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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-154

Filed 1 October 2024

Transylvania County, No. 23 JT 8

IN THE MATTER OF: L.R.M.

Appeal by Father from order entered 20 November 2023 by Judge Abe Hudson in Transylvania County District Court. Heard in the Court of Appeals 27 August 2024.

*Donald H. Barton for petitioner-appellee mother.*

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

*No brief filed for guardian ad litem.*

MURPHY, Judge.

We deny Father's contemporaneously-filed petition for writ of certiorari, as Father's timely-filed, handwritten, and signed notice of appeal from the order terminating his parental rights to Herman is sufficient to confer jurisdiction upon this Court. Father's failure to serve his *pro se* notice of appeal upon Mother was not a substantial or gross violation of Rule 3.1 where Mother had actual notice of Father's appeal within the statutorily-prescribed time period. At trial, Mother failed to meet

her burden as petitioner of proving either of the alleged grounds for termination under N.C.G.S. § 7B-1111(a)(4) or (a)(7), and we reverse the trial court's termination order without remand.

### **BACKGROUND**

On 24 February 2023, Mother filed a petition to terminate Father's parental rights to Herman, a minor child born to Mother and Father in August 2016.<sup>1</sup> As of the date of the petition's filing, Father was incarcerated, and Herman resided with Mother and her husband. On 28 February 2023, Father was served with a copy of the petition and summons while incarcerated in a North Carolina correctional facility. On 22 March 2023, the trial court appointed a guardian ad litem ("GAL") for Herman; and, on 23 March 2023, the trial court appointed counsel to represent Father in the termination proceedings. On 12 April 2023, Father appeared with his appointed counsel for a hearing that was continued. On 24 May 2023, Father's trial counsel filed a *Motion to Withdraw*, indicating that he had been unable to contact Father since 19 April 2023.<sup>2</sup>

On 18 July 2023, the GAL reported that Father was incarcerated on pending charges out-of-state. The GAL reported that he "wrote to Father seeking input on this case[.]" and "Father called the office of the GAL on [11 July 2023] and left a

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<sup>1</sup> We use a pseudonym to protect the juvenile's identity and for ease of reading.

<sup>2</sup> The record indicates that a hearing on Father's counsel's motion was scheduled on 28 June 2023; however, in the *Report of the Guardian ad Litem* filed on 18 July 2023, the GAL stated "that motion [had] been held."

truncated message giving the GAL the number of a person to call who could relay information to Father, but most of the message was cut off.” “The GAL attempted to call that number, but there was no voice mail box set up and no message could be left.” The GAL further stated it was his “understanding that [Father] is currently on parole in North Carolina, and that because he left North Carolina without permission, there is a fugitive warrant for his arrest[]” and that, “if and when he is released[,] . . . he will be taken into custody by North Carolina.” On 25 August 2023, Mother filed an *Amended Petition to Terminate Parental Rights*.

On 20 September 2023, a letter written by Father to Mother’s trial counsel and dated 31 August 2023 was filed. In his letter, Father stated that he had “only been out of prison for [around or about] 150-180 days since [Herman] was born[.]” Father further claimed that he had not known how to contact Herman because Mother “never responded to the letters [Father] wrote directly to [Herman][,] only to the ones to [Mother][]” and that he was “scared to try any harder to contact [Herman]” based on discipline he had received for violating Mother’s domestic violence protective orders against him in the past.

On 30 August 2023, Father was served in custody with a *Summons in Proceeding for Termination of Parental Rights*. On 15 November 2023, the trial court presided over a hearing on Mother’s petition to terminate Father’s parental rights to Herman; and, on 20 November 2023, the trial court entered its order terminating

Father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(4) and (a)(7).<sup>3</sup> Father appealed.

### **ANALYSIS**

Father appeals as a matter of right from a final judgment terminating his parental rights to Herman. *See* N.C.G.S. § 7B-1001(a)(7) (2023) (“Any order that terminates parental rights . . . may be appealed directly to the Court of Appeals.”). In a contemporaneously-filed petition for writ of certiorari, Father argues that his timely-filed notice of appeal is sufficient to confer jurisdiction upon this Court; alternatively, Father requests that we issue a writ of certiorari to review the order terminating his parental rights.

