NO. COA05-1433

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

IN THE MATTER OF:

A.A.H. and S.L.H., Minor Children.	Yadkin County No. 02 J 58, 59

Appeal by Respondent father from order entered 17 May 2005 by Judge Mitchell L. McLean in Yadkin County District Court. Heard in the Court of Appeals 6 June 2006.

Robert W. Ewing for Petitioner-Appellee Yadkin County Department of Social Services.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall for Respondent-Appellant father.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Katherine T. Lange for Appellee Guardian ad Litem.

STEPHENS, Judge.

Respondent father ("Respondent") appeals from the trial court's order terminating his parental rights to the minor children, A.A.H. and S.L.H. For the reasons which follow, we affirm.

I.FACTUAL AND PROCEDURAL BACKGROUND

Respondent is the father of two juveniles, A.A.H, born 14 August 1994, and S.L.H., born 12 June 1995. On 29 October 2002, the Yadkin County Department of Social Services ("DSS") filed a

juvenile petition alleging that A.A.H. and S.L.H. were neglected in that they did not receive proper care, supervision, or discipline, and were dependent in that they needed assistance or placement because they had no parent, guardian, or custodian responsible for their care. On 5 November 2002, the juveniles were placed in the temporary custody of DSS. In an adjudication order filed 27 January 2003, Judge David V. Byrd concluded that "[r]easonable efforts toward reunification with [Respondent] are not required and shall cease." In juvenile orders filed 11 April and 3 September 2003, the presiding judges determined that "[a]s to [Respondent], reasonable efforts to prevent or eliminate the need for placement would clearly be futile or would be inconsistent with the children's health, safety and need for a safe permanent home within a reasonable time." After a permanency planning review hearing, Judge Mitchell L. McLean filed an order on 23 February 2004 in which he determined that the best plan for the juveniles was to terminate the parental rights of Respondent.

On 24 May 2004, DSS filed a petition to terminate Respondent's parental rights.[1] The petition alleged, *inter alia*, that (1) prior to his incarceration, Respondent had little contact with his children, and the children were passed from one relative to another; (2) since his incarceration, Respondent has had little contact with his children; (3) Respondent has a long history of criminal activity and convictions, including breaking and entering,

[1]Prior to the termination hearing, the mother of the children voluntarily relinquished her parental rights.

larceny, obtaining property by worthless check, and conspiracy to commit second degree murder; and (4) Respondent was transferred from a medium security to a close security correctional facility due to infractions that he committed while incarcerated.

The petition further alleged that grounds existed to terminate Respondent's parental rights in that (1) Respondent had neglected his children as that term is defined in N.C. Gen. Stat. § 7B-101(15); (2) Respondent had willfully abandoned his children during the six consecutive months immediately preceding the filing of the petition; (3) Respondent is incapable of providing for the proper care and supervision of his children, such that they are dependent, and such incapability will continue for the foreseeable future; and (4) Respondent had willfully left his children in foster care for more than twelve months without showing that reasonable progress under the circumstances had been made in correcting the conditions which led to their placement in the custody of DSS.

Hearings on the petition were held on 30 November 2004, 25 February 2005, and 19 April 2005. Present and testifying at the hearings were Respondent; the mother of the juveniles ("Mary"); Ronald Avery, a program supervisor at the Alexander Correctional Institution; Teresa Pardue, a child support supervisor; Cathy Troutner, a social worker with DSS; Respondent's mother; Lynn Moree, a child and family therapist; Heather Cain, a child and juvenile counselor; and the minor children. At those hearings, evidence pertinent to the termination of Respondent's parental rights tended to show the following:

Respondent and Mary attended school together and started dating in school. Mary gave birth to A.A.H. on 14 August 1994, and in late 1994, Respondent and Mary were married. Respondent and Mary were both fifteen years old at the time. After the marriage, Respondent and Mary lived with Mary's mother, stepfather, and brother. S.L.H. was born on 12 June 1995. Approximately six months later, Respondent, Mary, and the two children moved in with Respondent's mother. At that time, Respondent was not employed, and the couple supported their children with help from Mary's mother and Respondent's parents. After living with Respondent's mother for a few months, the couple and their children moved into their own home. During this time Mary was not working and Respondent was sporadically employed. Less than one year later, Mary moved with her two children back to her mother's house. She testified that

> [b]etween getting the crap beat out of you and somebody coming in there being drunk and laying on the couch, and your daughter . . . getting slapped in the mouth for waking him up. And my dad came in . . . because I had a black eye. And his family come over raising Cain . . . it wasn't working out so we left.

