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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1270

Filed: 16 July 2019

Davidson County, No. 17 JT 9

IN THE MATTER OF: Z.O.S-W.

Appeal by respondent-father from order entered 30 August 2018 by Judge Jimmy L. Myers in Davidson County District Court. Heard in the Court of Appeals 27 June 2019.

No brief filed by petitioner-appellee Davidson County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Amy S. Flanary-Smith, for guardian ad litem.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant father.

TYSON, Judge.

Respondent-father (“Respondent”) appeals from an order terminating his parental rights to his child, Z.O.S-W. (“Zach”). *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of children). We affirm.

I. Background

On 26 January 2017, the Davidson County Department of Social Services (“DSS”) obtained nonsecure custody of four-month-old Zach and filed a juvenile petition alleging dependency and neglect. The petition alleged as grounds to terminate: (1) Zach was born with cocaine and methadone present in his system and spent six weeks in the hospital for withdrawal symptoms before being discharged to Respondent and Zach’s mother; (2) Zach’s mother had tested positive for illicit drugs throughout her pregnancy; (3) she had multiple drug-related charges pending against her and admitted to using cocaine on 24 January 2017; and, (4) on 25 January 2017, she contacted DSS and said “she was no longer able to care for [Zach]” and “was going to jail soon or would be dead.” The petition further alleged Respondent and Zach’s mother had lacked stable housing since Zach’s birth and were involved in a domestic violence incident on or about 24 January 2017.

The trial court adjudicated Zach as a neglected juvenile and Respondent to be Zach’s biological father on 9 May 2017. The court entered its disposition order on 25 July 2017. The court ordered continued physical custody of Zach with DSS, granted Respondent and Zach’s mother supervised visitation, and directed their adherence to a case plan. Respondent’s case plan included that he: (1) pay child support; (2) submit to random drug screens; (3) obtain and maintain a steady source of income; and (4) complete substance abuse and mental health assessments and comply with all recommendations.

After almost a year, DSS filed a petition to terminate Respondent's parental rights on 13 February 2018. After a hearing on 9 August 2018, the court found grounds existed to terminate Respondent's parental rights based upon neglect of Zach, willful failure to make reasonable progress to correct the conditions that led to his removal from the home, and willful failure to pay a reasonable portion of the cost of Zach's foster care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017). The court further concluded that Zach's mother had willfully abandoned the child. *See* N.C. Gen. Stat. § 7B-1111(a)(7) (2017). On 30 August 2018, the trial court entered an order terminating Respondent's parental rights to Zach. Respondent filed notice of appeal on 3 October 2018.

II. Motion to Dismiss Appeal

Zach's guardian *ad litem* ("GAL") moved to dismiss Respondent's appeal on 27 December 2018. The GAL asserts the notice of appeal filed on 3 October 2018 is untimely under N.C. Gen. Stat. § 7B-1001(b) (2017) and lacks Respondent's signature as is required by N.C. R. App. P. 3.1(a). Because the notice of appeal found in the settled record purports to be signed by trial counsel on Respondent's behalf, it does not, on its face, comply with the signature requirement of Rule 3.1(a). GAL's motion to dismiss is allowed. *See In re A.S.*, 190 N.C. App. 679, 683, 661 S.E.2d 313, 316 (2008), *aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361 (2009).

Respondent filed a response opposing the GAL's motion and has alternatively petitioned this Court for a writ of certiorari to review the trial court's order. *See* N.C. R. App. P. 21(a)(1) (allowing certiorari review "when the right to prosecute an appeal has been lost by failure to take timely action").

Respondent proffered a properly-signed notice of appeal in his petition for writ of certiorari. We allow Respondent's petition for a writ of certiorari filed on 11 January 2019. *See id.*

III. No-Merit Brief

Counsel for Respondent filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). Counsel may file a no-merit brief when "there is no issue of merit on which to base an argument for relief[.]" *Id.* Within the no-merit brief, counsel is required to "identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result." *Id.*

Respondent's counsel also shows after filing a no-merit brief, he advised Respondent of his right to file a *pro se* brief in support of his appeal and provided Respondent with the necessary materials to do so. Although Respondent has not submitted any *pro se* arguments to this Court, counsel asks this Court to conduct an independent examination of the case for possible error.

Counsel states that a "conscientious and thorough review of the record on appeal, including the transcript" has revealed no "issue of merit on which to base an

argument for relief” on appeal. Counsel further identifies an “arguabl[e]” basis to challenge the trial court’s conclusions with regard to the grounds for terminating Respondent’s parental rights under N.C. Gen. Stat. 7B-1111(a).

However, counsel concedes he “cannot in good faith argue that all three grounds [adjudicated by the court] were not properly supported by the evidence and the [court’s] findings.” See *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (If any single ground for termination is valid, the remaining grounds adjudicated by the trial court are superfluous.), *aff’d per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

In the case of *In re I.B.*, this Court stated that, while an independent review under Rule 3.1 “is not *required*[,] [it] does not mean we cannot conduct one.” *In re I.B.*, ___ N.C. App. ___, ___, 822 S.E.2d 472, 477 (2018). This Court conducted an independent review of the record, *in its discretion*, although the respondent-mother did not file a *pro se* brief, and affirmed the trial court’s order terminating the respondent-mother’s parental rights. *Id.*

IV. Standard of Review

On appeal, our standard of review for the termination of parental rights is whether the trial court’s findings of fact are based upon clear, cogent and convincing evidence and whether the findings support the conclusions of law.

