

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-962

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

IN RE: IRBY,
a minor child

Person County
No. 99 J 98

Appeal by respondent from order dated 19 July 2001 by Judge Pattie S. Harrison in District Court, Person County. Heard in the Court of Appeals 12 February 2002.

Jackson & Fitzgerald, by Thomas L. Fitzgerald, for petitioner-appellee.

Theresa K. Pressley for respondent-appellant.

McGEE, Judge.

Patricia Yarborough (respondent) appeals from an order dated 19 July 2001 terminating her parental rights as the mother of Timothy Irby (the juvenile).

The Person County Department of Social Services (DSS) filed a petition on 31 January 1997 requesting that the court declare the juvenile neglected pursuant to N.C. Gen. Stat. § 7A-517(21) (repealed by Session Laws 1998-202, s. 5, effective 1 July 1999. See now N.C. Gen. Stat. § 7B-101(15) (1999)). DSS alleged that respondent's neglect of the juvenile resulted in the two-year-old juvenile's failure to thrive. Following a hearing on 20 February 1997, the trial court entered an order and made the following

pertinent findings of fact:

7. That DSS was notified of the [juvenile's] condition as a "failure to thrive" child by Duke Medical Center, and the reports indicated that actions should be undertaken to protect the [juvenile]; the reports contained the Hospital staff's concerns that [respondent] was not able to adequately care for [the juvenile] and his condition;

8. That in the two weeks since [the juvenile's] discharge from the hospital, [r]espondent had been able to care for [the juvenile] such that he had not lost any of the weight he gained in the hospital; his local physician . . . reported on or about the day of the initial custody order granted in this cause, that [respondent] was doing a better job of providing adequate nutrition;

9. Family Connections, a family support organization operating in Person County had been assisting [r]espondent for several weeks prior to the [juvenile's] hospitalization;

10. Such agency had noticed deficiencies in [r]espondent's care giving abilities prior to the [juvenile's] hospitalization, which deficiencies were noted by the agency's staff even while the [juvenile] was hospitalized;

11. Concerns noted by Family Connections included provision of inadequate nutrition, lack of heat in the home, sanitation, provision of personal hygiene for the [juvenile], adequate stimulation of the [juvenile], and lack of supervision;

12. Despite such reports, the Court modified the immediate custody order to the extent that [respondent] could provide for the daily needs of [the juvenile], under the supervision of [respondent's] aunt, Margaret Dunn; Family Connections services and DSS homemaker services were also reinstated;

13. Respondent has the continued assistance of [respondent's aunt] promised . . . for the foreseeable future;

14. Family Connections has stated that they are able to maintain their services for an additional six weeks, and DSS has a homemaker available to assist [r]espondent;

15. That . . . DSS has made reasonable efforts in dealing with the [r]espondent in order to eliminate the need for placement and to make it possible for the [juvenile] to return to the [r]espondent's home;

16. That the juvenile's remaining in his own home would not be contrary to the best interests of the juvenile;

. . .

18. That the actions of the [r]espondent are significant enough to warrant an order of custody to DSS, but not so severe that [respondent] cannot work with the agencies listed above to show her continued abilities to care for [the juvenile] on her own[.]

The trial court concluded that the juvenile "is a neglected child as alleged in the [p]etition" and ordered that legal custody of the juvenile be granted to DSS, and that the juvenile return to respondent's home with supervision by DSS. The court further required respondent to attend evaluations scheduled by DSS and to follow recommendations resulting from such evaluations.

Following the juvenile's placement with respondent, the juvenile was again removed from respondent's home due to "deficiencies in [the] care provided by [r]espondent" in June 1997 and placed in out of home placement. The trial court again allowed placement of the juvenile with respondent in August 1998; however, the juvenile was again removed from respondent's care and ultimately placed in foster care in November 1998.