Mary testified further that while they were separated, Respondent provided little support and did not make much of an effort to see his two girls. In the fall of 1996, Mary and her mother got into an argument and her mother kicked her out of the house. As a result, Mary and Respondent signed a written custody agreement giving custody of both girls to Respondent's mother.

After the girls had stayed with Respondent's mother for approximately one year, Mary again tried to care for her children. They moved in with Respondent's brother, Gabriel, and his wife, Esmerelda. Respondent did not move in with his wife and children, and did not visit them during the time that the three lived there. After living with Gabriel and Esmerelda for approximately four months, Mary and Respondent signed a written custody agreement giving custody of both girls to Gabriel and Esmerelda.

Once custody of the children was relinquished to Gabriel and Esmerelda, Mary moved to High Point, where she worked as an exotic dancer. Overall, the children were cared for by their aunt and uncle for approximately four and one-half years.

Ronald Avery, a program supervisor at the Alexander Correctional Institution and Respondent's case manager, described Respondent's history of incarceration. He testified that on 14 December 1999, Respondent was sentenced to sixteen to twenty months for obtaining property by false pretenses and larceny. Respondent was later sentenced, on 18 July 2000, to seventy to ninety-three months on two counts of conspiracy to commit second degree murder. Avery testified that Respondent works as a janitor in prison and earns forty cents per day. Respondent has also consistently received money from friends and family while incarcerated.

According to Avery, Respondent has committed fourteen infractions for violating prison rules, including (1) disobeying orders, (2) provoking assault, (3) having unauthorized funds, (4) using profane language, (5) damaging state property, and (6)

possessing illegal substances. As a result of these infractions, Respondent was transferred from a medium custody facility to a close custody facility.

Additionally, Avery testified that inmates can purchase pens, paper, and stamps from the canteen, and that there are no prison rules which would prevent an inmate from sending home a birthday or Christmas card. There is likewise no prohibition against sending money home for child support.

Teresa Pardue, a DSS child support supervisor, testified regarding child support agreements and the general welfare of the children. She said that on 16 September 1996, Respondent signed a Voluntary Support Agreement for A.A.H. and S.L.H. to pay support of $68.00 per week. This amount was later reduced to $40.00 per week. Respondent last made a support payment on 10 March 1997, and there remains a total support arrearage of $2,443.00.

Cathy Troutner, a social worker with DSS, testified that DSS first received a report concerning A.A.H. and S.L.H. on 18 October 1995, when Mary was offered case management services. Since that time, DSS has been involved with the children, except for times when the children have lived outside of Yadkin County. In September 1996, Respondent and Mary signed a custody agreement giving Respondent's mother "full and complete custody of the girls until such time as the parties would mutually agree otherwise." Later, on 16 April 1997, Respondent and Mary signed a custody agreement giving custody of the children to Gabriel and Esmerelda. This agreement was in place for around four years.

With regard to Respondent's communication with his children, Troutner testified that during the history of court proceedings, she gave Respondent her work phone number and asked him to call her collect so that they could discuss the status of his children. Troutner never received a call from Respondent. On 27 October 2003, she received a card and picture, and on 3 September 2004, she received two letters, all of which Respondent wanted delivered to his children. Those were the only communications from Respondent to his children of which Troutner was aware.

Lynn Moree, a child and family therapist, testified that she began working with A.A.H. in January 2003 to help the child overcome a low grade depression and other symptoms resulting from situations encountered in her childhood. Moree testified that A.A.H. has "made considerable improvement over the last two years[]" and that "[s]he's made some improvements in her ability to trust . . .[and] in her ability to sleep." During their therapy work, "her relationship with her father only came up one or two times." Moree further testified that A.A.H.'s current placement is potentially permanent and that if the adoptive parents allow it, A.A.H. could continue her therapy with Moree.

