NO. COA06-140

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

IN THE MATTER OF:

G.D.C.,
Minor Child.

Johnston County
No. 04 J 193

Appeal by respondents from order entered 28 July 2005 by Judge Resson Faircloth in Johnston County District Court. Heard in the Court of Appeals 23 August 2006.

Jennifer S. O'Connor for petitioner-appellee.

Richard Croutharmel for respondent-appellant mother.

Richard E. Jester for respondent-appellant father.

Elizabeth Myrick Boone for guardian ad litem.

GEER, Judge.

Respondents father and mother appeal from an order of the district court terminating their parental rights with respect to their minor child, G.D.C. On appeal, both respondents challenge the trial court's conclusions that grounds existed under N.C. Gen. Stat. § 7B-1111 (2005) to terminate their parental rights. We hold that the trial court's findings of fact fully support its conclusion that the parents neglected the child under N.C. Gen. Stat. § 7B-1111(a)(1) and that the court did not abuse its discretion in deciding that termination of parental rights was in

the best interests of the child. With respect to respondent father's contention that the trial court should have dismissed the termination petition filed by Johnston County Department of Social Services ("DSS") because DSS improperly obtained some of his medical records, the father has cited to no authority warranting such a sanction, and, in any event, we cannot conclude that the court abused its discretion in determining that exclusion of the records from evidence was a sufficient sanction. Accordingly, we affirm the trial court's order.

Facts

G.D.C. was born in November 2002 to respondents, who are unmarried half-siblings that share the same biological father. On 14 August 2003, DSS received a referral alleging that respondent father had become intoxicated while supervising G.D.C. and had physically attacked both G.D.C. and respondent mother. As a result of this incident, respondent father was convicted of assault on a female and assault on a child under 12, his probation was revoked, and he was incarcerated. The mother originally informed DSS and the court that the father had grabbed the child by the throat, but at the time of the termination hearing, she denied that he had done so.

Although DSS substantiated neglect, the child was not removed from the custody of the mother, and DSS instead began providing case planning and case management services to the family. In early October 2003, DSS developed a case plan for respondent mother pursuant to which she agreed to obtain treatment for domestic

violence and mental health issues because of her being diagnosed with bipolar disorder and post traumatic stress disorder. The mother further agreed not to allow the child's father in the presence of the child until he had addressed his substance abuse, domestic violence, and mental health issues. She agreed to contact law enforcement if respondent father attempted to see the minor child.

Respondent father entered into a Safety Assessment with DSS, which similarly provided that the father agreed not to be in the presence of the child until he addressed his substance abuse, mental health, and domestic violence issues. During the initial involvement of DSS, respondent father also acknowledged to DSS that he had a 13-year substance abuse problem, including the use of cocaine.

In late October 2003, a DSS social worker observed respondents together in a car with their child in the back seat. When the social worker tried to talk to the parents, the mother sped away. Respondents were ultimately stopped by the Johnston County Sheriff's Office after running a red light. The mother acknowledged that she knew that she was not supposed to allow respondent father to be in the presence of the child and that she drove off to avoid the social worker. As a result of this incident, the child was removed from respondents' custody on 31 October 2003 pursuant to a non-secure custody order. Neither respondent attended the non-secure custody hearing.

By the date of the subsequent adjudication and disposition hearings, respondent father was incarcerated. For the disposition hearing, DSS had difficulty locating respondent mother, who, at that time, was using controlled substances and had been arrested for a probation violation.

On 22 January 2004, the trial court entered an order adjudicating G.D.C. to be neglected and dependent. On the same date, the court entered a dispositional order requiring that the parents cooperate with DSS and comply with the case plan, that respondent mother obtain mental health counseling and follow through with all recommendations and referrals by the mental health center, that respondent mother attend domestic violence counseling and parenting classes, and that respondent father attend parenting, domestic violence, and anger management classes if available through the correctional system.

Because respondent father was not incarcerated in Johnston County, DSS maintained regular contact with the father's case worker at the prison facility to monitor the father's progress. On 22 April 2004, the court ordered that DSS cease reunification efforts with respondent father. While in prison, the father did not take advantage of domestic violence counseling, attended only seven hours of substance abuse treatment after February 2004, and had unresolved mental health issues. He did complete parenting classes and a cognitive behavior class. The father had a release date of November 2004. He was informed by a DSS social worker that

he could call her collect about his daughter and was provided with the address so that he could write the social worker.

