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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-464

No. COA 21-757

Filed 5 July 2022

Cleveland County, No. 18 JT 14

IN THE MATTER OF: K.A.S.

Appeal by Respondent Mother and Respondent Father from order entered 20 August 2021 by Judge Jeannette R. Reeves in Cleveland County District Court.

Heard in the Court of Appeals 7 June 2022.

*Charles E. Wilson, Jr., for Petitioner-Appellee Cleveland County Department of Social Services.*

*Womble Bond Dickinson (US) LLP, by Jacob S. Wharton and Ryan H. Niland, for Appellee Guardian ad Litem.*

*Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant Mother.*

*Anné C. Wright for Respondent-Appellant Father.*

INMAN, Judge.

¶ 1

Respondent Mother (“Mother”) and Respondent Father (“Father”) appeal from the trial court’s termination of their parental rights. For the reasons explained below, we affirm the trial court’s decision on the ground of dependency and cannot conclude that the trial court abused its discretion in terminating parental rights.

**I. FACTUAL AND PROCEDURAL HISTORY**

¶ 2 Kylie<sup>1</sup> was born on 2 October 2017. Before she was born, Father had been charged with felony sexual abuse of a minor child and, as a bond condition, was prohibited from unsupervised contact with any juvenile. Because of this, Mother was Kylie’s primary caretaker before Cleveland County Department of Social Services (“DSS”) intervention. Mother has ongoing mental health needs and has been diagnosed with mild intellectual disability and schizoaffective disorder.

¶ 3 When Kylie was born, DSS received a report alleging Mother had previously lost custody of another child. DSS instructed Mother not to stay with family members because of their own history of DSS involvement, but during each DSS visit Mother asked to meet at the family’s house. On 6 February 2018, DSS filed a juvenile petition with the trial court and removed Kylie from Mother’s custody.

¶ 4 Both parents entered into case plans with DSS. Mother’s case plan required her to complete parenting and mental health assessments and comply with recommendations for treatment and also required her to secure proper housing. Father’s case plan required him to complete a parenting assessment and a sex offender evaluation. In the eight months between DSS taking custody of Kylie and a scheduled adjudication hearing in October 2018, Mother completed a parenting education program and psychological evaluation and was complying with mental

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<sup>1</sup> We use pseudonyms to protect the identity of the juvenile.

health treatment and medication recommendations. Father did not complete his sex offender assessment or parenting classes during that time. Both parents visited Kylie regularly, and Father brought food and gifts during his visits, attended doctor's visits, and was "clearly bonded" with her.

¶ 5           However, Mother was unable to secure safe and stable housing, and Kylie could not be placed with Father because of his bond restrictions. Mother and Father were unable to identify relatives who could provide proper care for Kylie. On 10 October 2018, Mother and Father entered into a consent order adjudicating Kylie as dependent.

¶ 6           A year later, in October 2019, Mother had made progress sufficient to be allowed unsupervised visits and by December was allowed overnight visits. Mother had moved into a house owned by Father's uncle, and Father had helped complete repairs to bring the house to community standards, including repairing the roof, fixing the ceiling, and doing electrical work.

¶ 7           On 30 September 2019, Father was arrested and incarcerated due to his failure to appear for a court hearing. He had completed the sex offender assessment only shortly before his incarceration and did not complete the court-ordered parenting classes. While Father was incarcerated, he called during Mother's visitation with Kylie to speak with Kylie and asked her foster parents how she was doing. Father remained incarcerated through the date of the termination hearing, and at the time

of the hearing had no pending trial or release date.

¶ 8

By February 2020, Mother had stopped taking her medication. Mother also took Kylie to visit her family, even though her social worker had told her not to visit their residence with Kylie or leave her unsupervised with them because of DSS's history with those family members. DSS was also concerned that unknown individuals were coming in and out of the house and that a social worker had smelled alcohol during a home visit. On 28 February 2020, DSS learned that the power to Mother's house was disconnected, and it remained disconnected for more than a year. Between 13 March 2020 and 13 July 2021, Mother tested positive for cocaine and marijuana and skipped or refused court-ordered drug testing. Although Mother denied taking cocaine, she admitted that she had been around family members who had it.

