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NO. COA06-158

NORTH CAROLINA COURT OF APPEALS

Filed: 3 October 2006

IN THE MATTER OF:

M.C. & R.C.

Cumberland County
Nos. 02 JT 264;
02 JT 267

Appeal by respondents from judgment entered 1 July 2005 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 23 August 2006.

Elizabeth Kennedy-Gurnee, for Cumberland County Department of Social Services, petitioner-appellees.

Nelson Mullins Riley & Scarborough, L.L.P., by Wallace C. Hollowell, III, for North Carolina Guardian ad Litem, petitioner-appellees.

Rebekah W. Davis, for respondent-mother-appellants.

Peter Wood, for respondent-father-appellants.

JACKSON, Judge.

Lynda C. ("respondent mother") and Ray C. ("respondent father") appeal the termination of their parental rights to their minor children, M.C. and R.C. For the reasons stated below, we affirm the order of the trial court terminating their parental rights.

R.C. was the fourth child born to respondent mother, the first to respondent father, while respondent mother was married to her first husband. M.C. was respondent mother's seventh child, born of her third marriage, to respondent father.

The Cumberland County Department of Social Services ("DSS") filed a juvenile petition on 29 April 2002, alleging M.C., R.C., and five other half-siblings were abused, neglected, and dependent, as those terms are defined by statute. At the time the petition was filed, R.C. was six years old, and M.C. was four months old.

After a hearing on the matter held 1 May 2002, non-secure custody was ordered, placing R.C. and M.C. in the custody of DSS. The trial court held regular review hearings on the custody matter. An adjudication hearing was held 28 January 2003 followed by a disposition hearing on 30 January 2003, finding that both M.C. and R.C. were abused and neglected as defined by statute, and ordering legal and physical custody be placed with DSS. Respondents appealed to this Court the order of abuse and neglect, and the trial court's placing of custody of M.C. and R.C. with DSS. By this time, respondent mother was expecting her eighth child.

Respondents worked with DSS to create a case plan, which was approved 7 March 2003. The plan required that respondents each complete psychological and psychiatric assessments and follow through with recommended treatments, participate in parenting assessments and complete parenting skills classes, and enroll in and complete domestic violence counseling, anger management counseling, and marital counseling. In addition, the plan required

respondent father to secure and maintain employment and provide verification of same, and to submit to random drug screenings and enroll in a substance abuse program. Respondent mother was to enroll in individual counseling to deal with depression and relationship problems.

Respondents attempted to enroll in a domestic violence program but were not accepted into the program because they had already completed the program twice before. They were instructed to utilize the techniques they previously had learned. Despite already having received domestic violence services, the acts of domestic violence between respondents continued. On 29 March 2003, respondent father choked respondent mother and threatened to cut the child from her stomach so that no one could take it. Respondent mother took out a restraining order against respondent father, and on 4 April 2003, respondent father was arrested and subsequently pled guilty to assault on a female on 17 April 2003. When respondents attempted to obtain marital counseling, they were informed they could not be counseled together if the restraining order was still in effect. The counselor also believed respondent father was under the influence of a substance at that time.

On 3 May 2003, respondents experienced a house fire which was later determined to be the result of arson. Respondent father was the prime suspect. In mid-October 2003, respondents were engaged in a domestic dispute in front of their residence, prompting a passing police officer to stop and intervene. On 29 October 2003, the trial court relieved DSS of reunification and visitation

efforts, and allowed DSS to change the placement plan to adoption. Also, between May and November 2003, respondent father had two positive drug screenings.

A petition to terminate respondents' parental rights to M.C. and R.C. was filed on 8 April 2004. However, due to the pending appeal in this Court of the underlying order of abuse and neglect, the matter was stayed, with regular permanency placement hearings continuing.¹ During the time in which respondents' appeal was pending, there continued to be numerous incidents which were concerning to DSS. On 30 March 2004, respondent father again had a positive drug screen, testing positive for marijuana. There was a report from a neighbor that respondent father slapped respondent mother in the head. On 1 April 2004, police were called to respondents' residence to investigate "inappropriate affection" between respondent mother and a fourteen year old boy. Respondents' new baby was removed from their custody prior to the 26 April 2004 permanency planning hearing in the instant case. Respondent father was arrested on 4 June 2004 for assaulting respondent mother, and was also charged with two counts of communicating threats, and interfering with emergency

