NO. COA07-323

NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2007

IN RE:

Iredell County
No. 04 J 165

M.M.,
Minor Child

Appeal by respondent from orders entered 10 January 2007 and 11 January 2007 by Judge Theodore S. Royster, Jr. in Iredell County District Court. Heard in the Court of Appeals 9 July 2007.

Iredell County Department of Social Services, by Elizabeth Boone, for petitioner-appellee.

Holly M. Groce, for Guardian ad Litem.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for respondent-appellant.

CALABRIA, Judge.

Jeffrey M. ("respondent"), appeals from orders of the trial court terminating his parental rights to M.M. ("the minor child"). Tammy D., the mother of the child ("the mother") (collectively the "parents"), did not appear for the termination hearing and did not file a notice of appeal. We affirm.

Respondent and the mother are the biological parents of the minor child. From July 2003 until March 2004, with the exception of a few weeks in December 2003, the parents voluntarily placed the

minor child, then age four, with a married couple ("the Fosters"[1]) who were family friends. In March 2004 the minor child moved in with her paternal grandmother while the respondent entered a twenty-eight day inpatient substance abuse program.

On 8 September 2004, the Iredell County Department of Social Services ("DSS") filed a juvenile petition alleging the minor child was neglected. The respondent stipulated to neglect and admitted to a long history of substance abuse and drug related criminal activity. The minor child was adjudicated neglected on 19 October 2004 and was placed in the custody of DSS, which continued placement of the child with the paternal grandmother. On 10 December 2004, respondent entered into a family services case plan with DSS, directed primarily at addressing his substance abuse issues. The case plan included counseling or classes to address respondent's coping skills and other psychological or parenting issues, as well as assistance in developing stability in housing and employment.

In January 2005, the minor child returned to live with the Fosters. On 1 February 2005, the plan for the minor child was changed from reunification to a concurrent plan of termination of parental rights/adoption and/or guardianship with the Fosters. DSS was relieved of reunification efforts. On 22 November 2005, the plan was changed solely to termination of parental rights and adoption. On 15 June 2006, DSS filed a petition to terminate the

[1]"Fosters" is a fictitious name used to protect the confidentiality of the minor child's identity.

parents' parental rights. After two continuances, the trial court heard the petition on 29 November 2006. On 10 January 2007, the trial court terminated the parents' parental rights and denied the respondent's motion to dismiss the termination of parental rights petition. The consolidated judgment and order of adjudication and disposition in termination of parental rights proceeding was filed on 10 January 2007. An amended order on the motion to dismiss the termination of parental rights petition was filed on 11 January 2007. Respondent appeals from the order terminating respondent's parental rights and the order denying respondent's motion to dismiss.

I.

First, respondent contends the court erred in making findings of fact that are not supported by clear, cogent and convincing evidence. We disagree.

"On appeal, the trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard and we must affirm where the court's findings of fact are based upon clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391 (2004), *review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004), *motion dismissed*, 359 N.C. 281, 609 S.E.2d 773 (2005) (internal citation and internal quotes omitted) (quoting *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996)). Clear, cogent, and convincing evidence is a standard of proof greater than the preponderance of the evidence standard required in most civil

cases but lesser than the standard of proof beyond a reasonable doubt in criminal cases. *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984), *later proceeding at*, 77 N.C. App. 709, 336 S.E.2d 136 (1985). An appellate court is bound by the trial judge's findings of fact "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53 (citations omitted). In addition to considering testimony and documentary evidence presented at the hearing, the court may take judicial notice of prior orders. *In re Shermer*, 156 N.C. App. 281, 287, 576 S.E.2d 403, 407 (2003) (trial court took judicial notice of past orders; past orders are relevant evidence in termination proceeding).

Respondent contests the findings that: (1) he failed to pay a reasonable portion of the cost of care of the child even though the court also found he was current in his court-ordered support obligation; (2) he is unable to provide independent housing for himself and the child; (3) he "has probably been rehabilitated" but may still have a drug problem; and (4) termination of his parental rights will not create an unnecessary severance of the relationship between him and the child despite the existence of a bond between the two.