#### **A. Jurisdiction**

North Carolina Rule of Appellate Procedure 3.1 provides that, in accordance with N.C.G.S. § 7B-1002, a parent whose parental rights have been terminated “may take appeal [from the termination order] by filing notice of appeal . . . in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c) and by serving copies of the notice of appeal on all other parties.” N.C. R. App. P. 3.1(b) (2023); *see* N.C.G.S. § 7B-1002 (2023) (designating a juvenile's parent as proper party for appeal).

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<sup>3</sup> The trial court's order indicates that “Respondent was present in court” on the date of the termination hearing. However, the termination hearing transcript reveals that Father was not present and was “[not] able to appear and speak for himself and take the witness stand.” Father's trial counsel further stated that Father was not “able to appear in this action to defend his constitutional right to parent.”

Pursuant to N.C.G.S. § 7B-1001(b), “[n]otice of appeal . . . shall be given in writing . . . and shall be made within 30 days after entry and service of the order[.]” N.C.G.S. § 7B-1001(b) (2023). Furthermore, “[n]otice of appeal shall be signed by both the appealing party and counsel for the appealing party, if any.” N.C.G.S. § 7B-1001(c) (2023).

The record contains a handwritten *pro se* notice of appeal bearing Father’s signature and the date of 28 November 2023. Father submits that his “notice of appeal was timely filed on 1 December 2023.”<sup>4</sup> Father’s notice of appeal states, in pertinent part, “[I,] [Father][,] appeal the termination of my parental rights[,] [I’ve] been incarcerated [Herman’s] whole life. I need an appellate attorney[.]”

Pursuant to N.C.G.S. § 7B-1001(c), “[n]otice of appeal shall be signed by both the appealing party and counsel *for the appealing party*, if any.” *Id.* (emphasis added). Although Father was appointed *trial* counsel, Father acted *pro se* in appealing the order terminating his parental rights. Father is not represented by trial counsel on appeal and had no appellate counsel when he gave notice of appeal; therefore, only Father’s own signature was necessary to fulfill the signature requirement contemplated in N.C.G.S. § 7B-1001(c). *Id.*; *cf. Connor v. Connor*, 258 N.C. App. 697 (2018) (unpublished) (emphasis added) (determining “[i]t was entirely

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<sup>4</sup> Although Father’s notice of appeal does not bear a file-stamped date, it is evident from the date written on Father’s notice of appeal and the filing date of the trial court’s appellate entries that Father’s notice of appeal was timely filed on some date between 28 November 2023 and 8 December 2023.

appropriate for [the appellant] to file a *pro se* notice of appeal[,]” as “[t]he language in Rule 3(d) requiring the notice of appeal to be signed by ‘counsel of record’ applies only if, at the time the notice of appeal is filed, the appellant is represented *by counsel who will handle the appeal*”).

Father unequivocally indicated his intention to appeal from the termination order, and, pursuant to N.C.G.S. § 7B-1001(a)(7), Father’s appeal lies directly to this Court as a matter of right. Father’s timely-filed notice bearing his own signature satisfies all jurisdictional requirements under N.C.G.S. § 7B-1001.

It is undisputed that Father’s notice of appeal was not accompanied by a certificate of service as required by Rule 3.1(b). However, “[i]t is the filing of the notice of appeal that confers jurisdiction upon this Court, not the service of the notice of appeal.” *State v. Golder*, 257 N.C. App. 803, 804 (2018), *aff’d as modified*, 374 N.C. 238 (2020). “[A] party’s failure to serve their notice of appeal on all parties in technical compliance with” Rule 3.1 of the North Carolina Rules of Appellate Procedure “is a non-jurisdictional defect, and the party’s noncompliance with the Rules of Appellate Procedure must instead be accessed for whether the party’s noncompliance is a substantial or gross violation of the appellate rules.” *In re A.N.B.*, 290 N.C. App. 151, 162 (2023).

As determined above, Father’s notice of appeal was unaffected by any jurisdictional defects. Mother does not contend that she suffered any prejudice from Father’s nonservice, and the trial court’s appellate entries were filed on 8 December

2023—a date within the 30-day time constraint provided in N.C.G.S. § 7B-1001(b). Mother had actual notice of Father’s appeal of the termination order within the statutorily-prescribed time period for filing notice of appeal. Mother contends only, without legal basis, that “[a] [c]ertificate of [s]ervice was needed in this matter to perfect the [n]otice of [a]ppeal as being timely filed[.]” As “there is no indication in the record before us that any party would be prejudiced should we hear Father’s appeal[.]” “any error in service made by Father is non-jurisdictional and is not a substantial or gross violation of the appellate rules.” *Id.*

Father’s notice of appeal was sufficient to confer jurisdiction upon this Court, and no jurisdictional issue is implicated by Father’s failure to file a certificate of service while incarcerated out-of-state. Therefore, we deny Father’s PWC as “superfluous” and proceed on the merits of Father’s appeal. *See id.* (“We deny Father’s PWC because it is superfluous.”).