¹*In re M.C.*, 166 N.C. App. 515, 603 S.E.2d 407 (2004) (unpublished opinion) (Court held the trial court did not err in: delaying the initial adjudication for nine months; making requisite findings of unfitness of respondents; finding that the children were exposed to a risk of abuse and that respondent parents created conditions that were likely to cause injury or abuse; and finding that the children were neglected.).

communications. Respondent mother was arrested on 17 June 2004 for trespassing and communicating a threat.

On 21 September 2004, this Court filed its unpublished opinion in the underlying appeal, upholding the determination of abuse and neglect by the trial court. The judgment was entered 11 October 2004. A hearing on the termination of parental rights petition was scheduled for 23 November 2004; however, multiple continuances were granted over the next several months due to scheduling conflicts, illness, appointment of a new *guardian ad litem* for respondent mother, and respondent father's incarceration. The petition for terminating respondents' parental rights ultimately was heard 16, 17 and 20 June 2005.

On 1 July 2005, the trial court entered an order terminating respondents' parental rights as to M.C. and R.C. The trial court concluded that grounds existed to terminate their parental rights pursuant to North Carolina General Statutes, sections 7B-1111(a)(1), (2) and (3). The court further concluded that it was in the children's best interest that respondents' parental rights be terminated. From the order terminating their parental rights, respondents appeal.

North Carolina General Statutes, section 7B-1111 sets forth the statutory grounds for terminating an individual's parental rights. We consistently have held that "[a] finding of any one of the separately enumerated grounds under N.C. Gen. Stat. § 7B-1111 that is supported by clear, cogent, and convincing evidence is sufficient to terminate." *In re Howell*, 161 N.C. App. 650, 656,

589 S.E.2d 157, 160-61 (2003) (citing *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990)); see also *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003). "[T]he party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). "On appeal, the trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard[.]" *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391 (citing *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001)), *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004). This Court must affirm a trial court's termination of an individual's parental rights "where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law." *Id.* (quoting *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996)).

Both respondents contend the trial court erred in terminating their parental rights based upon the ground that they "have abused or neglected the juveniles within the meaning of [N.C. Gen. Stat. §] 7B-101." Specifically respondents argue the trial court's conclusion was not sufficiently supported by the evidence or the trial court's findings of fact. We disagree.

"The standard of review of a termination of parental rights is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support its conclusions of law." *In re J.G.B.*, ___ N.C. App. ___,

___, 628 S.E.2d 450, 454 (2006) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)). Findings of fact not assigned as error or argued on appeal are deemed to be supported by sufficient evidence, and are binding on appeal. N.C. R. App. P. 28(b)(6) (2006); see also *In re Clark*, 159 N.C. App. 75, 83 n.5, 582 S.E.2d 657, 662 n.5 (2003) (citing *In re Caldwell*, 75 N.C. App. 299, 301, 330 S.E.2d 513, 515 (1985)). However, we review a trial court's conclusions of law *de novo*. *In re D.H.*, ___ N.C. App. ___, ___, 629 S.E.2d 920, 922 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

In his assignments of error, respondent father assigns error to several of the trial court's findings of fact. However, in his brief to this court, respondent father fails to present specific arguments as to any of the findings of fact, and fails to present argument as to the specific assignment of error concerning the trial court's findings of fact. Thus, all of the trial court's findings of fact are binding on appeal as to respondent father. See N.C. R. App. P. 28(b)(6). Respondent mother assigns error only to the trial court's findings of fact numbers 12, 15, 17, 19, 20, and 22. As respondent mother has neither assigned as error nor presented arguments as to the remaining findings of fact, these remaining findings of fact are deemed binding upon her on appeal. See *id.*

A trial court may terminate parental rights upon a finding that "[t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused . . . or a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2005). North Carolina General Statutes, section 7B-101(1) provides that a juvenile is "abused" if the child's parent "[i]nfllicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or] [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." N.C. Gen. Stat. § 7B-101(1)a, b (2005). A "neglected" juvenile is defined as one "who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare" N.C. Gen. Stat. § 7B-101(15) (2005).