The trial court’s conclusions of law are reviewable *de novo* on appeal.

In re J.S.L., 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

“The decision to terminate parental rights is vested within the sound discretion of the trial [court] and will not be overturned on appeal absent a showing that the [trial court’s] actions were manifestly unsupported by reason.” *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005).

V. Analysis

A. Grounds for terminating parental rights

Pursuant to N.C. Gen. Stat. § 7B-1111(a), the trial court may terminate parental rights upon the finding of one or more factors as grounds for termination. N.C. Gen. Stat. § 7B-1111(a). Here, the trial court found three statutory grounds. First, the trial court adjudicated Zach a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15) in that “he does not receive proper care, supervision or discipline from his parents or caretakers and that he lives in an environment injurious to his welfare.” N.C. Gen. Stat. § 7B-1111(a)(1). Second, the court found Respondent and Zach’s mother willfully left Zach in placement outside the home for more than twelve months without showing reasonable progress towards correcting conditions which led to the removal of the juvenile. N.C. Gen. Stat. § 7B-1111(a)(2). Third, the evidence and findings show Respondent willfully failed to pay any portion of Zach’s cost of care despite “having the ability to make some payment towards the

support . . . based on the proof of his own income that he provided.” N.C. Gen. Stat. § 7B-1111(a)(3).; *In re A.L.*, 245 N.C. App. 55, 63-64, 781 S.E.2d 856, 862 (2016).

Respondent does not challenge any of the trial court’s findings of fact, which are binding upon appeal. *In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) (“[T]he trial court’s findings of fact to which an appellant does not assign error are conclusive on appeal and binding on this Court.” (citation omitted)).

After review, we are unable to find any potential prejudicial error by the trial court to reverse its order. Its order includes findings of fact “based on clear and convincing evidence” which support at least one ground for terminating Respondent’s parental rights. *See In re J.S.L.*, 177 N.C. App. at 154, 628 S.E.2d at 389.

B. Determination of Best Interests of the Juvenile

Respondent’s counsel asks this Court to conduct an independent examination of the case for possible error in the trial court’s determination that termination of parental rights is in the best interest of Zach. “After an adjudication that one or more grounds for terminating a parent’s rights exist, the [trial] court shall determine whether terminating the parent’s rights is in the juvenile’s best interest.” N.C. Gen. Stat. § 7B-1110(a) (2017). When determining whether a juvenile’s best interests requires the court to terminate parental rights, the trial court must consider multiple

factors and make findings of fact regarding those the court determines to be relevant.

Id. The factors include:

- (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.

Id.

Zach was born with cocaine and methadone in his body, was four months old when he entered into DSS custody and was twenty-two months old at the time of the trial court's disposition. While Zach is familiar with Respondent, and the trial court found Respondent has demonstrated love for him, Zach seeks comfort with the person supervising visitation sessions rather than with Respondent. The current foster mother is ready, willing, and able to adopt Zach, and he is very bonded with her family. Considering these factors, the trial court determined the conduct of Respondent and Zach's mother "will not promote the healthy and orderly, physical and emotional growth of the child," and that the "minor child is in need of a safe, stable home and a permanent plan of care at the earliest possible age[.]"

Respondent's counsel concedes he cannot assert a good faith argument that the trial court abused its discretion in determining terminating Respondent's parental

rights was “in the juvenile’s best interest.” *Id.* Counsel for Respondent complied with all requirements of Rule 3.1(e). Respondent did not exercise his right to file a *pro se* brief under Rule 3.1(e).

This issue has not been argued or preserved for review in accordance with our Rules of Appellate Procedure, and we are not required to conduct further review. *See In re L.V.*, __ N.C. __, __, 814 S.E.2d 928, 929 (2018). “In our discretion, we have reviewed the transcript and record.” *In re T.H.*, __N.C. App. __, __, __S.E.2d __, __, 2019 WL 2505002, at *6 (2019). The trial court made appropriate dispositional findings. The trial court did not abuse its discretion in assessing Zach’s best interest.

VI. Conclusion

We agree with counsel there is no merit in Respondent’s appeal. *See* N.C. R. App. P. 3.1(e). The trial court’s unchallenged findings of fact are supported by clear and convincing evidence and those findings support the trial court’s conclusion that grounds existed to terminate Respondent’s parental rights. *See* N.C. Gen. Stat. § 7B-1111. Respondent has not submitted a *pro se* brief in support of this appeal and does not otherwise challenge the trial court’s order terminating his parental rights.

The trial court did not abuse its discretion when it determined that it was in Zach’s best interest to terminate Respondent’s parental rights. The trial court’s order terminating Respondent’s parental rights is affirmed. *It is so ordered.*

AFFIRMED.

IN RE: Z.O.S.-W.

Opinion of the Court

Judge DILLON concurs.

Judge BERGER concurs with separate opinion.

Report per Rule 30(e).

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BERGER, Judge, concurring in separate opinion.

I agree with the majority’s analysis, but would dismiss the appeal. Counsel for respondent-father complied with all requirements of Rule 3.1(d), and respondent-father did not exercise his right to file a *pro se* brief under Rule 3.1(d). “No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.” *In re L.V.*, ___ N.C. App. ___, ___, 814 S.E.2d 928, 929 (2018).