NO. COA06-493

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF
D.L.B., T.L.B., K.L.B.,
Minor Children.

Cabarrus County
Nos. 04 J 18-20

Appeal by Respondent mother from order entered 9 December 2005 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 14 November 2006.

Kathleen Arundell Widelski, for Petitioner-Appellee Cabarrus County Department of Social Services.

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

STEPHENS, Judge.

Respondent mother ("Respondent") appeals from an order of the Cabarrus County District Court terminating her parental rights to the minor children D.L.B, T.L.B., and K.L.B. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On 20 January 2004, Respondent was arrested for shoplifting. Pursuant to a juvenile petition alleging that Respondent's three minor children were neglected and dependent, a nonsecure custody order was entered that same day, and Petitioner Cabarrus County Department of Social Services ("DSS") took the three children into custody. On 29 January 2004, Respondent entered into a consent order stipulating that the children were neglected. Respondent

undertook to comply with a number of court directives to regain custody of her children. These included submitting to a psychological evaluation, a separate substance abuse assessment, random drug screens, attendance at Narcotics Anonymous meetings, and obtaining appropriate employment and housing.

On 8 April 2004, Respondent was convicted of possession of a Schedule II controlled substance and placed on probation, concurrent with an earlier thirty-six month probationary sentence imposed in Mecklenburg County. She was arrested again on 22 April 2004, apparently for failure to appear in court in response to the earlier shoplifting and separate Driving While License Revoked charges. She was subsequently bonded out on 26 April 2004.

The trial court reviewed Respondent's compliance with its earlier directives on 29 April 2004. DSS reported that Respondent had refused the court-mandated drug screens on 10 March 2004, 11 March 2004 and 15 April 2004. She had attended three out of eighteen scheduled substance abuse group sessions. Similarly, she did not complete her parenting classes due to numerous absences, nor did she provide any verification of attendance at Narcotics Anonymous meetings or her efforts to maintain stable employment. She had, however, appeared for her psychological assessment and had maintained contact with DSS.

DSS records indicated that Respondent appeared to be under the influence of controlled substances while meeting with her children on 11 March 2004 and 15 April 2004. Those visits had to be cancelled or cut short. The children were upset and angry with

their mother, and T.L.B. cried uncontrollably on the way home. Upon being questioned, Respondent stated that she had taken Klonopin, but could stop anytime. The records further indicated that Respondent's conduct was appropriate during the visits when she was not under the apparent influence of controlled substances. She brought snacks, clothes and gifts for the children, who appeared to enjoy her visits. The court continued custody arrangements until the next review hearing.

The next hearing was held on 5 August 2004. Respondent had been late to her last psychological evaluation, which had been rescheduled. She had missed enough substance abuse assessments to require a second intake assessment, but stated that she did not have the funds to undertake this. She did not provide verification of her attendance at Narcotics Anonymous sessions. She did provide some proof of employment and completed parenting classes. She behaved appropriately in her visits with the children and continued to bring them snacks, clothes and gifts. She also maintained contact with DSS. Once again, the court continued custody arrangements.

The next hearing was held on 12 November 2004. Respondent had been terminated from the substance abuse assessment group for accumulating excessive absences and had not attended Narcotics Anonymous meetings. She had also failed drug tests on 23 August 2004, 7 October 2004 and 28 October 2004. She continued to behave appropriately during her visits with the children, maintained contact with DSS, and had obtained a part-time position at a

restaurant in Kannapolis. Respondent had also ceased attending psychological assessment sessions, stating that she felt she no longer needed therapy. The therapist stated that she did not believe she could assist Respondent unless Respondent was willing to take responsibility for her own actions. At that point, DSS recommended that the permanent plan be changed to adoption. However, the trial court ordered that reunification efforts with Respondent continue until the next hearing.