DSS filed a petition to terminate respondent's parental rights

on 30 November 1999 alleging the following grounds for termination:

- a. That the [juvenile] has been in foster care for more than twelve (12) months;
- b. That the [r]espondent . . . has made no reasonable progress under the circumstances during such time to correct the conditions which led to the removal of [the juvenile];
- c. That [DSS] has provided means for the [r]espondent . . . to strengthen the parental relationship . . . and to correct conditions which led to removal of [the juvenile], and to follow through on constructive planning for the future of [the juvenile] by providing a social worker, a homemaker, mental health counseling services, nutrition classes, vocational rehabilitation referrals, visitation assistance (personal and financial) and transportation services;
- d. That despite the foregoing, since the last return of the [juvenile] to foster care, there has been no positive response to any of the foregoing;
- e. That the [r]espondent . . . has neglected [the juvenile] in that she has failed to maintain adequate and appropriate contact with [the juvenile] for purposes of nurturing said [juvenile], providing companionship and parental guidance since removal[.]

Respondent admitted in her answer that the juvenile had been in foster care for more than twelve months, but she denied the remaining allegations relating to grounds for termination of her parental rights.

Following a hearing on 31 March 2000, the trial court ordered the termination of respondent's parental rights. Respondent gave timely notice of appeal in open court. However, because the record on appeal to this Court did not contain an order signed and entered by the trial court, the appeal was dismissed without prejudice in

an unpublished opinion by this Court on 19 June 2001, *In re Irby* (COA00-993).

The trial court thereafter signed a written order dated 19 July 2001 terminating respondent's parental rights. The trial court made the following findings of fact:

8. That [DSS] has been granted custody of the [juvenile] pursuant to an Order of [the trial court], dated July 21, 1997, same having been continued under regular review by the District Court of Person County;

9. That DSS has had an open case on this juvenile for in excess of three years; that [respondent] regained custody of [the juvenile] after an adjudication of neglect in February, 1997, and has had a Court ordered trial placement of the [juvenile] with her on one other occasion during these three years;

After each such occasion of having the [juvenile] reside in her care, the Court has removed the [juvenile] due to deficiencies in care provided by [r]espondent, . . . and returned [the juvenile] to DSS custody in an out of home placement, or foster care;

10. That the juvenile has been placed out of the r]espondent['s] . . . home for periods exceeding two years;

11. During the pendency of this [p]etition, Petitioner has arranged for services from virtually every Person County agency available to assist the [r]espondent . . . in caring for [the juvenile] and learning to care for [the juvenile], including Family Connections, PACT program, Partnership for Children, Piedmont Community College, Children's Learning Center, Person Counseling Center, Duke Pediatrics, Person County Day Reporting Center, Duke Hospital and Person County Health Department nutritionists, Person Family medical Center, as well as all of the multiple programs within DSS itself;

. . .

13. That the [r]espondent also had substantial assistance from her family, by way of housing and personal assistance, during her periods of custody and trial placement;

14. Nevertheless, [r]espondent did not appropriately care for [the juvenile] while she had the opportunity; in fact, she had numerous opportunities to better her situation over the three year time frame, and failed to avail herself of those opportunities;

15. That custody orders in the original neglect Petition were reviewed at least twice per year, and each time she appeared in Court, [r]espondent would promise to avail herself of available services; and after each review, though the respondent [might] access one or more of the components offered by DSS, shortly after the Court session, she would cease or terminate her efforts, only to reinitiate them upon receipt of notice of the next scheduled review hearing; the Court finds that [r]espondent was merely responding to the crisis of the moment, and had not made any lasting change in her abilities as a parent;

16. The Court finds that the [respondent] has a history of failing to follow through on her obligations as a parent, and that type of behavior is untenable as a parent;

17. Respondent testifies, and the Court finds as a fact, that she . . . married on November 19, 1999, shortly before the initiation of this termination [p]etition; she has become employed within the last month; she has completed a course of counseling for non-offending parents, relating to sexual offenses against children; and she has initiated a short term educational program which will earn her a certificate to be a certified nursing assistant;

18. The Court presumes that these changes are temporary, such as [r]espondent's previous actions, and the Court notes that the job and educational classes have been initiated only since the filing of this petition, and in fact, only after notice of hearing of this petition was served;

19. With her previous history on initiating and then abandoning services, the Court has no reason to believe that the [respondent] will follow through with these positive changes, and ever become an appropriate parent for [the juvenile];

20. That visitation has been allowed to the [respondent] during the [juvenile's] entire three year period in foster care, including after the Court sanctioned a 'cease efforts' request by DSS in the neglect proceeding;

21. The [respondent] has utilized most of her visitation, same being twice per month;

22. However, such visits are not sufficient personal contact with the [juvenile], suitable to assist the [juvenile] in his social, physical, psychological or personal development; by failing to take steps to reacquire custody of [the juvenile], she has neglected him as well;

23. That the Guardian ad Litem, who has also served as the Attorney Advocate for [the juvenile] for three years, gave her opinion as to the issue, that Petitioner had proven the two grounds for termination of parental rights at issue, and that it would be in the best interests of [the juvenile] to have the parental rights of [respondent] terminated so [the juvenile] could be placed in a permanent placement[.]

