NO. COA01-705

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

IN RE: AARON JAY MASTERS and
SOPHIA LOUISE MOLINA,
Juveniles,

Cumberland County
No. 00 J 175-176

SYLVIA LEVELLE MASTERS,
LARRY WAYNE MASTERS,
JOSEPH TERSAH and
JOHN DOE,
Respondents-Appellants.

Appeal by respondent from order entered 12 December 2000 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 10 January 2002.

Cumberland County Department of Social Services, by David Kennedy, for Petitioner-Appellee.

Hatley & Stone, P.A., by Michael A. Stone, for Respondent-Appellant.

BRYANT, Judge.

This is an appeal by respondent Sylvia L. Masters from an order terminating her parental rights as to her two children.

On 28 February 1996, respondent's two minor children were taken into the custody of the Cumberland County Department of Social Services [DSS]. On 4 November 1996, the children were adjudicated as neglected by the district court upon a finding that they did not receive proper care, supervision or discipline. On 21

March 2000, DSS petitioned to terminate the parental rights of: 1) respondent, the mother of both children; 2) Larry Wayne Masters, the father of Aaron Masters; 3) Joseph Tersah, the putative father of Sophia Molina; 4) John Doe, any other male who claimed or may claim a parental right to Sophia Molina. DSS alleged that respondent was incapable of providing for the children because of mental retardation, mental illness, organic brain syndrome, other degenerative mental conditions, or substance abuse. On 29 June 2000, Judge John W. Dickson allowed respondent's attorney to withdraw after respondent indicated that she wanted to hire her own attorney. Respondent's new attorney filed a motion for recusal of Judge Dickson after learning that respondent had contacted the North Carolina Judicial Standards Commission [NCJSC] to complain about three judges, including Judge Dickson.

At trial on 24 October 2000, Judge Dickson denied respondent's motion for recusal. After conducting the adjudication and disposition stages of the trial, the court ordered respondent's parental rights terminated. Respondent appealed.

There are two stages of a hearing on a petition to terminate parental rights: adjudication and disposition. At the adjudication stage, the petitioner has the burden of proving by clear, cogent and convincing evidence that at least one statutory ground for termination exists. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 (citing *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)), *review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001); *see* N.C.G.S. § 7B-1109(f) (2001) (requiring findings of fact to be based on clear, cogent, and convincing evidence). A finding of one statutory ground is sufficient to support the termination of parental rights. *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). If there is a past adjudication of neglect but no evidence of neglect at the time of the termination proceeding, parental rights may be terminated upon a showing of a probability of repetition of neglect in the event the child is returned to the parent(s). *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227, 232 (1984)). Furthermore, "[w]here evidence of prior neglect is presented, '[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.'" *In re Young*, 346 N.C. 244, 250, 485 S.E.2d 612, 616 (1997) (alteration in original) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). Upon a finding that at least one statutory ground for termination exists, the trial court proceeds to the disposition stage, where it determines whether termination of parental rights is in the best interests of the child. *In re McMillon* at 408, 546 S.E.2d at 174.

When reviewing an appeal from an order terminating parental rights, our standard of review is whether: 1) there is clear, cogent and convincing evidence to support the trial court's findings of fact; and 2) the findings of fact support the

conclusions of law. *In re Huff*, 140 N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed and review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). Clear, cogent and convincing evidence "is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)). If the decision is supported by such evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). The trial court's conclusions of law are reviewable de novo. *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

Respondent presents four assignments of error. First, that the trial court erred by denying respondent's Motion for Recusal of Judge, thus violating her federal constitutional rights under the Fifth and Fourteenth Amendments. Second, that the trial court erred in taking judicial notice of the court orders and other documents incorporated therein. Third, that the trial court erred in allowing petitioner's witness to testify as an expert. Fourth, that the trial court erred in terminating her parental rights because the findings of fact and conclusions of law were not supported by clear, cogent and convincing evidence and many findings were de facto conclusions of law. We disagree as to each assignment of error and affirm the trial court.

I.

Respondent first argues that the trial court erred in denying her motion to recuse the trial judge. The Code of Judicial Conduct provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might be questioned, including . . ." where he is personally biased or prejudiced against the party. Code of Judicial Conduct Canon 3C(1)(a), 2002 Ann. R. N.C. 306. This Court has stated that disqualification is proper where "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner." *McClendon v. Clinard*, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978). The judge should recuse himself if there is "'sufficient force in the allegations contained in defendant's motion to proceed to find facts.'" *Koufman v. Koufman*, 97 N.C. App. 227, 234, 388 S.E.2d 207, 211 (1990), (quoting *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976)), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991). The party moving for recusal has the burden of objectively demonstrating that there are actual grounds for disqualification. *In re Nakell,* 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991). There must be substantial evidence that a personal bias, prejudice or interest exists such that the judge would be unable to rule impartially. *Id.*

In this case, the only evidence of personal bias or prejudice presented by respondent in support of her motion to recuse was a copy of a letter from the NCJSC. The NCJSC letter was dated 20

September 1999, and merely acknowledged receipt of respondent's complaint dated 9 September 1999. Respondent makes no further showing in support of her allegations that actual grounds for disqualification exist. The record contains no evidence of the nature of her complaint against Judge Dickson, nor any evidence that Judge Dickson knew the nature of the complaint. A reply letter dated thirteen months before the ruling on the motion for recusal is insufficient to demonstrate grounds for disqualification. We find nothing in the record to indicate the judge should have recused himself or referred the recusal motion to another judge. Respondent has failed to meet her burden. Accordingly, this assignment of error is overruled.