The trial court's findings of fact are summarized below. Respondent's addiction to drugs affects his ability to care for the minor child. Although respondent is current on his obligation to pay a court-ordered $55.00 per month in child support, some

payments were paid on his behalf by his mother. Other than a three-month period in mid-2006, respondent was unable to provide independent, suitable housing for the minor child. He was evicted from his most recent housing, where he lived from April 2006 until one week prior to the termination hearing. Respondent relies on his mother, friends and girlfriends to provide housing and does not appear able to maintain housing on his own. Since he is unable to provide housing for himself, he is unable to provide housing for the minor child.

Respondent tested positive for illegal drugs as far back as March of 2006. During the time the minor child was outside the home, respondent had a history of going through drug rehabilitation programs and relapsing. Respondent failed to explain why he missed five of eight drug screens requested by DSS.

Respondent also did not maintain steady employment. Although he held a job from April through September 2006, he lost that job due to absenteeism. The court reasoned that if respondent was unable to hold a job, as he demonstrated during the entire time the minor child was placed with others, then he would be unable to provide suitable housing, clothing, and food for the minor child.

We find adequate support for these findings in the testimony of social workers and Mr. Foster. The testimony shows respondent contributed to the support of the child by paying only $55.00 per month toward the cost of care with his mother's help. According to the allegations of the verified petition, the cost of caring for the child is $7,200.00. Respondent failed to reimburse his mother

for expenses associated with caring for his child.

The longest time that respondent resided at any one place prior to the filing of the termination petition, was when he was enrolled in a drug treatment program that paid for his housing while he received treatment. When not in treatment facilities for substance abuse, he lived with his mother or female companions. Respondent was evicted just before the termination hearing.

The social workers testified extensively regarding respondent's lifelong history of abusing cocaine, marijuana and alcohol. Respondent completed five to six inpatient drug treatment programs prior to DSS involvement in 2004 and four more inpatient drug treatment programs after DSS became involved. Within months after completion of a treatment program, he relapsed. The social workers testified that he last completed a drug treatment program in September 2005, and attended no further inpatient treatment programs or support groups after that date. He told a social worker that after September 2005 he did not attend Narcotics or Alcoholics Anonymous meetings because "he didn't feel like he needed it." Respondent tested positive for cocaine in August 2005. He tested positive for marijuana in March 2006.

Respondent's substance abuse affected the child, who was aware that respondent often left the house at night. While respondent was away from the house, the child feared monsters and the dark. In a reversal of parental roles, the child frequently worried about respondent and his well being. Furthermore, respondent would call DSS and request to see the child because "he was hurting and he

needed [the child] to make him feel better."

The evidence of respondent's drug use and inability to financially support his child satisfies the clear, cogent and convincing evidence standard and supports the trial court's findings of fact concerning respondent's failure to pay child support, failure to provide independent housing, failure to complete drug rehabilitation programs, and the finding that the termination of parental rights is necessary. This assignment of error is overruled.

II.

Respondent next contends the court erred in concluding that clear, cogent and convincing evidence supported its conclusions that grounds exist to terminate respondent's parental rights and that termination of parental rights is in the child's best interests. We disagree.

A.

To terminate one's parental rights, the petitioner must show by clear, cogent and convincing evidence that a statutory ground to terminate rights exists. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). The court's determination of the existence of a ground is a conclusion of law. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675-76 (1997) (holding that determination of neglect is a conclusion of law). "Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *Id.*, 127 N.C. App. at 511, 491 S.E.2d at 676 (citing *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253).

The court found four statutory grounds under N.C. Gen. Stat. § 7B-1111(a) (2006) to terminate the parents' parental rights: (1) the parents neglected the child; (2) the parents willfully left the child in a placement outside the home for a period of more than twelve months without showing the court that reasonable progress was made to correct the conditions which led to the removal of the child from the home; (3) the parents have, for a continuous period of six months next preceding the filing of the petition, willfully failed to pay a reasonable portion of the cost of care for the child; and (4) the parents abandoned the child for at least six months preceding the filing of the petition. The court concluded that termination of the parents' parental rights was in the best interests of the minor child. The court ordered termination of their parental rights and ordered DSS to proceed with adoption efforts.