The trial court concluded that respondent's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) because respondent neglected the juvenile. The trial court then determined it was in the best interests of the juvenile that respondent's parental rights be terminated. Respondent appeals the 19 July 2001 order.

I.

Respondent contends by her first assignment of error that the

trial court's termination of her parental rights was not supported by clear, cogent and convincing evidence.

Parental rights may be terminated upon a finding that a juvenile has been neglected within the meaning of N.C. Gen. Stat. § 7B-101. N.C. Gen. Stat. § 7B-1111(a)(1) (1999). A neglected juvenile is defined as a juvenile who "does not receive proper care, supervision, or discipline from [his] parent, guardian, custodian, or caretaker[.]" N.C. Gen. Stat. § 7B-101(15) (1999). Our Supreme Court explained that

[w]here the evidence shows that a parent has failed or is unable to adequately provide for his child's physical . . . needs, whether it be by reason of mental infirmity or . . . willful conduct on the part of the parent, and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time, the court may appropriately conclude that the child is neglected.

In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

The petitioner bears the burden of proving "the facts justifying such termination by clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b) (1999).

While

evidence of neglect by a parent prior to losing custody of a child . . . is admissible in subsequent proceedings to terminate parental rights[,] [t]he trial court must also consider . . . evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding.*

In re Ballard, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)

(citation omitted).

N.C. Gen. Stat. § 7B-1109 directs that the hearing on termination of parental rights be conducted by the trial court sitting without a jury, and that the court "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(a), (e) (1999). On review, if clear and convincing evidence in the record supports the trial court's findings and conclusion that neglect continued to exist at the time of the termination proceedings, then our Court will not reverse the decision of the trial court, even though contrary evidence may be presented at the hearing. *In re Allred*, 122 N.C. App. 561, 568, 471 S.E.2d 84, 88 (1996).

Respondent first argues the trial court failed to find by clear, cogent and convincing evidence that the juvenile had been left in foster care for more than twelve months, as alleged by DSS in the 30 November 1999 petition. (Resp. 17) "A finding of any one of the separately enumerated grounds is sufficient to support a termination." *In re Frasher*, ___ N.C. App. ___, ___, 555 S.E.2d 379, 381 (2001) (citing *In re Taylor*, 97 N.C. App. 57, 387 S.E.2d 230 (1990)). See also N.C. Gen. Stat. § 7B-1111(a) (1999). In the case before us, the trial court made findings of fact about the considerable amount of time the juvenile spent out of respondent's home; however, the trial court based its conclusion to terminate respondent's parental rights upon a finding of neglect, pursuant to

N.C. Gen. Stat. § 7B-1111(a)(1). Because N.C. Gen. Stat. § 7B-1111(a)(2) is not the basis for the trial court's termination of respondent's parental rights, this argument is without merit.

Respondent also argues that the trial court "allowed relitigation of the old neglect rather than making new findings relevant to the time of the hearing, and considering changed circumstances and the likelihood of the repetition of neglect." Further, respondent claims the trial court ignored certain evidence, including testimony that the juvenile loves his mother and that she loves him. We disagree.

The trial court found that after the 20 February 1997 neglect adjudication based upon the juvenile's failure to thrive, conditions affecting the juvenile remained unchanged in that respondent continued to neglect the juvenile by failing "to take steps to reacquire custody of her son" despite the fact that she had "numerous opportunities to better her situation." Evidence presented by petitioner at the termination hearing tended to show that respondent failed to take initiative or attempt to access services offered to her through DSS to further develop the parent/child relationship. The foster care case worker testified that "[f]or the most part [respondent] would try to initiate involvement with collateral and service providers around [the] time that [DSS was] going to have a court review; and then shortly after that court review, she would revert back to not following through." A representative from Person County Family Connections testified that out of twenty-six home visits, respondent missed twelve and

that respondent had "eighteen services offered to her . . . through nine different agencies," but failed to access or follow through with any of them.