The next review hearing was scheduled on 13 January 2005. Respondent, however, had been incarcerated for a probation violation and could not attend. At that point, the trial court ordered that reunification efforts cease, and that DSS initiate adoption efforts. DSS filed a Motion in the Cause to Terminate Parental Rights ("TPR") on 25 May 2005. Respondent filed a reply on 3 June 2005. The hearing on the Motion was scheduled on 18 August 2005, and again on 30 September 2005. Because Respondent was not writted in from the correctional facility on either occasion, postponement of the termination hearing was required. The hearing was finally conducted on 18 November 2005, and the district court's order terminating Respondent's parental rights was filed on 9 December 2005.

The district court concluded, *inter alia*, that Respondent was incapable of providing for the proper care and supervision of the children such that they were dependent juveniles under N.C. Gen. Stat. § 7B-101, and that there was a reasonable probability such incapability would continue for the foreseeable future. The trial

court found that Respondent, who had an eighth-grade education, had supported herself since the age of thirteen primarily by illegally selling drugs. Her last legitimate employment had terminated in October 2004 after five weeks. She had been unable to find employment since her release from prison on 9 October 2005. She had not completed any drug treatment program and had repeatedly failed drug screenings. Finally, she had little family support, since her mother had her own addiction problems in addition to being HIV positive. Her brother and husband were in prison.

The trial court also concluded that grounds existed to terminate Respondent's parental rights because

> Respondent neglected the juveniles and said juveniles are neglected within the meaning of N.C.G.S. § 7B-101(15), in that the Respondent failed to provide the proper care, supervision or discipline of the juveniles and there is a probability that neglect will continue in the future[] . . . .

The court supported this conclusion with nineteen detailed findings of fact. Proceeding to disposition, the court determined that terminating Respondent's parental rights would be in the best interests of the children. Respondent appeals and brings forward eleven assignments of error for our review.

QUESTIONS PRESENTED

I.

Respondent's first assignment of error concerns the failure of petitioner DSS to file the TPR motion within sixty days of the permanency planning hearing held on 13 January 2005, as required by statute. *See* N.C. Gen. Stat. § 7B-907(e) (2005). Respondent

argues that this delay stripped the trial court of subject matter jurisdiction. Respondent cites no legal authority for her argument, and our research has failed to unearth any. Her brief does contain a citation to this Court's decision in *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993), as purported support for her position. However, *Triscari* addressed the lack of subject matter jurisdiction when the TPR petition has not been verified, as required by statute. Respondent has not argued that such is the case here, and we cannot create an argument for her. *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 ("It is not the role of the appellate courts, however, to create an appeal for an appellant."), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

With regard to the delay, this Court has repeatedly stated that exceeding statutory time frames in termination cases does not constitute reversible error *per se*. *See, e.g., In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). We acknowledge that the purpose of the legislature in including the filing specifications in the statute was to "provide parties with a speedy resolution of cases where juvenile custody is at issue[,]" as in this case. *Id.* at 153, 595 S.E.2d at 172. However, requiring reversal of a trial court's order terminating parental rights in every case where a statutory deadline is not met "would only aid in further delaying a determination regarding [the minor children] because juvenile

petitions would have to be re-filed and new hearings conducted." *Id.*

Instead, the decisions of this Court require that, to constitute reversible error, a respondent must demonstrate prejudice suffered from the delay. *In re B.M.*, 168 N.C. App. 350, 607 S.E.2d 698 (2005). Despite a long line of case law establishing this principle, Respondent has not argued any prejudice in this instance. Indeed, in this case, the delay actually benefitted Respondent since it allowed her to be released from prison and gave her the opportunity to get her affairs in order prior to the termination hearing. This assignment of error is without merit and is therefore overruled.

II.

In her second assignment of error, Respondent argues that the trial court was without subject matter jurisdiction to hear the TPR motion since it failed to hold the hearing within the time required by N.C. Gen. Stat. § 7B-1109(a). In particular, she argues that because of the court's failure to hold the termination hearing within ninety days of DSS's filing of the motion to terminate her rights, "this Court should find that such significant non-compliance with the ninety-day statutory requirement is prejudice per se, thus requiring a new hearing." Again, however, she fails to cite any controlling authority for this assertion. On the contrary, in *In re S.N.H.* ___ N.C. App. ___, 627 S.E.2d 510 (2006), this Court specifically held that such a delay does *not* automatically strip the trial court of subject matter jurisdiction,

particularly where the delay was occasioned by the parent's own actions.

