NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

IN THE MATTER OF J.N. and J.N.,
Alleged Deprived Children:

JACOB NELSON,

Appellant,

vs.

STATE OF OKLAHOMA,

Appellee.

Case No. 120,201

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CASSANDRA WILLIAMS, TRIAL JUDGE

AFFIRMED

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Jacob Nelson, the father of the two deprived children at issue here, appeals a new dispositional order and incorporated individualized service plan (ISP) as part of a permanency plan with the goal of reunification. On review, we find the

decisions of the district court to have been within the court's discretion and therefore affirm.

BACKGROUND

The minor children at issue were taken into emergency custody in September 2019. In October 2019, the state filed its petition alleging the children were deprived. The children's mother stipulated to the allegations of drug use, domestic violence, mental health issues, and lack of care and guardianship. Nelson opposed the petition. The district court held a bench trial and found the children deprived as to both parents, the mother by her stipulation and Nelson on the grounds of domestic violence and lack of care and guardianship. The father appealed this order in Case No. 118,621. Division IV of this Court affirmed, and mandate was issued in June 2021. Meanwhile, both parties had made progress towards the requirements of their ISPs, though Nelson was more successful than the mother. For example, by the time the prior appeal was mandated, the father had successfully completed a fifty-two-week batterer's intervention program (BIP).

Nevertheless, in January 2021, while the first appeal was still pending, the state filed an amended petition seeking termination of both parents' parental rights. The mother consented and her rights have been terminated. In September 2021, a jury found that Nelson's parental rights should not be terminated.

DHS then changed its permanency plan to reunification. The case was transferred to another trial judge and, at the first hearing after the trial, DHS recommended, and the court agreed, that Nelson should obtain a domestic

violence assessment, and, if the assessment found it necessary, take the BIP a second time as part of a reunification ISP. Nelson now appeals that decision—as made in the dispositional order of January 7, 2021, into which the ISP of January 6, 2021 was fully incorporated—on constitutional, legal, and factual grounds, arguing that the court was required to have ordered custody be returned to him immediately or, at the very least, that he should not be required to repeat services he had already completed.

STANDARD OF REVIEW

This appeal is akin to *In re BTW,* 2010 OK 69, ¶ 15, 241 P.3d 199, 206, where the district court "changed [an existing] permanency plan from reunification to long-term out-of-home placement, and ordered supervised visitation." *In Re BTW* stated the standard of review in such cases. It states:

> Abuse of discretion is the standard of review for the conclusion we reach here. When reduced to articulate and meaningful simplicity, abuse of discretion—as a legal standard of appellate review—means exceeding the outer range of permissible judicial choice-making. A trial court's findings concerning visitation and placement of a child previously adjudicated as deprived are matters of equitable cognizance. Its paramount consideration is the best interest of the child. While an appellate court will examine and weigh the record proof, it must abide by the law's presumption that the *nisi prius* decision is legally correct. It is beyond the appellate court's power to disturb that decision unless it is found to be clearly contrary to the weight of the evidence or to some governing principle of applicable law.

Id. ¶ 16 (footnotes omitted).

ANALYSIS

JURISDICTION

Neither party states the jurisdictional basis for an appeal here. Nevertheless, it is this Court's duty to inquire into its appellate jurisdiction in every case. *Hall v. GEO Group, Inc.*, 2014 OK 22, ¶ 12, 324 P.3d 399, 404. The alleged error is that the court required Nelson to complete a new ISP before releasing the children into his custody. We find no reported case solely examining a decision to require an ISP or particular services. However, the relevant statute provides that any "interested party aggrieved by *any order* or decree may appeal to the Supreme Court pursuant to Section 1-5-103 of this title and the rules of the Supreme Court of this state." 10A O.S. § 1-5-101(A) (emphasis added). Here, the gravamen of Nelson's complaint is that he should not have been required to take any further steps to regain full parental rights after the jury decided against termination, and he is thereby "aggrieved" by the order requiring him to do so. This invokes the jurisdiction of this court, even if the exact details of an ISP are not individually subject to review.[1]

CONSTITUTIONAL ISSUES

Nelson makes a number of constitutional arguments based on the general rule that the rights of parents to the care and custody of their children are fundamental. Beyond this, he cites no statutory or common-law authority that