Heather Cain, a child counselor, testified that she began working with S.L.H. in March 2003 to help the child overcome an adjustment disorder and oppositional defiant disorder. Cain further testified that S.L.H.'s "biggest needs are for stability and structure, just to have loving and consistent parenting so that she can continue to work on feeling secure . . . having a stable

home where she gets the nurturing and the love that she desperately needs is going to be integral to her success." During their work together, S.L.H. has mentioned her father on only one occasion. Like Moree, Cain testified that she could continue to work with S.L.H. if the child's placement were to become permanent.

A.A.H. testified that she does not remember seeing her father and does not remember living with her paternal grandmother. She did remember living with Esmerelda, her paternal aunt, but did not remember seeing her father while she lived there. Overall, she testified that she does not remember anything about her father and did not know how long it has been since she last saw him. S.L.H. testified that she remembers seeing her father when her Aunt Tina took her to see him, but that it was a "fuzzy memory[.]" However, she did not remember her paternal grandmother and did not remember when her father and mother lived together.

After the evidentiary hearings were concluded, in an order filed 17 May 2005, Judge Mitchell L. McLean made the following findings of fact based on clear, cogent and convincing evidence: (1) Respondent entered a voluntary support agreement on 16 September 1996, and upon incarceration, there was an arrearage in his support payments of at least $2,443.00; (2) Respondent's arguments with Mary resulted in his assaulting her, and one time assaulting one of the children; (3) on 24 September 1996, Respondent and Mary entered into a written custody agreement granting exclusive care and custody of both children to Respondent's mother; (4) this agreement lasted until January 1997,

when the parents reconciled and the children lived with them; (5) the parents separated on 16 April 1997, and entered into another written custody agreement giving full and exclusive custody of both children to Esmerelda and Gabriel, a paternal aunt and uncle, and both parents agreed to pay $40.00 per week for child support; (6) the aunt and uncle maintained custody of the children for four years, and the children were never again in the custody of their parents; (7) Respondent has a criminal record, including a conviction on two counts of conspiracy to commit second-degree murder, for which he is serving a prison sentence of seventy to ninety-three months; (8) since he has been incarcerated, Respondent has committed fourteen infractions, including disobeying orders, provoking assault, damaging state property, and possessing controlled substances; (9) in prison, he works as a janitor earning $0.40 per day; as of 22 November 2004, he had received more than $3,500.00 in gifts from friends and family; and he had $199.25 in his prison account; (10) Respondent has sent no money to his children while he has been incarcerated, and has had no contact, telephone calls, or correspondence with them other than one visit, one card, and two letters; (11) Respondent has maintained regular contact with his mother; and (12) Respondent acknowledges that his father is a convicted child molester, but testified that he would not hesitate to take his children around his father.

Based on the foregoing findings of fact, the trial court concluded that grounds existed to terminate Respondent's parental rights, in that (1) having the ability and means to provide some

financial support for his children, Respondent failed to do so; (2) prior to incarceration, he neglected his children by failing to provide any consistent care or stability resulting in relatives rearing them for more than four years; (3) having the means and ability to regularly communicate with his children or to inquire about their welfare, he failed to do so; (4) he has abandoned his children pursuant to N.C. Gen. Stat. § 7B-1111(a)(7)[2]; and (5) he has neglected his children pursuant to N.C. Gen. Stat. § 7B-1111(a)(1)[3] and such neglect is likely to continue in the future.

The trial court further determined that "there is no reasonable hope that within a reasonable time [Respondent] can create the conditions to provide for the emotional and physical needs of these children[,]" and that it is in the best interest of the children to terminate Respondent's parental rights. Respondent appeals.

II. QUESTIONS PRESENTED

By his first assignment of error, Respondent argues that the trial court did not have subject matter jurisdiction because it did not comply with the timing mandates set forth in N.C. Gen. Stat. §. 7B-1109. That statute provides in relevant part that

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[2]The trial court's order concludes that Respondent has "abandoned his children pursuant to G.S. 7B-111(a)7[.]" Since there is no such statute, and N.C. Gen. Stat. § 7B-1111(a)(7) addresses abandonment, it is clear that the trial court's order simply contains a typographical error.

