NO. COA01-362

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

In Re: FISHER, ADRIA TAINAE

Moore County
No. 00 J 13

Appeal by respondent from judgment entered 2 August 2000 by Judge Lee Gavin in Moore County District Court. Heard in the Court of Appeals 26 November 2001.

Brannon Burroughs, Assistant County Attorney, for petitioner-appellee.

Hal Morris, for respondent-appellant.

Robert Alley, for Guardian Ad Litem.

BIGGS, Judge.

On 2 August 2000, the trial court entered an order terminating parental rights of Gwendolyn Fisher (respondent) and the father of the minor child, identified only as "Jose". Respondent gave notice of appeal on 10 August 2000. The father did not contest the order and is not a party to this appeal. Respondent testified that she had no further information regarding the identity or whereabouts of the father. For the reasons herein, we affirm the trial court's order terminating the parental rights of respondent.

Adria Tainae Fisher (Adria) was born in Chapel Hill on 30 March 1999, to Gwendolyn Fisher and "Jose" while Gwendolyn was in prison serving a sentence for a probation violation. Immediately

following her birth, Adria was adjudicated dependent and placed in the custody of the Moore County Department of Social Services (hereinafter DSS). Respondent remained incarcerated until May 1999, when she was released from serving a sentence for probation violation. On 28 July 1999, a dispositional hearing on Adria's adjudication of dependency was held. At the hearing, the trial court concluded that DSS was making reasonable efforts to prevent or eliminate the need for placement of Adria. The trial court ordered the following: for the custody and foster care placement of Adria to remain with DSS; for respondent to submit to random drug screening; and for supervised visitation between respondent and Adria be arranged.

On 2 February 2000, DSS filed a petition to terminate the parental rights of respondent and the father. The petition alleged that respondent neglected Adria, in violation of N.C.G.S. § 7B-1111 (1999), and respondent willfully abandoned Adria for at least six consecutive months immediately preceding the filing of the petition.

A hearing on the termination petition took place on 19 July 2000, more than a year after Adria was placed in foster care. Upon consideration of the evidence, the trial court concluded that grounds existed for termination of parental rights in that respondent has neglected the child pursuant to N.C.G.S. § 7B-1111(a)(1) (1999). The trial court determined that it was in the best interests of Adria for the parental rights of respondent to be terminated, and so ordered. Respondent appeals from this order.

Proceedings to terminate parental rights are conducted in two phases: adjudication and disposition. *See generally, In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000). During the adjudication stage, the petitioner has the burden of proof to demonstrate by clear, cogent and convincing evidence the existence of one or more of the statutory grounds for termination. *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997); *In re Bluebird*, 105 N.C. App. 42, 411 S.E.2d 820 (1992). The criteria for termination are set forth in N.C.G.S. § 7B-1111(a). The standard for appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial judge's findings of fact are supported by clear, cogent and convincing evidence, and whether these findings support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *disc. review denied*, ____ N.C. ____, 353 S.E.2d 374 (2001); *In re Allred,* 122 N.C. App. 561, 471 S.E.2d 84 (1996).

If the petitioner meets its burden of proving that there are grounds to terminate parental rights, the trial court then moves to the dispositional stage, and must consider whether termination is in the best interests of the child. *In re Brake*, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997); *In re Shue,* 311 N.C. 586, 319 S.E.2d 567 (1984). The trial court does not automatically terminate parental rights in every case that present statutory grounds to do so. *In re Leftwich*, 135 N.C. App. 67, 518 S.E.2d 799 (1999); *In re Allred,* 122 N.C. App. 561, 471 S.E.2d 84. However,

the trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights, upon a finding that it would be in the child's best interests. *In re Blackburn,* 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re McLemore,* 139 N.C. App. 426, 533 S.E.2d 508 (2000). The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *In re Brim,* 139 N.C. App. 733, 535 S.E.2d 367; *In re Allred,* 122 N.C. App. 561, 471 S.E.2d 84.

I.

Respondent has submitted seven assignments of error related to the trial court's determination that grounds exist to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).

