

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1365

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN THE MATTER OF:

D.J.N.

New Hanover County
No. 05 J 506

Appeal by respondent from order entered 22 June 2006 by Judge Phyllis M. Gorham in New Hanover County District Court. Heard in the Court of Appeals 2 April 2007.

No brief for New Hanover County Department of Social Services, petitioner-appellee.

Terry F. Rose for respondent-appellant.

ELMORE, Judge.

Robin N. (respondent) appeals the district court's 22 June 2006 order terminating her parental rights. Respondent is the mother of D.J.N., born 1997. New Hanover County Department of Social Services (petitioner) first became involved with D.J.N. in March 2005, in response to a child protective services report alleging that the child was living in an injurious environment.

Father, (J.L.), who had legal custody, repeatedly sent D.J.N. to live with his maternal great-grandparents. Respondent also occasionally resides with her grandparents, depending on them for shelter and financial support. During petitioner's investigation,

it became clear that D.J.N. is a child with special needs including a range of behavioral problems which require occasional medication. Because of those needs, and their advanced age, the great-grandparents were unable to properly care for D.J.N. J.L. repeatedly sent the child into this environment despite specific warnings from petitioner that the great-grandparents were not capable of caring for D.J.N. J.L. has subsequently left D.J.N. in the care of his maternal great-grandparents and has had no further contact with petitioner during this investigation.

Petitioner's investigation also revealed that respondent has a persistent problem with drug abuse and addiction. Respondent acknowledges her problem, yet has never managed to complete treatment. She repeatedly tested positive for cocaine and other substances during petitioner's evaluation, despite the knowledge that she could not visit with D.J.N. until she was able to produce consecutive negative drug tests. Respondent was never capable of meeting that requirement and failed tests on 2 June 2005, 14 July 2005, 19 July 2005, 21 July 2005, and 7 August 2005. Because of these conditions, D.J.N. has been in the custody and care of foster parents and petitioner continuously since 2 May 2005. As late as April 2006, respondent admitted to social workers and D.J.N.'s Guardian ad Litem that she continues to be addicted to drugs, despite repeated attempts to seek treatment.

On 21 July 2005, D.J.N. was adjudicated dependent and neglected. The adjudication cites D.J.N.'s residing with his maternal great-grandparents and their inability to meet his needs,

as well as respondent's persistent substance abuse and resulting behavior, which is disruptive in the home of the grandparents. Petitioner filed a petition to terminate parental rights on 7 December 2005. The court appointed a Guardian ad Litem (GAL) for respondent on 23 February 2006. The termination hearing was held on 15 May 2006.

The trial court determined that adequate grounds existed to terminate respondent's parental rights. The court cited the previous adjudication of neglect and dependency; respondent's persistent substance abuse and addiction, and her resulting inability to be a parent to D.J.N.; and respondent's loss of parental rights to her other children which were also terminated due to her substance abuse. It is from this order that respondent appeals.

Respondent's first argument on appeal is that she was inadequately represented at the termination hearing because both she and her GAL failed to appear at the proceedings. Notice is not disputed by respondent; both she and her GAL had proper notice of the date and time of the hearing. Respondent contacted her attorney on the morning of the hearing to state that she was ill, showing that she recognized that the hearing was to be held on 15 May 2006. No documentation of the illness was provided to the court. No reason was given for the absence of the GAL.

Respondent contends that, because her GAL was not present, her legal interests were not adequately represented. However, counsel for respondent was present at the termination hearing; her legal

interests were clearly represented. Also, given the testimonies of the child's GAL and the various social workers assigned to the case, it is unlikely that the appearance of respondent's GAL would have made a difference in the outcome of the hearing. Additionally, it is respondent's responsibility to appear for the hearing when she had proper notice. Failure on her part to do so does not constitute reversible error. Accordingly, this assignment of error is without merit.

Respondent's second and tenth assignments of error involve violations of statutory time limits. Respondent first contends that the trial court committed prejudicial error in proceeding with the termination hearing after the statutory limit had passed. Additionally, respondent contends that the court violated her constitutional right to parent her child by failing to enter the order for termination within thirty days of the termination hearing.

This Court has repeatedly held that failure to comply with statutory limits in a juvenile custody case is not error *per se*. See, e.g., *In re T.S., III*, ___ N.C. App. ___, ___, 631 S.E.2d 19, 23 (2006). "Rather, we have held that the complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal. . . . The passage of time alone is not enough to show prejudice" *Id.* (quoting *In re S.N.H.*, ___ N.C. App. ___, ___, 627 S.E.2d 510, 513 (2006) (internal citations omitted). "Whether a party has adequately shown prejudice is always resolved on a case-by-case basis; however, determining

prejudice is not a rubric by which this Court vacates or reverses an order when, in our opinion, the order is not in the child's best interest." *In re As.L.G. & Au.R.G.*, 173 N.C. App. 551, 554, 619 S.E.2d 561, 564 (2005).