Although evidence presented on behalf of respondent at the hearing tended to show, and the trial court found as fact, that respondent had recently married, become employed, completed a course of counseling and initiated a short term educational program, the trial court's findings stated the court "presumes that these changes are temporary[.]" "'[E]vidence of changed conditions must be considered in light of the history of neglect by the parent[] and the probability of a repetition of neglect.'" *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citation omitted). The trial court further found that based upon respondent's "previous history on initiating and then abandoning services, the [trial court] has no reason to believe that [respondent] will follow through with these positive changes[.]" Also, the trial court found that these changes were "initiated only since the filing of [the parental termination] petition, and in fact, only after notice of hearing of this petition was served[.]"

Finally, although evidence presented at the hearing tended to show respondent loves her child and he loves her, "the fact that [a] parent loves or is concerned about his child will not necessarily prevent the court from making a determination that the child is neglected." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. The trial court found that respondent's actions after the initial neglect adjudication were "not sufficient . . . to assist

[the juvenile] in his social, physical, psychological or personal development[,]" and determined that he remained a neglected child.

We find there is clear and convincing evidence to support the trial court's findings of fact in the record and conclusion of law terminating respondent's parental rights. Respondent's first assignment of error is overruled.

II.

Respondent argues in her second assignment of error that the trial court erred in determining that it was in the best interests of the juvenile that respondent's parental rights be terminated because "there was not clear, cogent and convincing evidence that [the juvenile's] need for permanency could not be met by [r]espondent."

Once a trial court determines at the adjudication stage that a condition permitting termination of parental rights exists, the court moves to the dispositional stage and

the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110 (1999). Upon review, our Court must determine whether at the dispositional stage the trial court abused its discretion in ordering the termination of respondent's parental rights. *In re Nesbitt*, ___ N.C. App. ___, ___, 555 S.E.2d 659, 662 (2001) (citing *In re Brim*, 139 N.C. App. 733, 535 S.E.2d 367 (2000) and *In re Young*, 346 N.C. 244, 485 S.E.2d 612 (1997)).

In this case, respondent argues that the juvenile needs

permanency and that respondent is "ready, able and willing to provide that permanency to" the juvenile. Respondent argues that testimony by the juvenile's foster mother shows that respondent "zealously visit[ed] and communicat[ed] with [the juvenile] even after DSS intended to seek termination of [respondent's] parental rights[.]" Although respondent states that the juvenile loves her and she loves him and that the juvenile "wants to go home to his mother," the fact that a parent still loves and has affection and concern for the child does not preclude termination of parental rights. *In re Montgomery*, 311 N.C. at 109, 316 S.E. 2d at 252.

"[W]here there is a reasonable hope that the family unit within a reasonable period of time can reunite and provide for the emotional and physical welfare of the child, the trial court is given discretion not to terminate rights." *Id.* However, after almost three years of continued efforts by DSS to reunite the family, the trial court found that "[w]ith [respondent's] previous history on initiating and then abandoning services, the Court has no reason to believe that [respondent] will follow through with these positive changes, and ever become an appropriate parent for this child."

The trial court's conclusion that it would be in the best interests of the juvenile for respondent's parental rights to be terminated was also based on the court's finding that the juvenile's guardian ad litem testified "that it would be in the best interests of [the juvenile] to have the parental rights of the [respondent] terminated, so [the juvenile] could be placed in a

permanent placement[.]” Such a finding is supported by the guardian ad litem's testimony that the juvenile

needs permanency. Looking at the best interest of [the juvenile], the only way that permanency can be achieved for [the juvenile] . . . would be for [respondent's] parental rights to be terminated so that [the juvenile] can be adopted by a stable family. . . . He's five years old. . . . and [has] had no stable home for basically his entire life. . . . [T]he bottom line remains that [respondent is] still not in a position where she can reassume custody of [the juvenile].

We find the trial court did not abuse its discretion in determining that it was in the best interests of the juvenile to terminate the parental rights of respondent. Respondent's second assignment of error is overruled.

We affirm the order of the trial court terminating respondent's parental rights.

Affirmed.

Judges GREENE and THOMAS concur.

Report per Rule 30(e).