II.

Respondent next argues that the trial court erred in taking judicial notice of information, such as pre— and post— adjudication court reports and documents, in the underlying juvenile action. We disagree. Rule 201 of the North Carolina Rules of Evidence provides, "A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.G.S. § 8C-1, Rule 201(b) (2001). "A trial court may take judicial notice of earlier proceedings in the same cause." *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). In a proceeding to terminate parental rights, prior adjudications of abuse or neglect are admissible, but they are not determinative of the ultimate issue. *In re Huff*, 140

N.C. App. 288, 536 S.E.2d 838 (2000), *appeal dismissed and review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001); *In re Beck*, 109 N.C. App. 539, 428 S.E.2d 232 (1993).

In this case, the trial court took judicial notice of the underlying case files —— 95 J 778 and 95 J 779 —— which, according to references in the record, contained various documents and reports to the court. We note that it is impossible for this Court to ascertain the contents of the underlying case files because the record on appeal contains none of the documents in question and respondent's brief refers only to the file numbers. However, based on *Isenhour* and *Huff*, we hold that the trial court did not err in taking judicial notice of information contained in previous reports and documents in underlying case files. The judge in a bench trial is presumed to have disregarded any incompetent evidence. *In re Beck*, 109 N.C. App. at 544, 428 S.E.2d at 235. Therefore, this assignment of error is overruled.

III.

Respondent next argues that the trial court erred in allowing petitioner's witness, David Williams, to testify as an expert. Specifically, respondent argues that Williams, the social work program manager at Cumberland County Mental Health Center, was allowed to testify as a de facto expert witness. We disagree.

Rule 602 of the North Carolina Rules of Evidence provides that, subject to the provisions of Rule 703, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."

N.C.G.S. § 8C-1, Rule 602 (2001). Rule 702(a), which governs expert testimony, states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702(a) (2001). Rule 701 governs opinion testimony by lay witnesses, and states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701 (2001).

In this case, Williams testified as a lay witness. As an administrator and respondent's social worker, Williams had contact with respondent between December 1998 and June 1999. He testified that respondent came to see him because she was sent by DSS after her children were removed from the home, and "there was [sic] some depressive kinds of issues that she — I talked around those issues of not — being separated from the children." Respondent objects to this testimony by asserting that it is 'defacto expert' testimony. It is clear from the record that Williams was neither offered nor received as an expert witness. Moreover, the foregoing testimony was properly received pursuant to Rule 701. *See* N.C.G.S. § 8C-1, Rule 701. Accordingly, this assignment of error is overruled.

IV.

Finally, respondent argues that the trial court erred in granting the termination of parental rights because the findings of fact and conclusions of law were not supported by clear and convincing evidence and many findings were de facto conclusions of law. We disagree.

In this assignment of error respondent does not point to any specific findings of fact or conclusions of law in support of her argument. She merely points to the transcript as a whole, in alleging that "[a]ll of the findings of fact are merely conclusions that amount to legally significant conclusions of law." The trial court made eight findings of fact before concluding as a matter of law that respondent's rights as a parent should be terminated. For example, the trial court found that respondent was incapable of providing proper care and supervision to her children because of substance abuse, which was reasonably likely to continue in the future. The record shows that respondent tested positive for cocaine use four times in 1998, including two refused testings, while attempting to comply with court orders.

The court also found that "Respondent mother claims to be in mental health treatment and on her medication but offers no proof of such and failed to sign a Release of Information for [DSS]." After reviewing the transcript and record on appeal, the only evidence that respondent sought mental health treatment was her own testimony at the termination proceedings. A social worker for DSS testified that he could not verify that respondent sought mental health treatment because she refused to sign a release of

information to allow the social worker to speak with the doctor. Although respondent testified that one of her attorneys signed the release, there is simply no independent evidence of this, nor of respondent's treatment.

The trial court heard and considered a substantial amount of testimony from witnesses, including respondent, prior to making findings of fact and conclusions of law. "The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness." *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996) (citation omitted). "The trial court, not the appellate court, weighs the credibility of evidence. Therefore, '[w]here there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence.'" *State v. Coronel*, 145 N.C. App. 237, 250, 550 S.E.2d 561, 570 (2001) (alteration in original) (citations omitted), *review denied*, 355 N.C. 217, 560 S.E.2d 144 (2002).

Based on our review of the evidence in the record, we conclude that there was clear, cogent and convincing evidence in support of the trial court's findings of fact, and that these findings support the trial court's conclusions of law. Therefore, this assignment of error is overruled.

Affirmed.

Judges MARTIN and SMITH concur.

Report per Rule 30(e).