NO. COA06-1349

NORTH CAROLINA COURT OF APPEALS

Filed: 6 March 2007

IN THE MATTER OF:

M.E.H. Davidson County
No. 05 J 151

Appeal by respondent from order entered 19 July 2006 by Judge H. Thomas Church, in the District Court, Davidson County. Heard in the Court of Appeals 19 February 2007.

Charles E. Frye, III, for petitioner-appellee Davidson County Department of Social Services.

Richard E. Jester for respondent-appellant.

Laura B. Beck, Guardian ad Litem Attorney Advocate

WYNN, Judge.

Where an appellant fails to properly argue that the findings of fact are unsupported by clear, cogent, and convincing evidence, the findings are binding on appeal.[1] Here, Respondent failed to argue that the findings of fact are not supported by clear, cogent, and convincing evidence. Because the findings of fact are binding on appeal and those findings support the trial court's conclusions, we uphold the order terminating Respondent's parental rights.

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[1] *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The facts pertinent to the instant appeal are as follows: On 11 February 2004, Davidson County Department of Social Services (DSS) filed a petition alleging abuse, neglect and dependency of Respondent's seven-month old child, M.E.H. The petition alleged that Respondent, who was diagnosed as Schizo Affective, allowed two registered sex offenders including Jonathan Moses to reside in her home with M.E.H. and that while Respondent was sleeping on 20 December 2003, Moses took M.E.H. from her crib, removed her diaper and digitally penetrated her vagina. The petition also alleged that Respondent admitted that when she noticed M.E.H.'s diaper was on backwards, she suspected that the child had been molested; however, she did not report her suspicion to law enforcement nor did she take the child to a doctor. Moses, who later admitted to having sexually molested M.E.H., was still staying in the home with M.E.H. when a social worker went to respondent's home on 30 December 2003. The petition further alleged that Respondent allowed a registered sex offender, James Waller, Jr., to reside in her home in 2004. M.E.H. was taken from the home of Respondent, and placed in protective custody of DSS.

In May 2004, the trial court adjudicated M.E.H. abused, neglected and dependent. Respondent subsequently entered into a case plan with DSS, in which she agreed to maintain stable housing; continue weekly therapy classes at Daymark Recovery Services; keep her medication appointments with her doctor at Daymark Recovery Services; take her medication as prescribed; and successfully complete parenting classes. In March of 2005, Respondent

reaffirmed the goals of her original case plan and agreed to attend classes at SCAN (Stop Child Abuse Now).

The initial permanent plan of care for M.E.H. was reunification, but the court changed the plan to a concurrent plan of reunification and termination of parental rights in February of 2005, and then to termination of parental rights and adoption in August of 2005.

On 19 September 2005, DSS filed a petition to terminate the parental rights of Respondent and the putative father under N.C. Gen. Stat. § 7B-1111(a)(1)(neglect); N.C. Gen. Stat. § 7B-1111 (a)(2) (willfully left the child in foster care or placement outside the home); and N.C. Gen. Stat. § 7B-1111 (a)(3) (failure to pay a reasonable portion of the cost of care for the child). On 19 July 2006, the trial court concluded that grounds for termination of respondent's parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1). The trial court further concluded that it was in the minor child's best interest to terminate respondent's parental rights. The trial court also terminated the parental rights of the putative father, who does not appeal. Respondent appeals.

The issue on appeal is whether the trial court erred in terminating Respondent's parental rights based upon the finding of neglect.

Termination of parental rights involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). At the adjudicatory stage, "the petitioner has the burden of establishing by clear and convincing evidence that at least one

of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002). "If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child." *Id.* at 98, 564 S.E.2d at 602. The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *Id.*

A neglected juvenile, is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent." N.C.G.S. § 7B-101(15) (2006). To prove neglect in a termination case, there must be clear and convincing evidence (1) the juvenile is neglected within the meaning of N.C.G.S. 7B-101(15), and (2) "the juvenile has sustained 'some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment'" as a consequence of the neglect. *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). "

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard,* 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

If the child has been removed from the parents' custody before the termination hearing, and the petitioner presents evidence of prior neglect, including an adjudication of such neglect, then "[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." *Id.* at 715, 319 S.E.2d at 232. Thus, where "there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents." *In re Reyes,* 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000).