[3]The trial court's order concludes that Respondent has "neglected his children pursuant to G.S. 7B-111(a)1[.]" Since there is no such statute, and N.C. Gen. Stat. § 7B-1111(a)(1) addresses neglect, it is clear that, in this instance as well, the trial court's order simply contains a typographical error.

> (a) [t]he hearing on the termination of parental rights . . . shall be held . . . no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time.

N.C. Gen. Stat. § 7B-1109(a) (2005). In this case, the petition to terminate Respondent's parental rights was filed on 24 May 2004, and the initial hearing was held on 30 November 2004, one hundred ninety days later. Additional hearings were held on 25 February 2005 and 19 April 2005. The order terminating Respondent's parental rights was filed on 17 May 2005, almost one year after the initial petition was filed. Respondent contends that these delays constitute prejudice *per se* and that as a result, he is entitled to a new hearing. We disagree.

This court has recently held that in order to reverse a trial court's order because of a violation of N.C. Gen. Stat. § 7B-1109(a), Respondent must demonstrate prejudice resulting from the delay. *In re S.W.*, ___ N.C. App. ___, 625 S.E.2d 594, *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (June 29, 2006)(No. 101P06). The holding in *S.W.* extended the interpretation of N.C. Gen. Stat. § 7B-1109(a) to conform with a long line of cases interpreting N.C. Gen. Stat. § 7B-1109(e). This line of case law requires a showing of prejudice resulting from delay to warrant reversal. *See, e.g., In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424, *disc. review denied*, 359 N.C. 632, 616 S.E.2d 538 (2005). In this case, Respondent did not demonstrate that the delay in holding the termination hearing caused prejudice to himself, his children, or

to the children's potential adoptive family. Absent a showing of prejudice, the order of a trial court will not be reversed. Accordingly, this assignment of error is overruled.

Respondent next argues that the trial court erred in allowing witnesses to testify regarding statements made by the juveniles, in violation of his Sixth Amendment right to confrontation. For the reasons which follow, this assignment of error is dismissed.

The North Carolina Rules of Appellate Procedure provide in relevant part that "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1). In support of this argument, Respondent cites to "p. 281 et seq." Contained on these pages is the testimony of the two juveniles who are the subject of the termination proceeding and the closing statements made by counsel. Respondent makes no effort to direct our attention to the testimony of other witnesses to which he now objects. Consequently, Respondent has left this Court to sift through 280 pages of testimony to try to determine if improper testimony was given and if the trial court improperly overruled any objection Respondent may have made to this testimony. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Therefore, this assignment of error is dismissed.

Moreover, even if Respondent had directed our attention to the pages on which the allegedly improper testimony can be found, his Sixth Amendment argument clearly fails. "A termination of parental rights hearing is a civil rather than criminal action, with the right to be present, to testify, and to confront witnesses subject to 'due limitations.'" *In re Faircloth*, 153 N.C. App. 565, 573, 571 S.E.2d 65, 71 (2002)(citations omitted). Since a termination of parental rights hearing is a civil action, the Sixth Amendment is not applicable. *In re D.R.*, 172 N.C. App. 300, 616 S.E.2d 300 (2005) (citing *Faircloth*, 153 N.C. App. at 573, 571 S.E.2d at 71). Accordingly, this assignment of error has no merit.

Respondent next contends that the trial court lacked subject matter jurisdiction because the petition to terminate Respondent's parental rights was not timely filed under N.C. Gen. Stat. § 7B-907. That statute provides in pertinent part that

> [i]f a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days.

N.C. Gen. Stat. § 7B-907(e) (2005). "[T]he time limitation specified in N.C. Gen. Stat. § 7B-907(e) is directory rather than mandatory and thus, not jurisdictional." *In re C.L.C.*, 171 N.C. App. 438, 445, 615 S.E.2d 704, 708 (2005), *aff'd and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006)(quoting

In re B.M., 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005)). As such, absent a showing of prejudice, the trial court will not be reversed. *C.L.C.*, 171 N.C. App. at 445, 615 S.E.2d at 708.