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[1] The limits of the jurisdictional grant of § 1-5-101(A), which requires only "aggrievement" by any order of the court as a basis for jurisdiction, are unclear. The procedure in a deprived case often requires frequent review and a large number of orders. One possible reading of § 1-5-101(A) is that *any* order in a deprived proceeding is subject to immediate appeal. If so, this grant of appellate jurisdiction is very wide.

any specific act he challenges is unconstitutional, but evidently urges that this Court make new specific law in this area. Nelson's exact constitutional arguments are, however, sometimes difficult to extrapolate from his brief. The central theme of his arguments is that a deprived case must legally end when a jury finds that the state has failed to prove its termination case, and requiring any further act as a prerequisite to reunion is therefore an unconstitutional denial of due process or fundamental parental rights.[2]

The first basis under which Nelson argues unconstitutionality is that he "won" at the termination trial but was "rewarded with starting a deprived case over from the beginning." *Brief-in-chief*, pg. 15. The relevant statutes are unambiguous. A jury deciding against termination does not end a deprived case. Title 10A O.S. § 1-4-908(B) states clearly:

> The failure of parental rights to be terminated at trial shall not deprive the court of its continuing jurisdiction over the child, nor shall it require reunification of the child with the parent if the child has been adjudicated to be deprived.

Nelson must therefore argue that 10A O.S. § 1-4-908(B) is unconstitutional.

We find no constitutional infirmity with the statute. Nelson points to no specific case in this or any other state finding the same in regard to a similar statute. Nor does ordinary common sense support such an argument. The simple fact that a jury finds that the present situation does not warrant termination

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[2] Nelson's briefing states that he does not argue that a decision not to terminate mandates reunification *generally*, or that a refusal to reunify after a failed termination is *inherently* unconstitutional but argues that any other result in his particular case is unconstitutional. How this failed termination differs constitutionally from any other failed termination is not clear, however.

does not mean that all the issues that led to the deprived adjudication have been corrected or that immediate reunification is in the child's best interests. The child's position remains essentially the same after a jury votes against termination. We will not read §1-4-908(B) as requiring any affirmative action on the part of the district court.

Nelson next argues that our Federal Constitution, citing both the Fourteenth and Sixth Amendments, prevents DHS from requiring him to undergo any ISP as progress towards reunification after a jury decides against termination. Again, the constitutional root for this argument is unclear. He *appears* to argue that the mother's allegations of violence and control, which Nelson considers to be the basis of the court's decision, were either inherently unreliable, or that the jury verdict against termination encompasses a finding that the mother was lying. Therefore, Nelson argues, any further action based on her testimony "after a jury found it to be untrue" constitutes a violation of his due process rights.

We disagree. The questions that were tried to the jury were whether the statutory grounds for termination were satisfied, including whether it was in the best interests of the children that Nelson's parental rights be terminated. While the question of whether the mother was "telling the truth" or whether the deprived proceeding should come to an end *might* have been considered by the jury in making its required findings, we cannot say. Nor can Nelson or anyone who was not a juror in that trial. We will not go behind the verdict in the manner Nelson suggests.

Nelson's next argument is that the requirement of a new assessment evidences an unconstitutional intent by the state to repeatedly delay reunification and keep the children in custody "until they turn 18."[3] Nelson argues that this constitutes a *de facto* termination of his parental rights without a jury determination. In fact, the record shows that, immediately after the failed termination trial, DHS changed its future permanency plan from adoption of the children to reunification. Nelson provides no evidence for this speculative argument. We cannot base any decision here on Nelson's speculation as to the future conduct of DHS, or any future decision by the courts.

Nelson's next argument is aimed at the specific requirements of the ISP. Before we can address them, however, we must first determine what the ISP actually requires of Nelson. Nelson's briefing implies that the court has required him to take a BIP for a second time, likening this to some form of "double jeopardy." However, the order of January 7, over Nelson's objection, required Nelson to "complete a domestic violence assessment" and that the outcome of this assessment would determine if he needed to retake the BIP. Similarly, over his objection, Nelson was ordered to take a substance abuse assessment. However, the parties agreed that no further substance-abuse services would be required if that assessment came back "clean." The record on appeal is silent as to the status of either assessment.