¶ 9

On 22 September 2020, two years and seven months after removing Kylie from Mother's custody, DSS petitioned to terminate both Mother's and Father's parental rights. The trial court heard the petition on 2 June and 14 July 2021. It found that neither parent had completed their case plan, that Mother was unable to safely parent Kylie without an appropriate support system and had not demonstrated a willingness to establish such a system, that Father had not demonstrated a willingness or ability to provide proper care or supervision and had not established a safe and stable home prior to his incarceration, and that Father was incarcerated

and his incarceration would continue for the foreseeable future.

¶ 10 The court found that grounds existed to terminate Mother's and Father's parental rights under neglect, willful failure to make reasonable progress, and dependency. It found that termination was in Kylie's best interest and terminated the parents' rights. Mother and Father appeal.

## II. ANALYSIS

### A. Standard of Review

¶ 11 A hearing on a petition to terminate parental rights is a two-stop process: adjudication followed by disposition. *In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106, ¶ 6. During the adjudicatory phase, the trial court hears the evidence and makes findings of fact to determine if any of the grounds for termination enumerated in N.C. Gen. Stat. § 7B-1111(a) (2021) exist. *Id.* If the court finds that one or more of those statutory grounds exists, it proceeds to the dispositional phase, during which it determines, in its discretion, whether terminating the parent's rights is in the juvenile's best interest. *In re H.N.D.*, 265 N.C. App. 10, 13, 827 S.E.2d 329, 332 (2019).

¶ 12 We review the trial court's adjudication to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings in turn support the conclusions of law. *Id.* Unchallenged findings of fact are binding on appeal. *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 9. We review the trial court's conclusions of law *de novo*. *Id.* at ¶ 15. With regards to the dispositional phase, we

review the “trial court’s 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.’” *H.N.D.*, 265 N.C. App. at 13, 827 S.E.2d at 332 (citation omitted).

¶ 13 Mother and Father appeal, each bringing separate issues corresponding to termination of their individual parental rights. We address each in turn.

### **B. Mother’s Appeal**

¶ 14 Mother’s counsel has filed a no-merit brief on her behalf pursuant to Rule 3.1(e) of our Rules of Appellate Procedure. In accordance with that Rule, counsel has identified issues in the record that might arguably support the appeal and has stated why each issue lacks merit or would not alter the ultimate result. N.C. R. App. P. Rule 3.1(e) (2022). Mother’s counsel has also provided Mother with copies of the no-merit brief, trial transcript, record on appeal, and a letter advising Mother that she has the option of filing a *pro se* brief. Mother has not filed a *pro se* brief in this case.

¶ 15 We independently review issues contained in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). After careful review of the record, we are satisfied that the trial court’s order as to Mother was supported by the evidence and based on proper legal grounds.

#### ***1. Clear and Convincing Evidence***

¶ 16 Counsel first directs our attention to the question of whether the trial court’s

findings of fact are supported by clear and convincing evidence, noting that the social worker who testified as to Mother's substance abuse testified that Mother tested positive for illegal substances and refused tests starting in February 2021, and the trial court's order specifies at least one drug test result not specified by the social worker.

¶ 17 We will disregard findings and portions of findings that are not supported by evidence, but if other findings are adequate to support the trial court's conclusions of law we will affirm the trial court's order. *In re R.G.L.*, 379 N.C. 452, 2021-NCSC-155, ¶ 25. The exact dates of each of Mother's drug tests were unnecessary to support the trial court's conclusions in this case. The social worker's testimony supports the finding that Mother's "continued drug use . . . has become a significant barrier to the reunification process." Further review of the trial court's findings does not reveal unsupported findings that would require reversal.

## ***2. Grounds for Termination***

¶ 18 Counsel next directs our attention to the trial court's finding that grounds existed to terminate Mother's parental rights. The trial court found that Mother had neglected Kylie and that this neglect was likely to reoccur in the future, that she had willfully failed to address the conditions that led to Kylie's removal, and that Kylie was a dependent juvenile. Although Mother's counsel states that Mother may have meritorious arguments on dependency and willful failure, counsel concedes, and we

agree, that DSS presented clear and convincing evidence of neglect sufficient to satisfy Subsection 7b-1111(a)(1) of our General Statutes. As long as there is sufficient evidence to support one ground for termination, we need not address the others. *In re N.N.B.*, 271 N.C. App. 199, 203, 843 S.E.2d 474, 477 (2020). The trial court properly found grounds to terminate Mother's parental rights.