N.C. Gen. Stat. § 7B-1109(d) requires that the hearing for termination of parental rights be held within 90 days after the petition to terminate is filed. N.C. Gen. Stat. § 7B-1109(d) (2005). The petition to terminate in this case was filed on 7 December 2005. The termination hearing was not held until 15 May 2006. The delay is, as respondent asserts, two months outside of the statutory limit. However, a review of the events of the case largely explain the delay.

The termination hearing was initially scheduled for 16 February 2006, at which time respondent requested a court appointed attorney. That request was granted. Additionally, petitioner motioned for appointment of a GAL for respondent, which was granted on 23 February 2006. The matter was continued until 10 April 2006, which was the next available hearing date. At that time, respondent again requested a continuance due to lack of notice. The motion was allowed and the hearing date was set for 15 May 2006. These delays in the hearing date were the result of respondent's needs for representation and time.

Respondent also contends that she was prejudiced when the court failed to enter a written order within the statutory time limit. N.C. Gen. Stat. § 7B-1109(e) requires the court to enter a written order within thirty days of the termination hearing. N.C.

Gen. Stat. § 7B-1109(e) (2005). The court did not enter that order until July, again exceeding the statutory limits.

However, despite the trial court's failure to comply with the statutory time limits for holding the hearing and filing its written order, respondent has not shown that she was prejudiced by the delay. See *In re E.N.S.*, 164 N.C. App. 146, 153-54, 595 S.E.2d 167, 172 (2004), *cert. denied*, 359 N.C. 189, 606 S.E.2d 903 (2005). Respondent cites the inability to parent her child as prejudice. However, even before the hearing respondent had chosen not to take the necessary steps to address the substance abuse that had already led to the loss of that ability. The *status quo* of the family, with the child in foster care, and respondent having no visitation, was not interrupted. There was no prejudice in this delay. Accordingly, both the second and the tenth assignments of error are without merit.

Next, respondent assigns error to the failure of the trial court to grant her motion for continuance when both respondent and her GAL failed to appear at the termination hearing. A trial court judge's decision on a motion for continuance is reviewed under the abuse of discretion standard. *In re D.Q.W., T.A.W., Q.K.T., & J.K.M.T.*, 167 N.C. App. 38, 40, 604 S.E.2d 675, 676 (2004). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *Id.*, 604 S.E.2d at 676-77 (quoting

In re Humphrey, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (internal quotations and additional citations omitted)).

We have established that proper notice of the hearing was given. Respondent's previous motion for a continuance based on lack of notice was granted. Respondent had plenty of time to prepare her case and her attorney was present at the termination hearing. While no reason was given for the absence of the GAL, respondent's legal interests were clearly represented by her attorney. Under these circumstances, the denial of the motion for a continuance does not rise to the level of an abuse of discretion. Accordingly, this assignment of error is overruled.

Respondent's fourth and fifth assignments of error assert that there was insufficient evidence to show that the child was neglected by respondent, or that respondent was incapable of parenting her child. "The standard of appellate review of the trial court's conclusion that grounds exist for termination of parental rights is whether the trial judge's findings of fact are supported by clear, cogent, and convincing evidence, and whether these findings support its conclusions of law." *In re Nesbitt*, 147 N.C. App. 349, 351, 555 S.E. 2d 659, 661 (2001). "A single ground for termination is all that is required for proper termination." *In re R.R.*, ___ N.C. App. ___, ___, 638 S.E.2d 502, 505 (2006). If the court finds at least one ground for termination during the adjudicatory phase, the court moves to the dispositional phase of the hearing to determine the best interests of the child. See,

e.g., *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001).

A neglected child is one who "does not receive proper care, supervision, or discipline from [its] parent, . . . or who is not provided necessary medical care; . . . remedial care; or who lives in an environment injurious to [its] welfare . . ." N.C. Gen. Stat. § 7B-101(15) (2005). A prior adjudication of neglect, alone, is insufficient to support termination when the parent has been deprived of custody for some time prior to the trial. *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984). However, if there is a probability of repetition of neglect, then evidence of neglect subsequent to the prior adjudication is not required. *In re Pope*, 144 N.C. App. 32, 37, 547 S.E.2d 153, 156 (2001), *aff'd per curiam*, 354 N.C. 359, 554 S.E.2d 644 (2001).