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[3] We note that the children are, at the time this opinion issues, three and four years old.

As neither party has seen fit to update the Court on this necessary question, we have gleaned from the post-appeal docket[4] that Nelson has *not*, in fact, been required to retake the BIP or any substance program, but is currently attending "individual counseling." *Journal Entry* (June 13, 2022). Thus, we find any argument that Nelson cannot be ordered to take another BIP or engage in substance-abuse services to be moot. *In re Guardianship of Doornbos*, 2006 OK 94, ¶ 2, 151 P.3d 126, 126 ("This Court has consistently held that it will not decide abstract or hypothetical questions when no practical relief will result.").

Nelson next presents a novel argument that successfully completing the BIP (or presumably the "individualized counseling") would ensnare him in some form of unconstitutional perjury trap. The basis of this alleged judicial or administrative subornation of perjury is that Nelson "testified under oath" that he had not engaged in any form of controlling behavior or domestic violence, but a goal of a BIP is that Nelson "articulate an understanding of the impact of his controlling and violent behaviors on his partner, his children and himself."

Nelson argues that he cannot do so because he has no controlling and violent behaviors and his truthful refusal to acknowledge such behavior will cause him to fail the ISP, which in turn will be cited as a basis for a new termination proceeding. Alternatively, he argues that if he does comply with the new ISP, he will have perjured himself against his prior testimony under oath and this "perjury" will also be used as a new basis for termination. We find no

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[4] Supreme Court Rules permit us to examine the district court's online docket to "inquire into and protect [our] jurisdiction." Okla. Sup. Ct. R. 1.1(d).

merit in this speculation that the DHS will attempt future termination on either basis, or that, if they do so, they will be successful.

Nelson's next argument is that requiring a second domestic violence assessment after he had completed the BIP is inherently unconstitutional. Again, he appears to liken the completion of an ISP requirement to a criminal acquittal, and hence argues that requiring him to repeat part of an ISP is some form of double jeopardy. Alternately, he returns to his argument that the jury's decision not to terminate his parental rights constitutes a finding that no further services were necessary.

If there is no rational basis whatsoever for part of an ISP to be repeated, due process questions might arise. However, a decision made without a rational basis is also "clearly contrary to the weight of the evidence or to some governing principle of applicable law" and may be dealt with by the normal appellate process for review here. This question does not require a constitutional construction, and we will not reach constitutional issues unless it is strictly necessary. *Smith v. Westinghouse Elec. Corp.*, 1987 OK 3, n. 3, 732 P.2d 466. We will discuss this argument further in the following section on "legal and factual issues."

Nelson also argues error on constitutional "speedy trial" grounds. In this case, the initial deprived adjudication was made in November of 2019, and the new ISP was imposed in January 2022, a period of two years and two months. Nelson argues that some equivalent of his constitutional right to a speedy trial was violated by the imposition of a new ISP at that time. We find no Oklahoma

case examining this question. In states that have set a statutory timetable for handling such cases, the requirement is sometimes referred to as a *legislative* "speedy trial" requirement,[5] but no constitutional dimension is mentioned. Several states have specifically found that a constitutional speedy trial right is *not* implicated in deprived child proceedings.[6]

The exception is Massachusetts, which has stated that "an extraordinary and prejudicial delay in custody proceedings" not attributable to the actions of the parents could rise to the level of a violation of due process.[7] Even if Oklahoma were to follow Massachusetts, however, we find Nelson has not shown on this record that any delay was not attributable to him, or that the length of the delay was extraordinary or prejudicial under the circumstances. The delay in this case, in our review of the record, appears to stem from DHS's and the trial court's concern for the best interests of the children.

LEGAL AND FACTUAL ISSUES

Nelson also challenges the decisions discussed above on grounds of law and fact. Here, Nelson appears to repeat his argument that the court's action

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[5] *See e.g,* Florida Rules of Juvenile Procedure 8. 8.090 (Speedy Trial).