### **3. Best Interests**

¶ 19 We review the trial court's finding that termination is in the best interests of the child for abuse of discretion and will reverse only when the trial court's decision is manifestly unsupported by reason. *H.N.D.* 265 N.C. App. at 13, 827 S.E.2d at 332.

¶ 20 Section 7B-1110 of our General Statutes lists factors the trial court is required to consider when deciding if termination is in the best interests of the child, including the juvenile's age, bond with the parent, and relationship between the juvenile and proposed adoptive guardian. The trial court's findings of fact show that it considered each of the factors, and each of its findings is supported by evidence in the record. The trial court did not abuse its discretion in finding that termination was in Kylie's best interests.

¶ 21 Our independent review of the record has revealed no additional issues that would necessitate reversal of the termination order as to Mother. *L.E.M.*, 372 N.C. at 402, 831 S.E.2d at 345.

### **C. Father's Appeal**



¶ 22 In his appeal, Father challenges each ground for termination found by the trial court: dependency, neglect, and willful failure to make reasonable progress. Because we hold that the trial court’s finding of dependency was supported by clear and convincing evidence, we affirm the trial court’s order and do not reach the second and third grounds.

¶ 23 Our Juvenile Code provides eleven statutory grounds for termination of parental rights. Among them is dependency: the movant must show by clear and convincing evidence

[t]hat the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111(a)(6) (2021). A dependent juvenile has no parent, guardian, or custodian who is able to provide for their care or supervision and no appropriate alternative childcare arrangement. N.C. Gen. Stat. § 7B-101(9) (2021). The record shows, and Father concedes, that neither Father nor Mother had family members or friends who could care for Kylie.

¶ 24 Termination of parental rights based on dependency “does not require that the

parent's incapability be permanent or that its duration be precisely known. Instead, this ground for termination merely requires that 'there is a *reasonable probability* that such incapacity will continue for the foreseeable future.' ” *In re N.T.U.*, 234 N.C. App. 722, 735, 760 S.E.2d 49, 58 (2014) (quoting N.C. Gen. Stat. § 7B-1111(a)(6)) (emphasis in original). Father told DSS employees that he did not think he was capable of raising Kylie alone and wanted Mother to regain custody. Under the conditions of his pretrial release, which have been in effect for Kylie's entire life, Father has not been allowed unsupervised contact with children. In September 2019, Father was arrested for failing to appear at a court date on his criminal charges and remained incarcerated awaiting trial through the termination hearing in June and July 2021. Additionally, prior to his incarceration, Father was living “place to place” and did not have safe or stable housing.

¶ 25 On appeal, Father does not challenge the trial court's finding of fact that from the time of Kylie's removal through the date of the termination hearing he has been unable to provide for her proper care and supervision. Instead, he argues that DSS failed to show by clear and convincing evidence that his incarceration would continue for the foreseeable future.

¶ 26 “Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.” *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (2003))

(Tyson, J., dissenting)). We have held that a parent’s incarceration can lead to a finding of dependency as grounds for termination. In *In re L.R.S.*, the juvenile’s mother was serving an active sentence at the time of the termination hearing and would be in custody for at least 13 and possibly 30 months following the hearing. 237 N.C. App. 16, 21, 764 S.E.2d 908, 911 (2014). We held that her incarceration was “clearly sufficient to constitute a condition that rendered her unable or unavailable to parent” and affirmed the trial court’s determination that this satisfied the requirement that the unavailability be reasonably likely to continue for the foreseeable future. *Id.*

¶ 27 Unlike in *L.R.S.*, Father is incarcerated awaiting trial, rather than serving an active sentence with a definite term. In *In re N.T.U.* we affirmed the termination of a mother’s parental rights on dependency grounds based on her pretrial incarceration. 234 N.C. App. at 735-36, 760 S.E.2d at 58-59. In that case, the mother was charged with murder and robbery, had been incarcerated for the two years prior to the termination hearing, and did not at that time have a trial date set. *Id.* at 730-32, 760 S.E.2d at 55-56. We recognized that termination based on dependency “does not require that the parent’s incapability be permanent or that its duration be precisely known.” *Id.* at 735, 760 S.E.2d at 58. The statute only requires that “there is a reasonable probability that such incapability will continue for the foreseeable future.” *Id.* (quoting N.C. Gen. Stat. § 7B-1111(a)(6)). Given that (1) the mother had

been incarcerated for two years and had not received a trial date, and (2) “no evidence was presented giving rise to any expectation of her release from incarceration in the foreseeable future,” we held that the trial court did not err in concluding the mother’s unavailability was reasonably likely to continue for the foreseeable future. *Id.*