Only one statutory ground is required to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a) (2006). The court found that the respondent neglected the child. A neglected juvenile is one "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 lives in an environment injurious to the juvenile's welfare. . . ." N.C. Gen. Stat. § 7B-101(15) (2006).

Prior to determining whether a child is neglected, and whether a finding of fact supports a conclusion that the child is neglected, the court considers evidence of prior neglect and events

occurring before and after an adjudication of neglect. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232-33 (1984).

The evidence is overwhelming that respondent has suffered from substance abuse for the majority of his life. He has been unable to refrain from abusing drugs and alcohol for any longer than a few months. In addition, he is unable to maintain a steady job and stable housing due to his substance abuse. As a result, he has been unable to care for the child, leading to the adjudication of neglect. He relied upon his mother and the Fosters to care for the child subsequent to the adjudication.

The first ground leads to the second ground for termination. Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2006), the court concluded respondent willfully left the child in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting the conditions which led to the removal of the juvenile.

The willfulness required for a finding under § 7B-1111(a)(2) is something less than willful abandonment and may be found even when the parent has made some effort to regain custody but has failed to show reasonable progress or positive response to efforts of DSS to rectify the conditions. *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004). "Extremely limited progress is not reasonable progress." *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995) (citing *In re Bishop*, 92 N.C. App. 662, 670, 375 S.E.2d 676, 681 (1989)).

As previously noted, respondent has a long history of drug abuse. From the time DSS became involved with this family, DSS requested that respondent undergo forty-two drug screens. For less than half of the screens, respondent tested negative eleven times, positive for cocaine six times, positive for marijuana twice, and he altered one screen. Of the twenty-two screens he failed to undergo, respondent admitted he would have tested positive on twelve of them. He tested positive for marijuana as late as March 2006. Furthermore, he failed to maintain steady employment and stable housing.

We therefore conclude the evidence and findings of fact support the court's conclusions of law that grounds existed to terminate respondent's parental rights. After determining that at least two grounds exist, we need not consider the other grounds found by the trial court. *See In re Davis*, 116 N.C. App. 409, 413, 448 S.E.2d 303, 305 (1994) (holding that when grounds to terminate exist under one subsection, no need to address whether termination is proper under another subsection).

B.

The court concluded that termination of the parents' parental rights was in the best interests of the minor child. Once a trial court finds grounds exist to terminate parental rights, then the trial court moves to the determination of the best interests of the child. *In re Shermer*, 156 N.C. App. at 285, 576 S.E.2d at 406-07. The determination of whether it is in the best interests of the child to terminate parental rights is in the discretion of the

trial court and will not be disturbed absent an abuse of discretion. *In re I.S.*, 170 N.C. App. 78, 89, 611 S.E.2d 467, 474 (2005) (citing *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001)); *In re Allred*, 122 N.C. App. 561, 569, 471 S.E.2d 84, 88 (1996).

The trial court found that after visitations with respondent the minor child required therapy. Once the visits ceased, the minor child progressed to a point where the therapist advised Mr. Foster that no future therapy was needed. Although respondent loves the minor child, continuation of the parental relationship will not provide stability and permanency for the minor child.

The minor child lived with the Fosters full-time from July 2003, with few interruptions, until March 2004, and then from January 2005 until the present. The minor child is "extremely happy" in the placement. The Fosters "appear to provide a loving environment" for the minor child, who calls Mr. Foster her "dad[.]" The minor child realizes respondent is her biological father but her love and affection, as between a father and daughter, are directed to Mr. Foster. The minor child views Mrs. Foster as her mother. When the minor child was first placed with the Fosters at age four, she was not potty trained or weaned from a bottle. Mrs. Foster succeeded in potty training and weaning the minor child. She considers the Fosters her parents and their son as her brother. The child desires permanency and stability in her life.

The minor child told the social workers her desire to be adopted by the Fosters. The minor child wants to be called by the

surname of Foster, and she writes that name on her papers at school. Her school allows her to use a hyphenated name until she is adopted. The minor child is adoptable and the Fosters are two loving parents who are willing to adopt her. The Fosters have a suitable home with enough room for the minor child and the financial ability to assume responsibility for another child.