[6] *See In Interest of K.D.B.,* 399 P.3d 287 (Kan. Ct. App. 2017) (although Kansas statutes require speedy trial, "those considerations ... do not endow parents with a right comparable to the statutory speedy trial protection for criminal defendants"); *In re Interest of Brandy M.,* 250 Neb. 510, 518, 550 N.W.2d 17, 23 (1996) ("[T]his court has held that the U.S. and Nebraska Constitutions do not provide a 'speedy trial' right in the context of a termination of parental rights proceeding"); *Meeks v. Chronister,* 2020 WL 2935980, at *2 (E.D. Cal. June 3, 2020) (holding that Sixth Amendment right to speedy trial applies to criminal proceedings and not to civil cases involving placement of children in foster care).

[7] *See Care & Prot. of Martha,* 407 Mass. 319, 330, 553 N.E.2d 902, 908 (1990) (noting that "an extraordinary and prejudicial delay in custody proceedings, not attributable to the parents, in some circumstances could rise to the level of a violation of due process" but holding that a three-year delay did not do so).

somehow constituted a new adjudication that the children were deprived without the required statutory process for a deprived adjudication. We have previously noted that this is not the law pursuant to 10A O.S. § 1-4-908(B). Nelson further cites no authority for a proposition that any change in the terms of an ISP requires or constitutes a new deprived adjudication or, as Nelson argues, "sets the case back to day one."

In terms of fact, Nelson argues that the imposition of continuing requirements before reunification was not supported by evidence. To make this argument, Nelson attacks the credibility of the mother and DHS workers, stating that DHS falsely claimed that he had made threatening comments to DHS workers, and that DHS is only continuing the matter because it "can't admit when it has made a mistake." *Brief-in-chief*, pg. 16. He describes the mother as a "paranoid schizophrenic," *Reply Brief*, pg. 1, who "has not and will never be believed by a jury." *Brief-in-chief*, pg. 16. Nelson's brief contains six pages reciting selected testimony from the January 7, 2020, deprived adjudication trial as demonstrating that the mother's testimony was not credible.[8]

As noted, Nelson has already appealed the result of the deprived adjudication in Case No.118,621, making the same arguments regarding the mother's mental problems and credibility. His appeal was unsuccessful. This Court found the evidence at the deprived hearing sufficient to find the children

[8] The record shows that the mother has a pattern of making accusations of violent and controlling behavior by Nelson to police officers, DHS workers, and various professionals involved in her care. She then returns to living with Nelson and recants her previous allegations, blaming them on her delusional mental state.

deprived, and hence a need for an ISP was established. This is the law of the case. As such, we will only consider what developments *since the first appeal* could change that result and indicate that the children were no longer deprived and hence there was no basis to order a new ISP.

Nelson again argues that the jury verdict against termination either overcomes the finality of the prior deprived adjudication because it constitutes a later decision that the mother was not credible, or acts as a jury finding that Nelson "was not a domestic abuser" and hence prevents the imposition of any further ISP. However, we have previously rejected Nelson's theory that his successful result at the termination trial undoes the initial adjudication order.

The facts that Nelson relies on after the initial deprived proceedings are primarily that he successfully completed the fifty-two-week BIP and received purportedly glowingly positive evaluations from various service providers. This progress, if genuine, is admirable. The question, however, is whether these facts have such weight that any decision to require further services on a path to reunification was clearly contrary to the weight of the evidence. The deference granted to a trial court's decisions in this area is substantial, and for good reason. The purpose of appellate review is not to relitigate such questions but to uncover and remedy trial court errors. Based on a review of the full record—which paints a far more complex and mixed picture of Nelson's behavior than his briefing would suggest—we find the trial court's decision to be within the limits of its discretion.

CONCLUSION

Nelson is on a path to reunification and appears to be addressing the requirements of his ISP. His frustration that reunification was not immediate after the jury decided against termination, while understandable, is not a legal basis to find error in the trial court's decision. We further find no unconstitutional statute or state action here. We find absolutely no evidence that, despite creating a reunification plan, DHS is somehow attempting to work towards another termination trial "behind the scenes," as Nelson alleges. DHS has changed Nelson's permanency plan to reunification and changed both his case worker and service providers to avoid any possible prejudicial "carry over" from the termination proceedings. Finding no error with the trial court's order, it is **AFFIRMED**.

HIXON, J. (sitting by designation), concurs, and WISEMAN, P.J., concurs in result.

November 23, 2022