Here, the termination hearing was originally scheduled well within the statutory time frame, but was continued because Respondent was in prison. Respondent's guardian *ad litem* and trial counsel were present for that hearing, and there is no indication in the record before us that either of them objected to a continuance to give Respondent the opportunity to attend the next scheduled hearing. At the next hearing on 30 September 2005, the trial court continued the hearing again because Respondent remained in prison and records subpoenaed for the hearing had not been received. The record reflects no objection from Respondent's attorney, who was present. On the contrary, according to the order of continuance, "[t]he parties agree[d] that the matter is continued. . . ."

While N.C. Gen. Stat. § 7B-1109(a) requires the trial court to conduct the termination hearing within ninety days of the filing of the TPR motion, subsection (d) of this provision allows the court to continue the termination hearing up to ninety additional days "in extraordinary circumstances when necessary for the proper administration of justice[]. . . ." N.C. Gen. Stat. § 7B-1109(a), (e) (2005). As with her first assignment of error, Respondent has failed to advance any argument as to how the delay in holding the termination hearing prejudiced her or any other party. We find the reasoning of *S.N.H., supra,* to be controlling here. Therefore, this assignment of error is overruled.

III. & IV.

Respondent's next arguments concern the statutory requirements for holding pretrial conference hearings in termination proceedings to give parents adequate notice of the issues raised by the pleadings and to be addressed at the termination hearing. *See* N.C. Gen. Stat. § 7B-1108 (2005). In her third assignment of error, Respondent argues that the trial court did not conduct a pretrial hearing. This Court has previously held that the statutory requirement of a pretrial hearing can be satisfied with a "brief" hearing "just prior to the trial[.]" *In re Peirce*, 53 N.C. App. 373, 383, 281 S.E.2d 198, 204 (1981). Here, the trial court opened its proceedings by suggesting that the pretrial conference orders be handled first.

> Court: . . . Ready to begin. We've done our pretrial. There is a pretrial order in the file - excuse me - a pretrial conference order in the file and an answer. Is that correct?
> Ms. Widelski: I do not recall seeing a pretrial conference order.
> Court: All right, let's do that then.

We hold that the pretrial hearing conducted immediately before the termination hearing, without objection by Respondent, satisfied the statutory criteria, as interpreted in *Peirce*. This assignment of error lacks merit and is also overruled.

Respondent's fourth assignment of error alleges that she was not given proper notice of the pretrial hearing. As noted above, the pretrial hearing was held at the outset of the termination proceeding with the consent of Respondent. After allowing an amendment to the termination motion, without objection, the trial

court offered Respondent a further continuance to prepare for the hearing, as evidenced by the following exchange:

> Court: . . . Anytime there is an amendment to a petition or to a pleading, the other side has an absolute right to a continuance. Mr. Nance, as of today, does your client still have a motion to continue?
> Mr. Nance [Respondent's Attorney]: Your Honor, after consulting with her guardian ad litem, Mr. Small, she advises me that she does not wish to continue and that she will proceed forward today.

In assessing whether she had sufficient notice, we also note that Respondent had filed an answer to the termination motion and that, with the exception of the amendment to the motion which arose during the pretrial hearing, Respondent was therefore on notice, through the earlier pleadings, of the issues upon which DSS was proceeding to establish grounds for the termination of her parental rights. The pleadings and pretrial proceedings thus covered every material issue to be addressed in the termination hearing. Given Respondent's assent to proceeding with the termination hearing immediately after the pretrial hearing, we find no merit in this assignment of error and, thus, overrule it. *Cf. Peirce*, 53 N.C. App. at 382, 281 S.E.2d at 204 (holding that the statute "does not prescribe the exact form the [pretrial] hearing is to take *except that it is to be used to determine the issues raised by the pleadings*") (emphasis added).

V.