In the case at hand there was a prior adjudication of neglect and dependence. The prior adjudication of neglect was based on respondent's continuous substance abuse. Respondent has repeatedly failed drug tests, despite her knowledge that doing so would result in her losing the ability to visit D.J.N. Respondent admitted to D.J.N.'s GAL as late as April 2006 that she was still addicted to cocaine and that she had not successfully completed any treatment options. Respondent's drug use and the likelihood of her continued drug use, as well as the great-grandparents' inability to care for a child with D.J.N.'s needs, clearly created an injurious environment. The drug addiction, which prompted the prior adjudication of neglect, is likely to continue into the foreseeable

future given respondent's repeated inability to seek help and complete treatment. Accordingly, the trial court's finding of neglect is affirmed. Because only one ground for termination is necessary to move forward to the dispositional phase of the termination hearing, there is no need to consider respondent's other arguments regarding the sufficiency of the evidence.

Respondent next contends that her constitutional rights to parent and care for her child were violated when the trial court refused to allow her visitation with D.J.N. until she had completed consecutive negative drug screens. However, the constitutional right to parent must be balanced with the requisite responsibilities required by parenthood.

The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citing *Lehr v. Robertson*, 463 U.S. 248, 257, 77 L. Ed. 2d 614, 624 (1983)). The justification for the paramount status is eviscerated when a parent's conduct is inconsistent with the presumption or when a parent "fails to shoulder the responsibilities that are attendant to rearing a child." *Id.*

Owenby v. Young, 357 N.C. 142, 145, 579 S.E. 2d 264, 266 (2003).

Respondent did have a constitutional right to parent her child. However, that right was effectively trumped when she chose to neglect D.J.N. because of her pervasive drug addiction. Respondent could have exercised her right to parent had she completed treatment for her drug addictions and acted in the best interests of her child. Respondent did not complete this treatment. She was not able to achieve negative results on any one

of the repeated drug tests. She chose not to seek or complete the necessary treatment, and therefore forfeited her right to parent D.J.N. Accordingly, this assignment of error is without merit.

Next, respondent argues that the trial court's findings of fact were recitation of testimony, and were therefore inadequate to support the conclusions of law and the termination of her rights. Respondent is correct in asserting that the trial court's findings of fact cannot be mere recitations of testimony: "verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505, n.1, 313 S.E. 2d 193, 195, n.1 (1984).

However, the findings of fact in this case do, in fact, include more than the recitation of testimony. The findings include the history of the case and of petitioner's involvement with respondent and D.J.N.; respondent's continuous drug use; the prior adjudications of dependency and neglect; the inability of the maternal great-grandparents to care for D.J.N.; the permanency planning hearing; respondent's contact with D.J.N.; and D.J.N.'s current living arrangements. These facts are based not only on testimony, but on reports of D.J.N.'s GAL and social workers, as well as on the record of past cases and related actions. The facts clearly support the conclusion of law that termination is in

D.J.N.'s best interest. Accordingly, this assignment of error must fail.

Finally, respondent argues that the trial court erred in determining that it was in the best interests of the child that respondent's parental rights be terminated absent a plan for adoption or future long-term care for D.J.N. In determining the best interests of the child, the court may consider the age of the child, the likelihood of adoption, the permanent plan for the child, the relationship between the child and the biological parents, and the child's relationship with prospective adoptive parents. N.C. Gen. Stat. § 7B-1110(a) (2005). "The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard." *In re Nesbitt*, 147 N.C. App. at 352, 555 S.E. 2d at 662.

The record of the case at hand clearly shows that the court considered the fact that plans for the adoption of D.J.N. were not yet concrete. There is still the possibility that D.J.N.'s prior foster parents will ask for his adoption. That possibility is only in question because there was a recent incident in which D.J.N. became assaultive toward his foster mother. However, this incident is indicative of the injurious environment in which D.J.N. has been raised. The incident also highlights the importance of finding an alternate environment for D.J.N. outside of respondent's care. D.J.N. is currently in foster care.

Plans for adoption are not the only consideration in the determination of a child's best interest. The trial court also

considered the lack of relationship with respondent, respondent's drug use, and the injurious environment created by that drug use. Thus, despite the lack of plans for adoption, the trial court did not abuse its discretion in determining that it is in D.J.N.'s best interest to terminate respondent's parental rights. Accordingly, this assignment of error is also without merit, and the decision of the trial court is affirmed.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).