In this case, the Permanency Planning Review hearing was held on 16 February 2004, and the trial court ordered Petitioner to file a Petition for Termination of Parental Rights within sixty days of that hearing. The petition to terminate Respondent's parental rights was then filed on 24 May 2004, ninety-eight days after the Permanency Planning Review hearing, in violation of N.C. Gen. Stat. § 7B-907(e).

Although this violation occurred, Respondent has not demonstrated, nor has he attempted to demonstrate, any prejudice suffered by any party. Since Respondent has not demonstrated prejudice, we hold that he is not entitled to a reversal of the trial court's order based on Petitioner's failure to comply with this statutory deadline. Accordingly, this assignment of error is also overruled.

By his next assignment of error, Respondent argues that the petition to terminate parental rights does not allege sufficiently specific facts to support termination of his parental rights. For the following reasons, we hold that this assignment of error was not properly preserved, and is therefore dismissed.

"The Rules of Civil Procedure apply to proceedings for termination of parental rights[.]" *In re McKinney*, 158 N.C. App. 441, 444, 581 S.E.2d 793, 795 (2003). In essence, Respondent urges

this Court to review a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Rule 12 provides in pertinent part that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) (2005). However, a 12(b)(6) motion cannot be raised for the first time on appeal. *Collyer v. Bell*, 12 N.C. App. 653, 184 S.E.2d 414 (1971). Moreover, the Rules of Appellate Procedure provide in pertinent part that

> [i]n 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1). In this case, Respondent, in his response to the petition to terminate parental rights, raised a defense under Rule 12(b)(6). However, Respondent failed to obtain a ruling by the trial court on the motion. Therefore, error was not properly preserved under Rule 10(b)(1) of the Appellate Rules and is not properly before this Court. See *In re Estate of Montgomery*, 137 N.C. App. 564, 567, 528 S.E.2d 618, 620 (2000)("Respondent's motion to dismiss, . . . was not treated as a

motion for summary judgment and, because the record contains no ruling on the motion, we do not address the issue[.]"). Accordingly, this assignment of error is dismissed.

Respondent next argues that the trial court erred in terminating his parental rights on grounds not alleged in the petition.

In the termination petition, DSS alleged that (1) Respondent neglected the juveniles as that term is defined in N.C. Gen. Stat. § 7B-101(15); (2) Respondent willfully abandoned his children during the six consecutive months immediately preceding the filing of the termination petition; (3) Respondent is incapable of providing for the proper care and supervision of the juveniles, such that they are dependent and such incapability will continue for the foreseeable future; and (4) Respondent left the juveniles in foster care for more than twelve months without showing reasonable progress under the circumstances to correct those conditions which led to their placement in foster care.

In the termination order, the trial court concluded that grounds existed to terminate Respondent's parental rights in that (1) having the ability and means to provide some financial support for his children, he failed to do so; (2) during the time before he was incarcerated, he and the children's mother neglected their children by failing to provide any consistent care or stability resulting in relatives rearing them for more than four years; (3) having the means and ability to regularly communicate with his

children or to inquire about their welfare, he failed to do so; (4) he abandoned his children pursuant to N.C. Gen. Stat. § 7B-1111(a)(7); (5) he neglected his children pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); and (6) it is likely that Respondent would continue to neglect the children in the future.

Respondent is correct that the termination petition did not include an allegation based on Respondent's failure to support his children. However, we are not persuaded by Respondent's argument that the failure of the trial court to state in its order the weight given to each termination factor precludes our review. Respondent cites no legal authority, and our research discloses none, to support his argument. On the contrary, this Court has held that "[a] finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003) (citing *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984)).

In this case, even without the trial court's conclusion that Respondent failed to support his children, there remain sufficient grounds enumerated in the court's additional conclusions to support the termination of Respondent's parental rights. Accordingly, this assignment of error is overruled.

In his next assignment of error, Respondent contends that the trial court lacked subject matter jurisdiction because no copy of any order by which Petitioner-Appellee was granted custody of the

minor children was attached to the motion to terminate parental rights as required by law. North Carolina General Statute 7B-1104(5) provides that a petition or motion to terminate parental rights shall contain "[t]he name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion." N.C. Gen. Stat. § 7B-1104(5) (2005).