Respondent's fifth argument is that the trial court lacked subject matter jurisdiction because the TPR motion did not conform to the statutory requirements of N.C. Gen. Stat. § 7B-1104.

Specifically, Respondent argues that a copy of the order giving DSS custody of the minors was not attached to the motion. However, the transcript reveals that at the start of the hearing, DSS requested that the TPR motion "be deemed to include the order giving the Department custody[.]" Before granting the motion, the trial court offered Respondent an opportunity to object. Both Mr. Nance and Mr. Small, counsel and guardian *ad litem* respectively for Respondent, stated that they had no objection. The order granting DSS custody of the children was thus added to the TPR motion with their consent. As modified, the motion conformed to the requirements of N.C. Gen. Stat. § 7B-1104, and to this Court's recent decision in *In re T.B.*, ___ N.C. App. ___, 629 S.E.2d 895 (2006). Therefore, the trial court had subject matter jurisdiction. This argument is wholly lacking in merit.

VI.

By her sixth assignment of error, Respondent asserts that the trial court erroneously relied on evidence admitted under a lower evidentiary benchmark than the "clear, cogent and convincing" threshold required for a termination of parental rights adjudication. Respondent cites this Court's decision in *In re Brim,* 139 N.C. App. 733, 535 S.E.2d 367 (2000), to argue that it is error for the trial court to consider evidence admitted under a lower evidentiary standard. However, our review of *Brim* reveals no such holding. Further, we recently rejected a virtually identical argument in *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quoting *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838,

845 (2000) (citation omitted), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)), noting the "well-established supposition that the trial court in a bench trial 'is presumed [to have] disregarded any incompetent evidence.'" Though the trial court's order does refer to its own earlier proceedings, we have long held that it is entirely appropriate for a trial court to take judicial notice of earlier proceedings in the same matter. *In re Isenhour*, 101 N.C. App. 550, 400 S.E.2d 71 (1991). This argument likewise is wholly without merit, and this assignment of error is overruled.

VII. & VIII.

Respondent's seventh and eighth assignments of error challenge the trial court's conclusions of law that grounds existed to terminate her parental rights because the minor children are dependent pursuant to N.C. Gen. Stat. § 1111(a)(6) and neglected under section 1111(a)(1). Respondent argues that these conclusions are not supported by sufficient findings of fact. These assignments of error either intentionally ignore or inadvertently overlook well-settled law in this State that "[a] finding of any one of the . . . enumerated grounds is sufficient to support a termination [of parental rights]." *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). Indeed, the statute itself plainly provides that "[t]he court may terminate the parental rights upon a finding of *one or more* of the following[]" grounds. N.C. Gen. Stat. § 7B-1111(a) (2005) (emphasis added).

Here, the trial court concluded that terminating Respondent's parental rights to the minor children was warranted by *four* of the

statutorily enumerated grounds. In addition to neglect and dependency of the children, the court entered conclusions of law that Respondent had "willfully failed to pay for the cost of the juveniles' care for a continuous period of six months next preceding the filing of [the TPR] motion although financially and physically able to do so[,]" and that Respondent had "willfully left the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances" had been made to correct the conditions that led to the removal of the children from Respondent's custody. *See* N.C. Gen. Stat. §§ 7B-1111(a)(2), (3). These conclusions of law are supported by detailed findings of fact based on clear, cogent and convincing evidence. Respondent has neither assigned error to the findings of fact nor to the conclusions of law which support terminating her parental rights under sections 7B-1111(a)(2) and (3). Further, she has not assigned error to any of the court's detailed findings of fact which support its conclusion of law that the juveniles are dependent within the meaning of the statute. It is also well settled that findings of fact of the trial court which are not challenged by assignments of error on appeal are deemed to be supported by competent and sufficient evidence, and are binding on appeal. *See, e.g., In re L.A.B.*, ___ N.C. App. ___, 631 S.E.2d 61 (2006). Thus, even if there is merit to her arguments that the court's conclusions based on neglect and dependency are not supported by sufficient findings of fact, an issue on which we

express no opinion because we decline to address these assignments of error, vacating those portions of the trial court's termination order based on neglect and dependency of the children would not change the adjudication result that grounds existed to terminate Respondent's parental rights. We thus reject assignments of error seven and eight.