N.C. Gen. Stat. § 7B-1111(a)(1) provides that the trial court may terminate a parent's parental rights where the parent has neglected a child. A neglected child, as defined in N.C.G.S. § 7B-101 (15), is:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . .; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of the law.

See also In the Matter of Blackburn, 142 N.C. App. at 611, 543 S.E.2d at 909. The burden is on the party seeking termination to show by clear, cogent and convincing evidence that neglect exists at the time of the termination proceeding. *In re Young,* 346 N.C. 244, 485 S.E.2d 612. However, where, as in the case *sub judice*, the child has been removed from the custody of the parent prior to

the termination proceeding, the court may consider evidence of prior neglect, as well as evidence of the probability that such neglect will continue. *Blackburn*, 142 N.C. App. at 611, 543 S.E.2d at 909.

A.

Respondent contends first that the trial court erred in its denial of her motion to dismiss. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (1999) sets forth the standard for a motion to dismiss in a non-jury trial. "[T]he judge becomes both the judge and [the] jury." *In re Becker,* 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993). Therefore, the judge "must consider and weigh all competent evidence before him." *Id.* As our Court stated in *McKnight v. Cagle,* 76 N.C. App. 59, 65, 331 S.E.2d 707, 711, *cert. denied*, 314 N.C. 541, 335 S.E.2d 20 (1985):

> A motion for dismissal pursuant to Rule 41(b), made at the close of petitioner's evidence in a non-jury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against plaintiff.

Dismissal under this statute is left to the sound discretion of the trial court. *Jones v. Stone,* 52 N.C. App. 502, 279 S.E.2d 13, *disc. review denied*, 304 N.C. 195, 285 S.E.2d 99 (1981).

In the case *sub judice,* the evidence considered by the trial court in the motion to dismiss is as follows: respondent has used cocaine for at least six years prior to the termination proceeding; during respondent's pregnancy with Adria, she tested positive for

cocaine; when respondent was released from jail, she visited with Adria only twice; despite respondent's drug problem, she refused treatment, and was hostile and uncooperative with drug screening and treatment; respondent did not attend parenting classes as requested by DSS until she was again placed in prison; during the time respondent was not in prison she did not work nor did she make any effort to support Adria; respondent has two other children who were placed in the care of her grandmother, one of which has been in her grandmother's care for the last six years; at the time of the termination hearing, respondent was again in jail on drug charges, and; respondent has failed to provide a plan to care for Adria when she is released from prison.

Moreover, there was testimony from the supervisor from the drug treatment program that based on her experience in counseling, it is uncommon for someone to be able to overcome a drug problem without treatment. She further explained when a person's life is disrupted by a jail stay, people do not typically go drug-free after being incarcerated. In fact, "I actually have clients that use drugs [while] in prison."

We conclude that the trial court did not abuse its discretion in denying respondent's motion to dismiss. Further, we conclude the evidence supports the trial court's findings, and its conclusion of law, that respondent has neglected the minor child and that grounds existed for termination of her parental rights. Moreover, we hold the evidence demonstrates that Adria was neglected at the time of the proceeding, and that there is a strong

likelihood that such neglect will continue.

B.

Next, respondent contends that the trial court committed reversible error in its finding of fact number 8 that respondent visited with Adria only once. Petitioner concedes that the trial testimony established that respondent had two visits with Adria. Thus, the court's finding was error. However, "to obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996).

Although the trial court made a finding which was not supported by the evidence, respondent has failed to show prejudice. The trial court made 17 findings of fact supporting its conclusion that grounds existed to terminate respondent's parental rights, many of which were uncontested by respondent. We hold that respondent was not prejudiced by the court's finding; accordingly, this assignment of error is overruled.

C.

Respondent argues next that the trial court committed reversible error in its conclusion that it was in Adria's best interest to terminate respondent's parental rights. We disagree.

The trial court is given great deference in determining the best interests of the minor in termination of parental rights

proceedings, and its decision will not be disturbed absent an abuse of discretion. *See, generally, Elrod v. Elrod*, 125 N.C. App. 407, 481 S.E.2d 108 (1997).