Respondent cites *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), to support his contention that failure to comply with this statutory mandate divests the trial court of subject matter jurisdiction. Respondent's reliance on *Z.T.B.* is misplaced. In a subsequent case, this Court, relying on "precedential authority[,]"[4] determined that, absent a showing of prejudice,

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[4]See *In re Joseph Children*, 122 N.C. App. 468, 471, 470 S.E.2d 539, 541 (1996)(citation omitted), in which respondent claimed that she was denied assistance of counsel because her summons did not contain the statement "parents may contact the clerk immediately to request counsel," as required by statute. This Court determined that, although the notice requirement was not specifically complied with, the Court did "not, however, believe the discrepancy is material in this case so as to result in any prejudice to the respondent." *Id.* (Citation omitted). In making this determination, the Court held that although the statutory language was missing, the notice "supplied information that if seen by respondent would inform her of the petition filed against her, her need to answer the service of process, the availability of counsel if she was indigent, as well as the phone number of the Deputy Clerk of Juvenile Court[.]" *Id.* at 472, 470 S.E.2d at 541. Additionally, in *Humphrey*, 156 N.C. App. at 539, 577 S.E.2d at 426, this Court found that a violation of N.C. Gen. Stat. § 7B-1104(7), where the petition or motion for the termination of parental rights did not include a statement that it had not been filed to circumvent the Uniform Child-Custody Jurisdiction and Enforcement Act, did not automatically warrant reversal because "under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced[.]"

failure to comply with N.C. Gen. Stat. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction. *In re B.D.*, ___ N.C. App. ___, ___, 620 S.E.2d 913, 918 (2005), *disc. review denied*, ___ N.C. ___, 628 S.E.2d 245 (2006)(citation omitted).

We agree with the determination in *B.D.*, and for the following reasons, overrule Respondent's assignment of error. In the present case, as in *B.D.*, Respondent was not able to show that he was unaware of the placement of his children at any point during the case. Moreover, from the Record on Appeal, it is apparent that Respondent was represented by counsel throughout the process and that Respondent was present at the initial and review hearings impacting his parental rights. After evaluating these facts, we believe that Respondent has been unable to demonstrate any prejudice from the failure to attach a copy of the custody order to the petition to terminate Respondent's parental rights. Accordingly, this assignment of error is overruled.

Respondent next contends that the trial court lacked subject matter jurisdiction to terminate his parental rights because no summons was ever issued to the juveniles or to DSS, as required by North Carolina law.

North Carolina General Statute 7B-1106 provides in pertinent part that

> upon the filing of the petition . . . [a] summons shall be directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

> (1) The parents of the juvenile;
>
> . . . .
>
> (4) Any county department of social services or licenced child-placing agency to whom a juvenile has been released by one parent . . . or any county department of social services to whom placement responsibility for the child has been given by a court of competent jurisdiction; and
> (5) The juvenile.
> Provided, no summons need be directed to or served upon any parent who,. . . has irrevocably relinquished the juvenile to a county department of social services or licensed child-placing agency[.] . . . . Except that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed, service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j).

N.C. Gen. Stat. § 7B-1106(a)(1), (a)(4), (a)(5) (2005).

Respondent's argument fails for two reasons. First, Respondent's argument, and our research, fails to provide any authority to support his contention that the statute in question in any way impacts subject matter jurisdiction. Rather, this statute was intended to confer personal jurisdiction upon the trial court. *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005).

Additionally, a party appealing from a judgment of a trial court must be a "party aggrieved[.]" *Id.* at 8, 616 S.E.2d at 269 (Citations omitted). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Culton v. Culton*, 327 N.C. 624, 625-26, 398 S.E.2d 323, 324-25 (1990)(citations omitted). Even if Respondent intended to challenge the personal jurisdiction of the trial court, he has been

unable to demonstrate that he was "directly and injuriously" impacted by the fact that a summons was not issued to the agency or the minor children. Accordingly, this assignment of error is also overruled.