### **B. Termination Order**

To demonstrate grounds for termination, “[t]he burden . . . is on the petitioner or movant to prove the facts justifying the termination by clear and convincing evidence.” N.C.G.S. § 7B-1111(b) (2023). Therefore, to demonstrate grounds for termination of Father’s parental rights to Herman under the alleged grounds of N.C.G.S. § 7B-1111(a)(4) and (7), Mother must demonstrate by clear and convincing evidence that

(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

. . . .

(7) The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion . . . .

N.C.G.S. § 7B-1111(a)(4), (7) (2023).

“We review the trial court’s adjudicatory order to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court’s conclusions of law being subject to de novo review.” *In re E.Q.B.*, 290 N.C. App. 51, 55 (2023) (cleaned up). The trial court concluded that grounds existed to terminate Father’s parental rights to Herman under N.C.G.S. § 7B-1111(a)(4) and (a)(7) based on the following findings:

7. That [Father], for a continuous period since the birth of the minor child, has willfully failed to pay any portion of the cost of the care of the minor child, [Herman], during which time the child has been in the custody of [Mother]. [Mother] has not received any support from [Father] since the birth of the minor child . . . .

8. That [Father] has not made any attempt to see or communicate with the minor child in over 18 months. [Father] has not sent the minor child a birthday card, Christmas card, or any presents other than on one occasion in 2017 or 2018.

9. That [Father] has known how to contact [Mother] since the birth of the minor child in that [Father] has the address of [Mother] . . . [and] [Mother] has lived at the same address since 2008.

10. That at all relevant times, [Father] has had the ability to maintain communication with the minor child and to pay child support. [Father] has willfully failed to do so.

We agree with Father that these findings are insufficient to support termination of his parental rights to Herman under N.C.G.S. § 7B-1111(a)(4) and (a)(7). Upon our careful review of the record, Mother failed to carry her burden at trial of proving these grounds for termination exist, and remand for further factfinding would be futile. *See Arnold v. Ray Charles Enters., Inc.*, 264 N.C. 92, 99 (1965) (“To remand this case for further findings, however, when defendants, the parties upon whom rests the burden of proof here, have failed to offer any evidence bearing upon the point, would be futile.”).

### **1. Termination Under (a)(4)**

To prove grounds for termination under N.C.G.S. § 7B-1111(a)(4), Mother “must show ‘the existence of a support order that was enforceable during the year before the termination petition was filed.’” *In re S.R.*, 384 N.C. 516, 521 (2023) (quoting *In re C.L.H.*, 376 N.C. 614, 620 (2021)). When the trial court fails to make “any findings of fact that a child support order existed in the year prior to the filing of the petition to terminate [the] respondent’s parental rights, those factual findings could not support termination pursuant to N.C.G.S. § 7B-1111(a)(4).” *Id.* Here,

Mother did not prove, and the trial court therefore could not find, that such agreement or decree existed during the relevant one-year period between 24 February 2022 and 24 February 2023.

Furthermore, Mother did not present any evidence of Father's ability to pay towards Herman's care; in fact, the record contains a report by Herman's GAL indicating that "[Father] hasn't paid support, because *he has no means* to support his child." "Because we find that the trial court made no findings of fact related to the existence of a child support order or the willfulness of [Father's] failure to pay during the relevant period of time, . . . grounds were not established to terminate [Father's] parental rights under N.C.G.S. § 7B-1111(a)(4)." *See id.* at 522-23.

## **2. Termination Under (a)(7)**

To support grounds for termination of Father's parental rights to Herman under N.C.G.S. § 7B-1111(a)(7), Mother must prove, and the trial court must find, by clear, cogent, and convincing evidence that Father "has willfully abandoned [Herman] for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7) (2023). "Although the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re J.A.J.*, 381 N.C. 761, 770 (2022) (marks omitted). Here, the determinative period

for adjudicating abandonment under N.C.G.S. § 7B-1111(a)(7) is between 24 August 2022 and 24 February 2023.

“Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” *In re C.B.C.*, 373 N.C. 16, 19 (2019). “Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence.” *In re J.A.J.*, 381 N.C. at 770. The trial court’s “findings must clearly show that the parent’s actions are wholly inconsistent with a desire to maintain custody of the child[]” and “more than a failure of the parent to live up to [his] obligations as a parent in an appropriate fashion[.]” *In re S.R.G.*, 195 N.C. App. 79, 87 (2009), *disc. rev. denied*, 363 N.C. 804 (2010). “[A]bandonment is evident when a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance.” *In re J.A.J.*, 381 N.C. at 770 (cleaned up).

Here, the trial court found that “at all relevant times, [Father] has had the ability to maintain communication with the minor child and . . . has willfully failed to do so.” The trial court further found that, although Father knew how to contact Mother and Herman at Mother’s home address, Father “has not made any attempt to see or communicate with the minor child in over 18 months,” including sending any “birthday card, Christmas card, or . . . presents[.]”

The parties do not dispute that Father was incarcerated in North Carolina on the date that Mother filed the petition to terminate his parental rights to Herman.

Nor do the parties dispute that Father was incarcerated out-of-state on the date of the termination hearing. However, Father challenges the trial court’s finding that Father had been incarcerated in North Carolina from 30 December 2020 until 6 March 2023—dates inclusive of the six months immediately preceding the termination petition—as unsupported by the evidence. On our review of the record, no evidence indicates Father’s incarceration status during the determinative period between 24 August 2022 and 24 February 2023.

Although incarceration is no excuse from showing interest in Herman’s welfare “by whatever means [are] available[]” to Father, our Supreme Court has noted that its “decisions concerning the termination of the parental rights of incarcerated persons require that courts *recognize the limitations* for showing love, affection, and parental concern under which such individuals labor while simultaneously requiring them *to do what they can* to exhibit the required level of concern for their children.” *Id.* (emphasis added). As Father notes, the “[trial] court entirely failed to grapple with [Father’s] incarceration and how that affected his ability to even have a relationship with his son.” The trial court made no substantive finding, and Mother made no showing, as to Father’s *ability*—whether incarcerated or not—to contact Herman or to “show[] love, affection, and parental concern” for Herman during the determinative period, except that “[Father] has known how to contact [Mother] since the birth of the minor child in that [Father] has the address of [Mother][.]” Therefore, the trial court could not properly find that “at all relevant times, [Father] has had the

ability to maintain communication with the minor child and . . . has willfully failed to do so.”

During the termination hearing, Mother testified that, although she was aware of Father’s location as of the date of the hearing, she “[doesn’t] really know how long he’s going to be there[,]” has no “firsthand knowledge of why he is currently incarcerated[,]” “only knew what [she has] heard[,]” and “[has] no idea what’s going on in his life.” The GAL then testified that Father was being held out-of-state “because he is charged with [an] offense of violence[]” and has “been in and out of jail—well, he’s been in jail more than he has been out of jail since [Herman] was born.”

No clear, cogent, and convincing evidence exists to demonstrate that Father knew how to contact Mother or Herman or that he willfully failed to do so. As Mother failed to present sufficient evidence to support either of the alleged grounds for termination, “we are compelled to simply, *without remand*, reverse the trial court’s order.” *In re M.R.F.*, 378 N.C. 638, 643 (2022) (emphasis in original); *see Cnty. of Durham v. Hodges*, 257 N.C. App. 288, 298 (2018) (“Since there is no evidence to support the required findings of fact, we need not remand for additional findings of fact. Instead, we reverse . . . .”); *accord Arnold*, 264 N.C. at 99. To remand this case for further findings as to the existence of a child support order, Father’s periods of incarceration, his ability to pay towards Herman’s care and support, and his

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willfulness or lack thereof to abandon Herman, where Mother failed to offer any evidence bearing upon these points, would be futile.

**CONCLUSION**

Father's PWC is superfluous, as Father's notice of appeal properly invoked this Court's jurisdiction. Furthermore, Father's failure to serve Mother with notice of appeal was not a gross or substantial violation of the appellate rules. Mother failed to present clear, cogent, and convincing evidence of grounds for termination under either alleged ground for termination under N.C.G.S. § 7B-1111(a)(4) or (a)(7), and remand for further factfinding on the record would be futile.

REVERSED.

Judge ZACHARY concurs.

Judge GORE concurs in result only.

Report per Rule 30(e).