Respondent mother did not have contact with DSS from the end of December 2003 until February 2004 and missed some of her visitation with the child. She agreed, however, to enter a program to address her substance abuse issues, was attending the Johnston County Mental Health Center regarding her mental health issues, and had been referred to a parenting program. At the time of a permanency planning hearing on 14 April 2004, the mother had completed the substance abuse program and parenting classes, and she was residing in a half-way house in Wake County where she had arranged to begin further substance abuse treatment.

In April 2004, however, respondent mother left the half-way house without notifying DSS after she had violated the house's visitation rules. The mother had stopped receiving substance abuse treatment, was not submitting to random drug screenings as she had agreed, and had stopped receiving mental health therapy and medication. From April 2004 until June 2004, she missed some of her visitation and did not maintain regular contact with DSS. She was dependent upon her new boyfriend for housing and support. She stopped all contact with DSS after the agency was relieved of further efforts toward reunification in July 2004.

On 12 October 2004, DSS filed a petition seeking to terminate respondents' parental rights. Respondent mother contacted a DSS social worker by telephone in November 2004 and was advised by the social worker as to what she needed to do to address the issues

that led to her child's removal from her custody. Respondent mother did not contact the DSS social worker any further after that telephone call. She gave birth to a second child in January 2005, at which time she tested positive for marijuana. She admitted to smoking marijuana during her pregnancy and admitted to a history of cocaine use.

Respondent father was released from prison in November 2004 and went to the Office of the Clerk of Superior Court to request appointed counsel for the termination of parental rights hearing. From the date of his release through the date of the termination hearing, he did not contact DSS. He made no inquiries about his daughter or what he needed to do to regain custody of her. In addition, following his release, he did not provide any gifts, cards, or provisions for the child and did not attend any hearings.

The termination hearing was held on 4 May and 28 June 2005. The trial court concluded that grounds for termination existed under N.C. Gen. Stat. § 7B-1111(a)(1), as both parents had neglected the child, and under N.C. Gen. Stat. § 7B-1111(a)(6), as both parents were incapable of providing proper care and supervision of the child and there was a reasonable probability that this incapability would continue for the foreseeable future. With respect to respondent mother, the court also concluded that she had willfully failed to pay a reasonable portion of the cost of the care of the child under N.C. Gen. Stat. § 7B-1111(a)(3). The court then determined that it was in the best interests of the

child that respondents' parental rights be terminated. Both respondents timely appealed to this Court.

Discussion

A termination of parental rights proceeding is conducted in two phases: (1) an adjudication phase that is governed by N.C. Gen. Stat. § 7B-1109 (2005) and (2) a disposition phase that is governed by N.C. Gen. Stat. § 7B-1110 (2005). *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). During the adjudication stage, petitioner has the burden of proving by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111 exist. The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If petitioner meets its burden of proving that grounds for termination exist, the trial court moves to the disposition phase and must consider whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a). The trial court has discretion to terminate parental rights upon a finding that it would be in the best interests of the child to do so. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. The trial court's decision to terminate parental rights is reviewed under an abuse of

discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001).

I

We first address respondent father's argument that because DSS obtained his medical records from the Johnston County Mental Health Department in violation of federal law, the trial court should have dismissed the petition to terminate his parental rights. Even assuming, *arguendo*, that respondent father's substance abuse records were obtained in violation of federal law, he has not established that he was entitled to have the termination petition dismissed.

On 15 August 2003, DSS sent the Johnston County Mental Health Department a letter, pursuant to N.C. Gen. Stat. § 7B-302(e) (2005), requesting "all information you have regarding [respondent father], including but not limited to the any [sic] psychological/psychiatric evaluations, admission assessments, contact notes, treatment goal plans, or any other pertinent information regarding the medical/social history." In response, the mental health department sent records pertaining to the mental health status and substance abuse history of both respondents. The respondents had not consented to the disclosure of their medical records.

Federal law provides that "[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse . . . treatment,

rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall . . . be confidential . . . ." 42 U.S.C. § 290dd-2(a) (2005). Aside from certain exceptions not applicable here, consent of the patient is required to obtain disclosure. 42 U.S.C. § 290dd-2(b)(1) ("The content of any record referred to in subsection (a) may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained . . . ."). Regulations further provide that "no State law may either authorize or compel any disclosure prohibited by [federal substance abuse] regulations." 42 C.F.R. § 2.20 (2005).