By his next assignment of error, Respondent argues that the trial court erred by terminating his parental rights for not paying sufficient financial support while he was incarcerated. Since we have held that there were sufficient other grounds to support the trial court's termination of Respondent's parental rights, it is not necessary to reach the merits of this argument.

Respondent next argues that the trial court erred in finding that "there [was] no reasonable hope that within a reasonable time [Respondent] can create the conditions to provide for the emotional and physical needs of the children." We disagree.

In termination of parental rights cases, the burden "shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2005). "Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *In re C.C.*, ___ N.C. App. ___, ___, 618 S.E.2d 813, 817 (2005) (quoting *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338 (1985)(citation omitted)). Findings of

a trial court are conclusive on appeal if they are supported by competent evidence, even when conflicting evidence would support different findings. *In re Hughes*, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

Respondent's lone argument on this issue is that he is likely to soon be released from prison, and upon release he will be available to devote time to the care of his children. Respondent incorrectly equates availability with the ability to care for the emotional and physical needs of a child, and thus his argument is not persuasive. Although Respondent is correct that he will likely soon be available, the trial court's findings of fact and the evidence upon which those findings are based demonstrate that Respondent is not prepared to provide for the needs of his daughters. For example, the findings and evidence establish that (1) Respondent failed to support his children prior to his incarceration; (2) Respondent, on two separate occasions, signed custody of his children over to other members of his family; (3) Respondent has an extensive criminal history, and his continued behavior of committing infractions while incarcerated demonstrates reasons to question his ability to abide by societal norms; (4) Respondent failed to regularly communicate with his children while he was incarcerated and visited with them only once in a four-year period; and (5) although Respondent's father is a convicted child molester, Respondent testified that he would not hesitate to take his children around his father.

Based on this evidence, we hold that the trial court did not err in concluding that Respondent will not, within a reasonable time, be able to create necessary conditions to provide for the emotional and physical needs of his children. Accordingly, this assignment of error is overruled.

By his next assignment of error, Respondent contends that the trial court erred in finding that he had abandoned his children when he was incarcerated and Petitioner did not make reasonable efforts to reunite him with his children. He argues the court did not find that the abandonment was willful, and that the findings of fact which support abandonment are based on conditions that existed before he was incarcerated, five years before the filing of the termination petition. This assignment of error is also overruled.

North Carolina law provides that a court may terminate parental rights if a "parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2005). This Court has determined that incarceration, standing alone, neither requires nor precludes a finding of willful abandonment. *In re McLemore*, 139 N.C. App. 426, 533 S.E.2d 508 (2000). "The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). The intent to willfully abandon a child is a question of fact to be determined by the evidence presented at

the termination hearing. *Id.* (Citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and [willfully] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *McLemore*, 139 N.C. App. at 429, 533 S.E.2d at 509 (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)(citation omitted)).

First, it is important to note that the trial court's findings of abandonment relate to Respondent's behavior while he was incarcerated, not his behavior prior to his incarceration. Moreover, the trial court's findings, supported by clear, cogent and convincing evidence presented at the hearing, establish that other than a visit in September 2002, a card he sent to both children on 27 October 2003, and letters sent to both children in September 2004, Respondent has had no contact with his children. Compounding the concerns over Respondent's lack of communication with his children is that, while incarcerated, Respondent maintained monthly contact with his mother, but in the last two years, communicated with his mother about the children on only two occasions.

Based on the evidence presented and the findings made by the trial court, we hold that the lower court did not err in concluding that Respondent abandoned his children under N.C. Gen. Stat. § 7B-1111(a)(7).

Next, Respondent argues that the trial court erred by not making specific findings of fact on the record and by improperly deferring the fact-finding duty to Petitioner's counsel. For the reasons which follow, this assignment of error is overruled.

North Carolina law provides:

> After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . . Any order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1110(a)(2005). However, "[t]he statute does not require that the trial court issue oral findings with regard to its determination." *J.B.*, 172 N.C. App. at 24, 616 S.E.2d at 278 (citation omitted). Moreover, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2005). Under North Carolina law, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2005). "Nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf." *J.B.*, 172 N.C. App. at 25, 616 S.E.2d at 279.