IX.

Respondent's ninth argument is that the trial court erred in making its dispositional findings before determining that sufficient grounds existed to terminate her parental rights. This argument has no merit. The record shows that the trial court first determined that grounds existed to terminate Respondent's parental rights. The trial court then offered *additional* analysis in separate findings of fact related to the best interests of the children. Moreover, the proceedings commenced with an observation that "[b]y agreement of the parties, this matter will be non-bifurcated." There is no requirement that the trial court hold separate hearings on adjudication and disposition so long as the requisite evidentiary safeguards are followed. *In re Shepard*, 162 N.C. App. 215, 591 S.E.2d 1 (2004). Here, the court made detailed findings of fact on all four of the statutory grounds it concluded were in existence to support termination of Respondent's parental rights. The court clearly stated that these findings of fact were based on clear, cogent and convincing evidence, the evidentiary standard required for adjudicatory findings. *See, e.g., In re C.C.*, 173 N.C. App. 375, 618 S.E.2d 813 (2005). As indicated, many

of these findings are unchallenged on this appeal and are, thus, binding on this Court. Further, the trial court did not enter its findings of fact on disposition until after it completed its findings of fact on adjudication. The court also clearly stated that its dispositional findings were made "in the best interest of the children[.]" We perceive no error in the form of the court's termination order and, therefore, this assignment of error is overruled.

X.

Respondent next contends that the trial court failed to make any findings of fact on the record, in violation of N.C. Gen. Stat. § 7B-1109(e). After exhaustive review of counsel's argument, we fail to comprehend the thrust of her contention. The statute states in relevant part that

> [t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the Respondent. The adjudicatory 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-1109(e) (2005). As previously discussed, the trial court made extensive findings of fact, covering more than ten single-spaced pages in the record. Our review of the transcript and the exhibits admitted at the termination hearing establishes that the court's findings are well supported by the evidence and, since most are uncontested on this appeal, are binding, as we have also previously observed. We hold that the trial court's findings

of fact satisfy the statutory requirement. This argument is wholly lacking in merit and is rejected.

XI.

Finally, Respondent argues that the trial court erred in admitting Petitioner's Exhibit 2, her prison record. In the assignment of error relating to this argument, Respondent asserts that the exhibit was not properly authenticated. We note that although the trial court reserved its ruling on the admission of this exhibit, the record is silent as to the court's eventual decision. Nevertheless, the trial court relied on the document in its findings 9(i), 9(j) and 9(n). The inference, thus, is that the trial court admitted the evidence. In doing so, it acted correctly under our general statutes, which state that:

> A seal shall be provided to be affixed to any paper, record, copy or form or true copy of any of the same in the files or records of the Records Section, and when so certified under seal by the duly appointed custodian, such record or copy shall be admitted as evidence in any court of the State.

N.C. Gen. Stat. § 148-80 (2005). The requisite certification is in the record. Therefore, the trial court properly admitted Respondent's prison record.

In her argument on this assignment of error, however, Respondent contends that since the court did not include its ruling on the admission of this exhibit in the termination order, the evidentiary standard under which this evidence was considered cannot be determined. Respondent thus argues that, for this alleged error, the court's termination order "should be vacated and

this matter remanded." Respondent requests such drastic relief despite the fact that (1) this assignment of error concerns only three subparts of only one finding of fact; (2) the court stated in making its findings of fact that they were based on "clear, cogent and convincing evidence[,]" and Respondent has advanced no argument as to how her properly authenticated prison record did not meet this evidentiary standard, and (3) even without the challenged subparts of this one finding of fact, the *unchallenged* findings of fact and conclusions of law sufficiently support the trial court's termination of Respondent's parental rights. This assignment of error also wholly lacks merit and is overruled.

The order of the trial court terminating Respondent's parental rights is

AFFIRMED.

Judges WYNN and HUDSON concur.

Report per Rule 30(e).

The judges concurred prior to 31 December 2006.