When, as here, a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). With respect to Respondent, the trial court found that M.E.H. had previously been adjudicated neglected, and there was a probability of future neglect if she were returned to respondent's custody.

Respondent asserts the "evidence presented, and the [f]indings of [f]act do not support the conclusion that [respondent] will probably neglect [M.E.H.] if their lives are reunited."

As to Respondent, the court found that she: (1) was diagnosed at Daymark with Dysthymic Disorder and Borderline Personality Disorder; (2) declined to participate in M.E.H.'s rehabilitation for certain developmental delays; (3) sporadically attended her appointments at Daymark in October of 2004 and in February of 2005; (4) abandoned her individual therapy and medication checks at Daymark since November of 2005; (5) stopped seeing her therapist and taking her medication because she felt like she did not need the therapy or the medication any more; (6) started to miss individual and group sessions at SCAN in February of 2005; (7) last attended an individual therapy session at SCAN in May of 2005 and did not complete the group therapy through the Parents and Partners program at SCAN; (8) successfully completed the Nurturing Family Program and training of the Partners in Parenting Program, but had missed five visits between December of 2004 and February of 2005, four visits in June and July of 2005, and four visits in August of 2005; and (9) failed to comply with provisions of her case plans and with "prior orders of this court that address the conditions that caused the juvenile to be adjudicated a neglected juvenile."

Although Respondent assigns error to these findings, she does not make any argument as to why they are unsupported by competent evidence. Indeed, she admits that she did not attend all of her meetings and visits, but points to the progress she did make. These arguments address questions of credibility and the weight of the evidence that may only be decided by the trial court. Consequently, Respondent has abandoned her assignments of error on

these issues, and they are deemed binding on appeal. *See In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence"). A review of the record and transcript shows the trial court's findings are based upon orders entered in the case and testimony from social workers and respondent.

Respondent nevertheless argues that the trial court ignored significant progress and, therefore, erred in concluding there was the probability of a repetition of neglect. Here, the trial court made findings that Respondent had made progress with her case plan and had been granted unsupervised visitation in December of 2004. The trial court found, however, that Respondent's improvements started to deteriorate as evidenced by the decrease in her attendance for therapy at Daymark and SCAN and in her medication checks.

We, therefore, conclude the trial court had clear, cogent, and convincing evidence to determine that M.E.H. had been subjected to a history of neglect and was likely to be similarly neglected in the future and that the findings are sufficient to show neglect. We further conclude that these findings of fact support the trial court's conclusion that grounds existed to terminate respondent's parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). *See, e.g., In re Davis*, 116 N.C. App. 409, 414, 448 S.E.2d 303, 306 (the parents' failure to "obtain[] continued counseling, a stable home, stable employment, and [attend] parenting classes" was sufficient

to show a probability that neglect would be repeated if the child were returned to the care of the parents), *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994); *In re Johnson*, 70 N.C. App. 383, 389, 320 S.E.2d 301, 305-06 (1984) (holding that improper care during a trial placement, a failure to make lifestyle changes, and sporadic attendance at counseling sessions constituted evidence of neglect).

Finally, the trial court did not abuse its discretion in concluding that it was in the best interests of M.E.H. to terminate Respondent's parental rights. Upon finding adequate grounds for termination of parental rights, the petitioner and the respondent may each offer relevant evidence as to the child's best interests. *In re Pierce*, 356 N.C. 68, 76, 565 S.E.2d 81, 86 (2002). The decision of whether to terminate parental rights is within the trial court's discretion. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 174, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). "[T]he child's best interests are paramount, not the rights of the parent." *In re T.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741, *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005).

Here, the trial court properly found that Respondent had neglected M.E.H and there was a probability of repetition of the neglect. Moreover, the evidence at the termination hearing demonstrated that the child was doing well in her foster home. During the disposition portion of the proceedings, social worker Twanna Robinson testified that M.E.H has made "tremendous progress" with regard to her speech delays since being in her foster home;

that she calls her foster parents "mom and dad[;]" and that M.E.H.'s foster parents are interested in adopting her. Further, the child's guardian *ad litem* testified that it would be in the child's best interests to terminate respondent's parental rights.

In light of the evidence presented during the termination proceedings and discussed above, we are unable to conclude that the trial court's determination that terminating the parental rights of Respondent was in the best interests of the child is arbitrary or manifestly unsupported by reason. Therefore, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).