After listening to the testimony and evidence presented at respondents' termination of parental rights hearing, the trial court made the following findings of fact related to the abuse and neglect of M.C. and R.C.:

3. That the juveniles [R.C. and M.C.] have been in the continual care of [DSS] since on or before April 26, 2002 as a result of a non secure custody order and a petition alleging abuse, neglect and dependency.
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8. That the Respondents Lynda and Ray C. have abused and neglected the juveniles within the meaning of [N.C. Gen. Stat. §]

75-101(15) based upon the findings in [the previous adjudication and disposition] orders.

9. That the abuse and neglect was one of the primary reasons for the removal of the children from the care, custody and control of the respondents.

10. That the abuse and neglect included the infliction of inappropriate discipline upon the juveniles by the respondents, the respondents engaging in acts of domestic violence in the presence of the juveniles on a regular and frequent basis and the abuse of illegal drugs by the respondent Ray C.

. . . .

12. That the respondents have continued to engage in acts of domestic violence since the January 28 and 30, 2003 orders of the court.

. . . .

15. That the domestic violence escalated to the point that respondent Lynda C. sought and obtained a domestic violence protective order against Ray C.

16. That Ray C. subsequently violated the protective order.

17. That the respondents have engaged in some counseling services prior to the filing of the petition but have demonstrated little if any benefit from said counseling as evidenced by the continued acts of violence and aggression following the adjudication, prior to the filing of this petition and continuing thereafter.

. . . .

20. That the respondents Ray and Lynda C. have continued to engage in various acts of domestic violence since the adjudication and disposition was entered in January 28 and 30, 2003 resulting in the court relieving DSS of reunification

and visitation efforts on or about October 29, 2003.

21. That respondent Ray C. possessed marijuana and drug paraphernalia as recently as February 24, 2005.

We hold that these findings, if supported by clear, cogent and convincing evidence, will support the trial court's conclusion that M.C. and R.C. were abused or neglected.

As we previously have noted that respondent father failed to present arguments challenging the trial court's findings, we hold the above findings of fact are binding on respondent, and therefore support the trial court's conclusion of law that M.C. and R.C. were abused or neglected as to respondent father.

On appeal, respondent mother presents arguments challenging only findings of fact 12, 15, 17, and 20 of the above findings; therefore the remaining findings of fact listed above are deemed binding on respondent mother.

"When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996) (citing *G. R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 112, 362 S.E.2d 807, 811 (1987)). "If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected.'" *In re J.W., K.W.*, 173 N.C. App. 450, 458, 619 S.E.2d 534, 541 (2005) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (2000)), *aff'd*, 360 N.C. 361, 625 S.E.2d 780 (2006) . If the decision is supported by clear, cogent

and convincing evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *Id.*

Upon a thorough review of the record before us, we hold the trial court's finding of fact 12 to be supported by sufficient evidence. The record and transcript contain evidence of an assault by respondent father upon respondent mother resulting in arrest on 29 March 2003, an altercation between respondents in mid-October 2003 prompting police involvement, a reported assault by respondent father upon respondent mother in early 2004, an assault by respondent father upon respondent mother resulting in arrest on 4 June 2004, and respondent mother's communicating threats resulting in an arrest on 17 June 2004. Although there was some evidence from which the trial court could have found that the last incident of domestic violence occurred 4 June 2004, there also was evidence that it had not. Evidence of additional incidents between respondents was admitted into evidence, which suggested that the domestic violence between respondents continued beyond June 2004. On 18 October 2004, a social worker observed bruises on respondent mother's upper arms that appeared to be grab marks. On 1 November 2004 respondents arrived separately to a visit with M.C. and R.C.'s younger sibling. Respondent father was fifteen minutes late, and appeared nervous when asked about respondent mother. Respondent mother arrived forty-five minutes late and was very upset with her husband. Respondents' relationship was marked by repeated separations and reunifications, and denials that the domestic

violence issues were a problem. Therefore, we hold finding of fact 12 is supported by clear, cogent and convincing evidence.