Based upon the trial court's findings we find no abuse of discretion in the trial court's conclusion that termination is in the child's best interests. This assignment of error is overruled.

III.

Respondent next contends the court erred in failing to conduct the termination hearing within 90 days after the filing of the petition to terminate parental rights. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-1109(a), the adjudicatory hearing in a proceeding to terminate parental rights must be held within 90 days from the filing of the petition. N.C. Gen. Stat. § 7B-1109(a) (2006). However, the trial court has authority to "continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence" and conduct discovery. N.C. Gen. Stat. § 7B-1109(d) (2006). Reversal of the trial court for failure to comply with the above time limitation will result when the hearing is held "egregiously late." *In re D.M.M.*, ___ N.C. App. ___, ___, 633 S.E.2d 715, 717 (Sept. 5, 2006) (No. COA06-29). Reversal of a termination order for failure to comply with a time deadline is improper unless prejudice is shown. *In re As.L.G. & Au.R.G.*, 173 N.C. App. 551, 558, 619

S.E.2d 561, 566 (2005), *reh'g granted by*, 360 N.C. 289, 627 S.E.2d 618 (2006), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006), *motion granted by*, __ N.C. __, __, 630 S.E.2d 671 (March 29, 2006) (No. 624PA05), *motion denied by*, __ N.C. __, __, __ S.E.2d __, __ (April 6, 2006).

Respondent has not presented any evidence that he was prejudiced by the delay. The petition was filed on 15 June 2006 and the matter calendared for 6 September 2006, within the 90-day period. The court continued the hearing on 6 September 2006 until 25 October 2006 because the time allotted for the mother to respond to the petition had not expired. Respondent did not appear for this hearing. The court entered a second continuance on 25 October 2006 until 29 November 2006, to permit the appointment of a guardian ad litem for respondent. Although the hearing held on 29 November 2006 was outside the statutory time period allowed for the court to continue the hearing, respondent has not shown he was prejudiced by the delay. This assignment of error is overruled.

IV.

Respondent next contends the court erred by failing to file the adjudication/termination and disposition order within thirty days after the date of the hearing as required by N.C. Gen. Stat. § 7B-1109(e) (2006) and N.C. Gen. Stat. § 7B-1110(a) (2006). We disagree.

Failure to file an order within this time limitation does not invalidate the order unless prejudice resulting from the delay is shown. *In re J.L.K.*, 165 N.C. App. at 316, 598 S.E.2d at 391

(delay of eighty-nine days was not prejudicial). "[A] trial court's violation of statutory time limits in a juvenile case is not reversible error *per se* . . . . [T]he complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal." *In re S.N.H. & L.J.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (citations omitted).

Here, the hearing was conducted on 29 November 2006 and the order was filed on 10 January 2007. Respondent fails to "appropriately articulate" how he was prejudiced by a delay of twelve days. We overrule this assignment of error.

V.

Respondent next contends the court violated his due process rights by relying upon incompetent hearsay and testimony presented without proper or sufficient foundation. We disagree.

Respondent lists under this assignment of error three instances in which the court purportedly admitted incompetent evidence. He excepts to testimony by a social worker that the child said she wants to be adopted by the Fosters, testimony of Mr. Foster that the child underwent an investigation for sexual abuse, and testimony of Mr. Foster as to the effect respondent's behavior has had upon the child. The court sustained respondent's objection to Mr. Foster's testimony regarding an investigation into possible sexual abuse of the child.

"The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal." *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000), *review*

denied, *appeal dismissed,* 353 N.C. 374, 547 S.E.2d 9 (2001). In a bench trial, the appellant must show the court relied upon the incompetent evidence in making its findings of fact and must overcome the presumption the court disregarded the incompetent evidence. *Id.*, 140 N.C. App. at 301, 536 S.E.2d at 846. Given the overwhelming amount of other competent evidence to support the court's findings of fact, we conclude this showing has not been made and overrule this assignment of error.

VI.

Respondent's final contention is that the court erred by denying his pretrial motion to dismiss the petition made on three grounds: (1) the hearing was not held within 90 days from the filing of the petition pursuant to N.C. Gen. Stat. § 7B-1109(a); (2) the petition was not in compliance with N.C. Gen. Stat. § 7B-1104 (2006); and (3) a special hearing was not held as provided by N.C. Gen. Stat. § 7B-1108(b) (2006). We disagree.