In the case currently before this Court, the trial judge did not make findings on the record. However, under the controlling statute and prior determinations by this Court, findings on the record are not required. Accordingly, this part of Respondent's

argument is without merit. Additionally, directing the prevailing party to draft the order is not prohibited by the North Carolina Rules of Civil Procedure, or their interpretation by our Courts. Therefore, it was not error for the trial court to allow Petitioner's attorney to draft the order.

Respondent's remaining assignments of error are dismissed for violations of Rule 10 of the North Carolina Rules of Appellate Procedure, which provides in part as follows:

> 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

N.C. R. App. P. 10(b)(1). When a party fails to object during trial, the trial court is not given a chance to rule on the objection, and thus, this Court has nothing to evaluate. Accordingly, the error may not be raised for the first time on appeal.

Although the following assignments of error are being dismissed for the same appellate rule violation, we find it instructive to comment on each.

By his second assignment of error, Respondent argues that his due process rights were violated when the court ordered his absence from the courtroom during the testimony of his daughters. In this case, not only did Respondent fail to object, his trial counsel

stipulated to Respondent's removal and indicated to the court that he had "talked with [Respondent] about that." Since Respondent did not object during the hearing, this question was not properly preserved, and therefore, this assignment of error is dismissed.

Respondent next contends that the trial court erred by taking judicial notice of the contents of the juvenile file, including prior orders, because those orders were not based on the same evidentiary standard as the standard required to terminate parental rights. When the trial court admitted the juvenile file and prior orders in evidence, Respondent's counsel did not object. Consequently, error was not preserved at the trial court and this assignment of error is also dismissed. Moreover, even if potential error at the lower court had been preserved, Respondent's argument has no merit because an identical argument has recently been rejected by this Court. *J.B.*, 172 N.C. App. at 16, 616 S.E.2d at 273.

In assignments of error four and five, Respondent argues that the trial court erred in allowing Heather Cain and Lynn Moree to testify regarding their diagnoses of A.A.H. and S.L.H. without any evidentiary foundation having been established for their expert testimony. Again, Respondent did not object at trial to the witnesses' testimony regarding their diagnoses. In fact, the only objection that Respondent made during the testimony of either witness was related to Moree's knowledge of the possibility of adoptive placement for A.A.H. Since no objection was made at

trial, error was not properly preserved and both assignments of error are dismissed.

Recognizing that he has failed to preserve assignments of error four and five for our review, Respondent urges this Court to employ plain error review to reach these issues. We decline to do so. It is well established that "plain error review is limited to criminal cases and is not applicable to civil cases." *In re L.M.C.*, 170 N.C. App. 676, 678, 613 S.E.2d 256, 257-58 (2005) (citing *Durham v. Quincy Mutual Fire Ins. Co.*, 311 N.C. 361, 367, 317 S.E.2d 372, 377 (1984)).

Finally, by his fifteenth assignment of error, Respondent argues that the trial court erred in failing to conduct a bifurcated adjudication and dispositional hearing. Respondent did not object to the court's procedures at trial. On the contrary, the following exchange occurred between the trial court, Mr. Randleman (counsel for Petitioner), and Mr. Zachary (counsel for Respondent):

> THE COURT: And is this, what you're getting ready to do, the witnesses you're getting ready to put up, for my edification, is this more for adjudication or disposition?
> MR. RANDLEMAN: This is for the purpose of disposition only.
>
> . . . .
>
> THE COURT: Okay, all right. And I believe the case law is such that we can co-mingle, so to speak, the two hearings.
> MR. RANDLEMAN: Yes, sir.
> THE COURT: All right. Do you have any objection to that, Mr. Zachary?
> MR. ZACHARY: Your Honor, I don't have any objection to that.

> . . . .
>
> THE COURT: All right. Just show by the record, for the record then, that was stipulated by counsel that we be allowed to call witnesses out of order at this stage for both the purposes of adjudication and/or disposition.

Since Respondent did not object, this assignment of error is also dismissed pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure.

For all the foregoing reasons, the district court's order terminating Respondent's parental rights is affirmed.

AFFIRMED.

Judges WYNN and GEER concur.

Report per Rule 30(e).