continued working with DSS, regularly communicating with his children and following the DSS case plan. *Id.* at 283-85, 576 S.E.2d at 405-06. Despite the father's progress, his parental rights were terminated at the hearing. *Id.* at 285, 576 S.E.2d at 406. On appeal, this Court reversed the trial court's order, holding that "[w]e do not believe that adequate time had elapsed for an assessment of respondent's progress on the case plan." *Id.* at 288, 576 S.E.2d at 408.

The matter *sub judice* is distinguishable from both *H.D.F.* and *Shermer*. Unlike the father in *H.D.F.*, respondent was given adequate notice and voluntarily chose not to attend the permanency planning hearings or the termination hearing. Moreover, unlike the father in *Shermer*, respondent has voluntarily chosen not to be a part of Kajik's case plan nor attempted to communicate with Kajik. Respondent has not been released from incarceration and most likely will not be at any period in the near future, given the weight of evidence against her. Neither case set forth by respondent supports her assertions. Meaningful participation was available for respondent despite her contention to the contrary. After careful review, we agree with respondent's appellate counsel's assessment that no meritorious argument is available. The trial court did not err because respondent had ample opportunity to

meaningfully participate prior to the filing of the petition for termination of parental rights.

B. Grounds for Termination

Next, respondent submits for our consideration that the trial court erred by concluding that grounds for termination existed because the evidence failed to support the findings, and the findings failed to support the conclusion. The North Carolina Juvenile Code “provides for a two-stage process for the termination of parental rights.” *In re C.B.C.*, 373 N.C. at 18, 832 S.E.2d at 694. The two stages are: (1) adjudication and (2) disposition. *In re Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 145 (2003). “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 [N.C. Gen. Stat. §] 7B-1111(a). . . .” *C.B.C.*, 373 N.C. at 18-19, 832 S.E.2d at 694 (internal quotation marks and citation omitted). “If [the trial court] determines that one or more grounds listed in [§] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interest of the juvenile to terminate parental rights.” *Id.* (citation omitted).

On appeal, the standard of review is whether the trial court’s findings of fact are based on “clear, cogent and convincing evidence” and whether the “findings support the conclusions of law.” *In re Baker*, 158 N.C. App. at 493, 581 S.E.2d at 146 (internal quotation marks and citations omitted). “Where no exception is taken to a

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finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). “[O]ur appellate courts are bound by the trial courts’ findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.” *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) (citations omitted). “The trial court’s conclusions of law are reviewable de novo on appeal.” *Id.* (citation omitted). Here, at the adjudicatory phase, the trial court concluded that three grounds for termination existed by clear, cogent, and convincing evidence: (1) abuse and neglect, (2) dependency, and (3) murder or voluntary manslaughter of a sibling. N.C. Gen. Stat. § 7B-1111(a)(1), (a)(6), (a)(8) (2023).

Kajik is an abused juvenile, defined as “[a]ny juvenile less than [eighteen] years of age . . . whose parent . . . [i]nflicts . . . upon the juvenile serious physical injury by other than accidental means; [or] . . . use[s] . . . cruel or grossly inappropriate procedures to modify behavior.” *Id.* at § 7B-101(1)(a), (c). He is also a neglected juvenile, that is one whose parent “[d]oes not provide proper care, supervision, or discipline . . . or [c]reates . . . a living environment that is injurious to the juvenile’s welfare.” *Id.* at § 7B-101(15). Kajik’s had multiple injuries that created a very high concern for “severe child physical abuse.” Respondent herself admitted to the severe physical abuse towards Kajik and Kell in text messages to others as reflected in the record: she “beat there [sic] *ss for misbehavior” and that “disciplined” the children

“by having them do physical activity, sleep on the toilet, and make them sleep on the floor for bedwetting.” Respondent also sent videos to others showing Kajik and Kell “doing wall squats and running place as discipline for stealing food.” After conducting an independent review, we conclude that the trial court did not err by terminating respondent’s parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). We need not review the other grounds since “an adjudication of any single ground in [N.C. Gen. Stat.] § 7B-1111(a) is sufficient to support a termination of parental rights.” *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019) (citation omitted).

C. Termination of Parental Rights

Respondent argues that the trial court abused its discretion in terminating parental rights at the dispositional phase of the termination hearing. “If the trial court determines that at least one ground for termination exists, it then proceeds to the disposition stage where it must determine whether terminating the rights of the parent is in the best interest of the child, in accordance with N.C. Gen. Stat. § 7B-1110(a).” *In re A.B.*, 239 N.C. App. 157, 161, 768 S.E.2d 573, 575 (2015) (citation omitted). On appeal, “[t]he trial court’s determination of the child’s best interests is reviewed only for an abuse of discretion.” *Id.* at 161, 768 S.E.2d at 576 (citation omitted). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (citation omitted).

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Trial courts determine the best interest of the child in the dispositional phase by considering these six relevant factors:

(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, and (6) any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). “[A] factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the [trial] court.” *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019) (internal quotation marks and citations omitted).

Here, the trial court applied all factors set out in § 7B-1110(a) when considering “Kajik’s age, his likelihood of adoption, his permanent plan, his bond with respondent, his relationship with his current caregiver, and other relevant considerations” including his present disabilities. Significant among the many findings showing the trial court’s consideration of the relevant factors was that “[t]he likelihood of adoption is very likely.” This finding aligns with the social worker’s testimony that Kajik has special needs due to the abuse and neglect suffered at the hands of respondent and that even so, Kajik is still very likely to be adopted based on his ability to form bonds. In light of the considerable evidence demonstrating the six

factors of N.C. Gen. Stat. § 7B-1110(a), the trial court did not abuse its discretion by finding that it was in Kajik's best interest to terminate respondent's parental rights.

IV. Conclusion

In accordance with *In re L.E.M.*, we have conducted an independent review of the issues raised in the no-merit brief. *In re L.E.M.*, 372 N.C. 396, 402 (2019) ("We conclude that the text of Rule 3.1([e]) plainly contemplates appellate review of the issues contained in a no-merit brief."). Our independent review of the issues raised in the no-merit brief review leads us to conclude that the trial court's order terminating respondent's parental rights is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. *See In re K.M.S.*, 380 N.C. 56, 59 (2022). For the reasons above, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

Chief Judge DILLON and Judge STROUD concur.

Report per Rule 30(e).