Before the termination hearing, respondents filed motions contending that the substance abuse records sent by the Johnston County Mental Health Department in response to DSS' request were released in violation of federal privacy laws, and, therefore, respondents were entitled to either dismissal of the termination petition or suppression of the evidence obtained from the records. After hearing oral argument on the matter, the trial court concluded that the federal requirements for obtaining respondents' substance abuse records had not been met, and the court, therefore, suppressed any reference to the records during trial. The trial court declined, however, to dismiss the petition.

To date, our case law has recognized only two situations in which termination of parental rights petitions may be involuntarily dismissed prior to a determination on the merits: (1) when the trial court lacks subject matter jurisdiction over the controversy;

or (2) when the petition fails to state a statutorily recognized ground for termination. *See, e.g.*, *In re T.B.*, ___ N.C. App. ___, ___, 629 S.E.2d 895, 897-98 (2006) (concluding that, when DSS failed to attach a copy of an order awarding legal custody of the children to DSS, the trial court should have granted respondents' motion to dismiss the termination petition for lack of subject matter jurisdiction); *In re Hardesty*, 150 N.C. App. 380, 383, 563 S.E.2d 79, 82 (2002) (noting termination petitions may be dismissed under N.C.R. Civ. P. 12(b)(6) for failure to allege statutory grounds for termination). Respondent father has argued neither of these grounds for dismissal on appeal and has not pointed to any other authority justifying dismissal of a termination of parental rights petition under these circumstances.

The federal statute upon which respondent father relies provides an explicit remedy that has nothing to do with dismissal. Rather, with respect to penalties, the statute provides only: "Penalties. Any person who violates any provision of this section or any regulation issued pursuant to this section *shall be fined* in accordance with title 18, United States Code." 42 U.S.C. § 290dd-2(f) (emphasis added). Respondent father's remedy lies — if at all — with the imposition of a penalty against Johnston County Mental Health Department.

Respondent father argues alternatively that the trial court should not have limited its ruling to suppression of any reference to the disputed records at trial, but rather should have also suppressed all of respondent father's "subsequent interviews and

testimony," arguing that the court should adopt a "fruit of the poisonous tree" concept in these cases. *See State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992) ("When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed."). As respondent father recognizes, however, this is not a criminal case, and he has not cited any authority supporting incorporation of this doctrine into termination of parental rights cases.

We note further that DSS received ample information regarding respondent father's substance abuse from proper sources. The original referral from DSS alleged that respondent had become intoxicated and assaulted respondent mother and G.D.C. Moreover, early in DSS' involvement with this family, respondent mother informed DSS that respondent father "had a history of drinking" and had previously used marijuana. Indeed, at the termination of parental rights hearing, respondent father's own trial counsel brought out that respondent father himself had testified at prior hearings that he was involved in numerous substance abuse treatment programs. Consequently, there was ample competent evidence in the record, even apart from information derived from improperly obtained records, supporting the court's findings with respect to respondent father's history of substance abuse, and we can find no error in the trial court's rulings with respect to those records. This assignment of error is overruled.

II

We next turn to respondents' arguments that the trial court erred by concluding that G.D.C. was neglected. Under N.C. Gen. Stat. § 7B-1111(a)(1), the court may terminate parental rights upon a finding that "[t]he parent has abused or neglected the juvenile." A neglected juvenile is defined by the General Statutes as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2005).

In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is 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) (emphasis omitted). "[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." *Id.* at 713-14, 319 S.E.2d at 231. Termination may not, however, be based solely on past conditions that no longer exist. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997).

When, as here, a child has not been in the custody of the parents for a significant period of time prior to the termination hearing, "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *In re Shermer*, 156

N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003). In those circumstances, 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." *Id.* With respect to both respondents, the trial court found that G.D.C. had previously been adjudicated neglected, and there was a probability of future neglect if she were returned to their custody.

As to respondent father, the court based its determination of the likelihood of future neglect on respondent father's conduct between the initial adjudication of neglect in December 2003 and the termination of parental rights hearing, finding that the father: (1) had not contacted DSS to inquire about G.D.C.; (2) had not provided any gifts or cards for G.D.C.; (3) had, following his release from prison, made no inquiries on what he needed to do to be considered as a placement for his daughter; (4) had not attended any court proceedings following his release from prison; (5) had effectively abandoned G.D.C.; (6) had not demonstrated any stability in that he had provided at least four different North Carolina addresses since his release from prison; and (7) had not provided any verification that he had attended the substance abuse, mental health, and domestic violence counseling that was required by his case plan. Although respondent father has assigned error to these factual findings, he makes no argument as to why they are unsupported by competent evidence, and, consequently, they are 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").