This Court has recently held that "the child and her best interests are at issue [], not respondent's hopes for the future." *In re Blackburn,* 142 N.C. App. at 614, 543 S.E.2d at 911 (citing *In re Smith,* 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied,* 306 N.C. 385, 294 S.E.2d 212 (1982)). Here, respondent has not demonstrated a willingness to change her behavior, in order to meet Adria's needs. The court's conclusion that it is in Adria's best interest to terminate respondent's parental rights is supported by its findings, which are fully supported by competent evidence in the record.

Accordingly, we conclude that the trial court did not abuse its discretion. This assignment of error is overruled.

II.

Respondent next assigns as error the trial court's finding of fact number 5, that respondent tested positive for cocaine during her pregnancy with Adria. Specifically, she contends that since a fetus is not a person as defined by the North Carolina Juvenile Code, the court could not use this finding as a basis for its conclusion that Adria was a neglected child.

Respondent has failed to preserve this argument for appellate review, in violation of Rule 10(b) of the North Carolina Rules of Appellate Procedure, which states in relevant part, that "in order to preserve a question for appellate review, a party must have

presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Respondent failed to object, during the trial proceeding, to admission of evidence related to the test results or to the testimony concerning her cocaine usage and hence cannot challenge this finding on appeal.

Moreover, it appears that respondent raises a constitutional question for the first time on appeal: whether a fetus is a person for purpose of constitutional protection. It is well established that "appellate courts will not decide a constitutional question [not] raised or considered in the trial court." *Peace River Electric Cooperative v. Ward Transformer Co.,* 116 N.C. App. 493, 449 S.E.2d 202 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995)*; Midrex Corp. v. Lynch Sec. of Revenue,* 50 N.C. App. 611, 618, 274 S.E.2d 853, 858, *disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981); *Carpenter v. Carpenter,* 25 N.C. App. 235, 212 S.E.2d 911, *cert. denied* 287 N.C. 465, 215 S.E.2d 623 (1975). Accordingly, we overrule this assignment of error.

III.

Finally, respondent assigns as error the trial court's decision to admit into evidence respondent's treatment records from the Clean Start program. We disagree.

Business records are admissible as an exception to the hearsay rules if "made in the regular course of business, at or near the time of the transaction involved, and . . . authenticated by a

witness who is familiar with them and the system under which they were made. . . ." *State v. Galloway*, 304 N.C. 485, 492, 284 S.E.2d. 509, 514 (1981); *see also In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988); *In Re Smith*, 56 N.C. App. 142, 287 S.E.2d 440 (1982).

In the case *sub judice*, the trial court admitted, over defendant's objection, the respondent's client records from the Clean Start program. Ms. Alexander confirmed that the records were "kept in the ordinary course of business", and were "prepared while the information [was] still fresh . . . in the mind of the person who[] [was] writing them." She further confirmed that she was familiar with the record-keeping system, had supervisory authority over the system, and that the people who keep those records are guided by a regulated system for managing such records. We conclude that the trial court properly admitted the records and the related testimony concerning the records under the business records exception to the hearsay rule.

Assuming, *arguendo,* that the records were inadmissible, we are unpersuaded by respondent's argument that the admission of her records disclosing a history of "heavy drinking" and drug use was reversible error. There was considerable testimony admitted, without objection, that established her drug and alcohol problem. The testimony of Kelsie Martinez, respondent's mother, established respondent's history of drug and alcohol use. Ms. Martinez specifically testified that "it's public knowledge that

[respondent] does have a problem with substances -- being a substance abuser." In addition, respondent's probation officer, testified that respondent admitted her drug problem during her pregnancy, and that respondent violated probation by testing positive for cocaine.

We conclude that there is significant evidence outside of the client records, establishing respondent's history of drug and alcohol use and, thus, that respondent was not prejudiced by the admission of her records. Accordingly, this assignment of error is overruled.

For the reasons stated above, we hold that the record supports the trial court's conclusion that grounds exist to terminate respondent's parental rights. Further, we hold the trial court did not abuse its discretion in concluding that termination was in Adria's best interests.

Accordingly, we affirm the trial court's order terminating respondent's parental rights.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).