As a preliminary matter, we must address respondent's failure to specifically assert these three issues in his original Notice of Appeal to this Court filed on 22 January 2007. Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, the time and manner for appeals in termination of parental rights cases are governed by the North Carolina General Statutes § 7B-1113 (2006). N.C. R. App. P. 3(b)(1)(2006). N.C. Gen. Stat. § 7B-1113 requires that written notice of appeal be given within ten days of the entry of the order terminating parental rights. N.C. Gen. Stat. § 7B-1113 (2006). In this case, respondent filed his Notice of

Appeal from the trial judge's Order on Motion to Dismiss Termination of Parental Rights Petition entered on 29 November 2006. This Order does not assert the three issues respondent now argues.

Respondent asks this Court to consider these issues as a petition for writ of certiorari pursuant to N.C. R. App. P. 21 (2006). Such a writ "may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action. . . ." N.C. R. App. P. 21(a)(1) (2006).

Here, we note the serious consequences of the termination of respondent's parental rights. *See In re I.S.*, 170 N.C. App. 78, 84-85, 611 S.E.2d 467, 471 (2005). Therefore, we choose to grant certiorari in this case and will consider respondent's three arguments on the merits.

First, respondent contends the court erred by denying his pretrial motion to dismiss the termination petition because the hearing was not held within 90 days from the filing of the petition as required by N.C. Gen. Stat. § 7B-1109(a) (2006).

We concluded under section III of this opinion that although the 29 November 2006 hearing was held more than 90 days after filing the initial petition, respondent failed to show how this error resulted in prejudice to him. Because we find no prejudicial error in continuing the hearing for more than 90 days of the filing of the petition, the court's denial of respondent's pretrial motion

to dismiss was not in error on this ground.

Respondent does not bring forward any argument in his brief regarding the second ground and therefore abandons this ground. N.C. R. App. P. 28(b)(6) (2006); *In re B.D.*, 174 N.C. App. 234, 239, 620 S.E.2d 913, 916 (2005), *disc. review denied,* 360 N.C. 289, 628 S.E.2d 245 (2006).

Respondent asserts the court erred in not conducting a special hearing required by N.C. Gen. Stat. § 7B-1108(b) when a respondent files an answer and denies any material allegation of the petition or motion. N.C. Gen. Stat. § 7B-1108(a) (2006). This statute provides:

> The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days given by the petitioner or movant to the respondent who answered or responded, and the guardian ad litem for the juvenile to determine the issues raised by the petition and answer or motion and response.

N.C. Gen. Stat. § 7B-1108(b) (2006).

In construing an earlier version of this statute, N.C. Gen. Stat. § 7A-289.29(b), this Court noted the statute "does not prescribe the exact form the special hearing is to take except that it is to be used to determine the issues raised by the pleadings." *In re Peirce,* 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981). We held the requirement of the special hearing may be satisfied by the holding of a pre-trial hearing at which the issues for resolution at trial may be identified. *Id.*, 53 N.C. App. at 383, 281 S.E.2d at 204. Furthermore, we have held the failure to give notice of the special hearing is not prejudicial when the answering

respondent denies all of the material allegations of the petition, thereby leaving no issues for pre-trial disposition by the court. *In re B.D.*, 174 N.C. App. at 240, 620 S.E.2d at 917.

In the case before us, respondent, in his answer, denied all the material allegations of the petition and contested every ground alleged for terminating his parental rights. Therefore, there were no issues remaining for disposition at a special hearing. The day before trial the court conducted a "pre-calendar call" during which the parties agreed to set this case as the only one for trial on 29 November 2006. The day of trial, the court chastised respondent's attorney for not bringing an oral motion to the court's attention during the previous day's hearing, stating the court "possibly could have heard [the motion]" at that time while all the parties were present. Although the court did not expressly call it as such, it appears the "pre-calendar call" hearing served the purpose of a pre-trial hearing. We conclude the court did not err by denying the motion to dismiss.

The order terminating respondent's parental rights is affirmed.

Affirmed.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).