In turn, these findings of fact support the trial court's conclusion that G.D.C. was neglected by respondent father. *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 Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) ("Neglect may be manifested in ways less tangible than failure to provide physical necessities. . . . [T]he trial judge may consider . . . a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship."). Accordingly, the trial court did not err in concluding that grounds existed to terminate respondent father's parental rights based on neglect.

As to respondent mother, the court found that she: (1) had not contacted DSS after November 2004 as to what she should do to address the issues that led to G.D.C.'s removal; (2) had not addressed the substance abuse, domestic violence, and mental health issues that led to the removal; (3) had tested positive for marijuana at the birth of a subsequent child; and (4) refused to believe she needed any domestic violence counseling despite the incident of domestic violence between her and respondent father and a childhood involving domestic violence. Although respondent

mother assigns error to these findings, she also does not seriously contest them in her brief. Indeed, as to (1) and (3), she makes no argument; as to (2), she admits that she was not progressing with respect to these issues "at times." Consequently, as was the case with respondent father, respondent mother has abandoned her assignments of error on these issues, and they are deemed binding on appeal. *P.M.*, 169 N.C. App. at 424, 610 S.E.2d at 404-05. As to (4), she only reiterates her contention that she does not believe she needs domestic violence counseling — precisely the assertion in the trial court's finding of fact.

We conclude these findings are sufficient to show neglect. *See, e.g.*, *In re Johnson*, 70 N.C. App. 383, 389, 320 S.E.2d 301, 305-06 (1984) (improper care during a trial placement, a failure to make lifestyle changes, and sporadic attendance at counseling sessions constituted evidence of neglect). Respondent mother nevertheless argues that the trial court ignored significant changes in her circumstances. *See, e.g.*, *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 ("The 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.").

Specifically, she contends that, by the time of the termination hearing, she was attending mental health therapy, had completed a parenting class, and had submitted to several random drug screens. The trial court found, however, that respondent mother's recent improvements did not demonstrate a change in circumstances, but, rather, merely reflected a larger "pattern of

initiating services and being compliant . . . but only to stop attending . . . after a few months." Although respondent mother challenges this finding on appeal, she admits that after the initial adjudication of neglect, she was evicted from her home and failed to keep in touch with DSS, but then went into substance abuse treatment and entered a half-way house. She later left the half-way house early, but then returned to therapy. She subsequently dropped out of therapy, began abusing drugs, and again lost touch with DSS, but asserts that now she is "a year older" and has "six months of documented good progress." These admitted facts establish precisely the "pattern of initiating services" for only "a few months" to which the trial court referred.

We, therefore, conclude the trial court had clear, cogent, and convincing evidence with respect to both respondents upon which to determine that G.D.C. had been subjected to a history of neglect and was likely to be similarly neglected in the future. Accordingly, the trial court did not err in finding that grounds existed to terminate respondents' parental rights under N.C. Gen. Stat. § 7B-1111(a)(1). "Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court." *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004).

III

Finally, respondent mother contends the trial court (1) erred by concluding it was in G.D.C.'s best interests to terminate her parental rights and (2) abused its discretion by ordering

respondent mother's parental rights terminated. As DSS met its burden of proving that at least one statutory ground for termination existed, the trial court had discretion to terminate respondent mother's parental rights upon a finding that it would be in the best interests of G.D.C. to do so. *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. The evidence recited above pertaining to respondents' neglect of G.D.C. provided clear, cogent, and convincing evidence to support the trial court's finding that termination was indeed in G.D.C.'s best interests.

Respondent mother nevertheless argues the trial court abused its discretion by improperly basing its decision to terminate her parental rights on G.D.C.'s success in foster care and the stability provided by the foster care home. *See Bost v. Van Nortwick*, 117 N.C. App. 1, 8, 449 S.E.2d 911, 915 (1994) ("[A] finding that the children are well settled in their new family unit . . . *does not alone* support a finding that it is in the best interest of the children to terminate respondent's parental rights." (emphasis added)), *appeal dismissed*, 340 N.C. 109, 458 S.E.2d 183 (1995). Unlike *Bost*, however, where the trial court terminated a parent's rights despite the testimony of the children's guardian ad litem and the court-appointed psychologist that it would not be in the children's best interests to do so, *id.* at 9, 449 S.E.2d at 916, the trial court in the present case did not base its decision solely on the child's experience in the foster home, but rather appropriately considered that factor along with the substantial evidence of neglect by both parents. We, therefore, cannot conclude the trial court's termination decision

was manifestly unreasonable. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).