¶ 28 In this case, like *N.T.U.*, at the time of the termination hearing Father was awaiting trial on at least one felony and had been incarcerated for nearly two years. Father also did not have a trial date set, and his case could not be placed on a trial docket for another five or six months at the earliest: the termination hearing was held on 2 June and 14 July 2021 and Father’s criminal case could not be set until 2022. The delay in Father’s trial is at least partially due to Father’s own actions: his failure to appear for the initial setting of his trial resulted in his incarceration and delayed the ultimate setting of a trial date.<sup>2</sup> He has also requested new counsel, which has resulted in further delay.

¶ 29 Father argues his case is distinct from *N.T.U.* and directs our attention to *In re D.M.G.*, an unpublished decision of this Court in which we held that the evidence

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<sup>2</sup> Father argues that he arrived at court on his court date, though not in time for calendar call, and that his inability to make bond should not be held against him because our Juvenile Code provides that parental rights shall not be terminated on account of poverty. N.C. Gen. Stat. § 7B-1111(a)(2) (2021). **[Father’s Br p 12]** The record does not show that Father moved to strike his failure to appear or lower his bond. Even if Father were released, his pretrial condition prohibiting him from having unsupervised contact with children would render him unavailable to care for and supervise Kylie until his criminal charges are resolved.

was insufficient to support the trial court's findings that the mother's incarceration for her probation violations was reasonably likely to continue for the foreseeable future. 266 N.C. App. 402, 2019 WL 3183645, at \*5 (July 16, 2019).<sup>3</sup> In that case, the termination hearing was held less than six months after the mother's arrest, and her sentencing hearing was scheduled for four months after the termination hearing. *Id.* at \*2-3. The only evidence as to the mother's possible sentence was her own testimony, which indicated that she anticipated being released no more than eight months after the termination hearing. *Id.* at \*3-4. We specifically distinguished that case from *N.T.U.* by noting that the mother in *N.T.U.* had no scheduled trial date, whereas the mother in *D.M.G.* not only had a scheduled sentencing date, but also "the evidence presented here gave rise to an expectation of Mother's release from incarceration in the foreseeable future." *Id.* at \*4.

¶ 30 We agree that there are differences between the facts of this case and *N.T.U.* Father's charges involving sexual abuse of a minor could result in significant further incarceration, but for a shorter term than the bank robbery and murder charges faced by the mother in *N.T.U.* And unlike the mother whose parental rights were terminated in *N.T.U.*, Father has not confessed to any element of the criminal charges pending against him, and the trial court's findings of fact do not address the evidence

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<sup>3</sup> Unpublished decisions of this Court do not constitute controlling legal authority and citation to them is generally disfavored. N.C. R. App. P. 30(e) (2022).

brought against Father or the likelihood of his conviction.

¶ 31           However, given that: (1) no date has been set for Father’s trial; (2) Father’s trial cannot be scheduled until at least five to six months after the termination hearing; (3) Father had been incarcerated for nearly two years preceding the hearing under charges pending since 2015; and (4) “no evidence was presented giving rise to any expectation of [his] release from incarceration in the foreseeable future,” *N.T.U.*, 234 N.C. App. at 735, 760 S.E.2d at 58, we are satisfied that the trial court did not err in concluding there was a reasonable probability that Father’s unavailability would continue for the foreseeable future. Grounds existed pursuant to Subsection 7B-1111(a)(6) to terminate Father’s parental rights.

### III. CONCLUSION

¶ 32           The conclusion that a single ground for termination existed pursuant to Section 7B-1111 of our General Statutes is sufficient by itself to support termination of Father’s parental rights. *In re A.S.D.*, 378 N.C. 425, 2021-NCSC-94, ¶ 21. Accordingly, we do not reach Father’s arguments regarding the other grounds for termination found by the trial court. We affirm the trial court’s order terminating Mother’s and Father’s parental rights.

AFFIRMED.

Judges Hampson and Griffin concur.

Report per Rule 30(e).