With respect to finding of fact 15, the record reveals that respondent mother obtained a domestic violence protective order against respondent father on 4 April 2003. Thus, this finding of fact is supported by clear, cogent and convincing evidence.

Finding of fact 17 concerns respondents participation in counseling services prior to the filing of the petition to terminate their parental rights. Evidence and testimony presented to the trial court demonstrated that both respondents participated in some counseling services, however they did not complete the court ordered marital counseling, and they failed to comply fully with the court's additional orders regarding psychiatric evaluations and services. Evidence before the trial court indicated that despite respondents' participation in counseling, the incidents of domestic violence continued, and respondent father continued to have substance abuse problems. Respondents separated from each other several times as a result of the domestic violence incidents, only later to reunite. Based upon the evidence before the trial court, we hold there was clear, cogent and convincing evidence to support the trial court's finding of fact 17.

Respondent mother contends that these findings 15, 19, and 20, together with findings 12 and 17, erroneously indicate that domestic violence was ongoing. She argues that from 4 June 2004 until the hearing on 16 June 2005, there had been no further instances of domestic violence. As previously stated, evidence was

presented indicating that there were several incidents of domestic violence occurring after the 28 and 30 January 2003 orders. Based upon the multiple incidents of domestic violence, we hold finding of fact 20 is also supported by clear, cogent and convincing evidence.

In addition to the evidence directly bearing on the trial court's findings, there was additional evidence from which the trial court could find that domestic violence continued despite respondent mother's testimony to the contrary. This evidence includes the bruises on respondent mother's arms observed on 18 October 2004, the suspicious behavior observed on 1 November 2004 during respondents' visit with another child, and the frequent separations and reunifications between respondents.

Therefore, as the trial court's findings of fact regarding the abuse and neglect of M.C. and R.C. are binding on appeal and are properly supported by the evidence, we hold they in turn support the trial court's conclusion of law that M.C. and R.C. were abused or neglected, pursuant to section 7B-1111(a)(1), as to both respondents. There is substantial evidence in the record which is clear, cogent and convincing support of the trial court's findings of fact, which in turn support its conclusion of law. The trial court, therefore, did not err in concluding that respondents had abused or neglected M.C. and R.C., and that grounds for the termination of their parental rights existed. Respondents' assignments of error are overruled.

Since grounds exist pursuant to section 7B-1111(a)(1) to support the trial court's order terminating respondents' parental rights, the remaining grounds found by the trial court to support termination of respondents' parent rights need not be reviewed by the Court. *Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34.

Respondents next contend the trial court abused its discretion in concluding "[t]hat it would be in the best interest of the juveniles for the parental rights of the respondents to be terminated." We find no error.

"A termination of parental rights proceeding is a two-stage process.'" *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004) (quoting *In re Howell*, 161 N.C. App. 650, 656, 589 S.E.2d 157, 160 (2003)). First there is an adjudicatory phase, which is followed by the dispositional phase. See N.C. Gen. Stat. §§ 7B-1109 to -1110.

During the adjudicatory phase, the court takes evidence, makes findings of fact, and determines the existence or nonexistence of grounds for termination. The burden of proof is on DSS in this phase, and the court's findings must be "based on clear, cogent, and convincing evidence." Assuming a judicial finding that a ground for termination exists, the trial court's decision in the dispositional phase is discretionary. The court need not order termination if it further determines "the best interests of the juvenile require that the parental rights of the parent not be terminated."

In re R.T.W., 359 N.C. 539, 548-49, 614 S.E.2d 489, 495 (2005) (internal citations omitted).

In the instant case, the trial court found not one, but three grounds for termination of respondents' parental rights. Upon

finding grounds to support the termination of respondents' parental rights, the trial court moved to the disposition stage of the proceeding, and found that termination of the parental rights was in the children's best interests. However, before making the determination regarding the children's best interests, the trial court not only spoke with the children in chambers, but also took great care in reaching its decision, and in weighing all of the evidence, including evidence of the changes in respondents' conditions. In support of the finding regarding the children's best interests, the trial court found that R.C. continued to suffer from nightmares about her parents, as a result of the abuse she suffered while in their care. The trial court heard evidence about how R.C. was improving in the stable environment of her foster home, in which she was living with her half-siblings. The trial court also found that in the eighteen months in which respondent mother visited with M.C., the child never was able to bond with her mother, although she was comfortable with other people. Neither parent was found to have made any progress in demonstrating their ability to parent either child, and they were found to have made little, if any, progress in addressing the other issues of concern including the domestic violence, substance abuse, and housing issues.

Based upon all of the evidence before the trial court, we hold the trial court made a well-reasoned decision, and in no way approached its decision lightly. Thus, we hold the trial court did

not abuse its discretion in finding that it was in M.C. and R.C.'s best interests that respondents' parental rights be terminated.

Finally, respondent father assigns as error the trial court's failure to conduct the termination of parental rights hearing within ninety days of the filing of the petition as mandated by statute. We hold respondent father was not prejudiced by the delay.

"The hearing on the termination of parental rights shall be conducted . . . 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). Subsection (d) allows for a ninety day continuance for good cause shown "to receive additional evidence . . . , to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile." N.C. Gen. Stat. § 7B-1109(d) (2005). Continuances beyond ninety days after the petition is filed "shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance." *Id.*

The petition to terminate respondents' parental rights was filed on 8 April 2004. However, the underlying adjudication order of abuse and neglect was pending appeal in this Court at that time. See N.C. Gen. Stat. § 7B-1003(b) (2005) ("Pending disposition of an appeal, unless directed otherwise by an appellate court . . . the trial court shall: (1) Continue to exercise jurisdiction and

conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile."). While the trial court did retain jurisdiction to proceed with the termination of parental rights hearing, per our Supreme Court's holding in *In re R.T.W.*, 359 N.C. 539, 542, 614 S.E.2d 489, 491 (2005) ("the pending appeal of a custody order does not deprive a trial court of jurisdiction over termination proceedings"), the trial court had the discretion to consider the pending appeal as an extraordinary circumstance such that a continuance was necessary for the proper administration of justice. In the next permanency planning placement review order filed, from the 7 July 2004 hearing, the trial court found as fact that the case was "currently on Appeal."

This Court's opinion on the underlying appeal was filed on 21 September 2004, and became final on 11 October 2004. A hearing on the petition to terminate respondents' parental rights was scheduled for 23 November 2004; however, several continuances were granted due to scheduling conflicts, illness, appointment of a new *guardian ad litem* for respondent mother, and respondent father's incarceration. The hearing on the petition for termination of respondents' parental rights ultimately was heard on 16, 17 and 20 June 2005. The orders granting these various continuances are not included in the record on appeal. However, this Court recently has held that even when the ninety day period admittedly was violated, such violation "need only be reversed when the appellant

demonstrates prejudice as a result of the delay." *In re S.W.*, __ N.C. App. __, __, 625 S.E.2d 594, 596 (2006).

Respondent father contends the delay denied M.C. and R.C. permanency, prejudiced the foster parents and family, and compromised his parental rights. He analogizes his case to *In re L.E.B., K.T.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 which this Court found that all parties were prejudiced due to a delay in the filing of the termination order. However, in *L.E.B.*, the trial court already had decided to terminate parental rights; thus, the delay prevented all parties from moving forward with adoption as that process could not begin until the trial court entered its order.

The case *sub judice* is distinguishable in that the delay did not prevent a court's order from being implemented. If anything, respondent father benefitted by the delay. It allowed him to argue that issues of domestic violence had been resolved, in that the 4 June 2004 incident had occurred twelve months prior to the hearing, while previous incidents of domestic violence were more frequent. The delay also allowed him additional time to bring himself into compliance with his case plan. In fact, one continuance was granted specifically to allow respondent father the opportunity to be present in court, as he was incarcerated on the day scheduled for trial. Thus, respondent father has failed to demonstrate that he was prejudiced by the delay.

Because we find that the trial court's findings of fact were supported by clear, cogent and convincing evidence and that these

findings supported the conclusions of law, that there was no abuse of discretion in the trial court's termination of respondents' parental rights, and that respondents were not prejudiced by the delay between the filing of the petition and the hearing, we affirm the trial court's order terminating the parental rights of respondent mother and respondent father.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).