

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-568

NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2007

IN THE MATTER OF:

S.M.B. and  
T.M.B.

McDowell County  
Nos. 03 J 17  
03 J 108

Appeal by Respondent-Mother from order entered 12 March 2007 by Judge C. Randy Hodl in McDowell County District Court. Heard in the Court of Appeals 4 September 2007.

*Goldsmith, Goldsmith & Dews, P.A., by James W. Goldsmith, for Petitioner-Appellee McDowell County Department of Social Services.*

*Taylor, Penry, Rash & Riemann, PLLC, by Neil A. Riemann, for Guardian ad Litem.*

*Robert W. Ewing for Respondent-Appellant.*

STEPHENS, Judge.

Respondent-Mother appeals from an order terminating her parental rights to her children, S.M.B. and T.M.B. For the reasons set forth below, we affirm.

Petitioner McDowell County Department of Social Services ("DSS") has been involved with Respondent-Mother and her husband, M.B., (collectively, "Respondents") since 1994.<sup>1</sup> Respondents'

---

<sup>1</sup>Although the trial court terminated M.B.'s parental rights to S.M.B. and T.M.B. in the same order in which it terminated the rights of Respondent-Mother, M.B. has not appealed the order.

first child, H.M.B., was adjudicated neglected in 1995 based upon a history of domestic violence between Respondents. Custody of H.M.B. was ultimately placed with a third-party. On 30 January 2003, DSS filed a petition in case number "03 J 17" alleging that Respondents' second child, S.M.B., was a neglected juvenile. In May 2003, the trial court adjudicated S.M.B. neglected based upon (1) M.B.'s acts of domestic violence upon Respondent-Mother while the family lived in the house of S.M.B.'s paternal grandfather; and (2) Respondent-Mother's violation of two separate safety plans she entered into with DSS in which she agreed to keep S.M.B. away from M.B. The adjudication order found that Respondent-Mother had contributed to an unsafe environment for S.M.B. and placed her at risk of harm by continuing to expose S.M.B. to M.B. knowing him to be a chronic alcoholic who engages in acts of domestic violence.

On 29 September 2003, after the birth of Respondents' third child, T.M.B., DSS filed a petition in case number "03 J 108" alleging that T.M.B. was a neglected juvenile. T.M.B. was adjudicated neglected a month later. The adjudication order found that since S.M.B. had been adjudicated neglected, M.B. had been through several alcohol and drug abuse programs, but continued to abuse alcohol on a regular basis; he was arrested for threatening his father and assaulting a jailer; and he had not complied with the prior orders of the court or family services case plan. Custody of T.M.B. was placed with DSS, and a trial placement was authorized with Respondent-Mother upon the condition that she not allow T.M.B. to be around M.B. without DSS's approval. In a review order

entered 15 January 2004, the trial court ordered Respondent-Mother to obtain and maintain employment, establish a residence separate from the residence of the paternal grandfather, and refrain from contact with M.B.

On 23 September 2004, the trial court entered a permanency planning review order with respect to S.M.B. and T.M.B. The trial court made several findings of fact and concluded that it was in the children's best interests to continue to work with Respondent-Mother toward reunification. Respondent-Mother was ordered to maintain employment, maintain a suitable residence for herself and the children, continue counseling, and to refrain from any contact with M.B.

By permanency planning order filed 13 January 2005, the trial court ordered legal and physical custody of S.M.B. and T.M.B. to be with Respondent-Mother. Conditions of the order included that she not voluntarily contact M.B., maintain a suitable residence for herself and the children, and provide proper care and supervision of the children in a safe home. In accordance with the order, Respondent-Mother moved out of the paternal grandfather's house and into a trailer purchased by the paternal grandfather; however, Respondent-Mother and the children moved back into the paternal grandfather's house in the winter of 2005. In April 2006, after M.B. was released from prison, he returned to the paternal grandfather's house where Respondent-Mother and the children resided.

On 23 June 2006, DSS filed a juvenile petition in 03 J 17 and 03 J 108 alleging that S.M.B. and T.M.B. were neglected juveniles in that they were living in an environment injurious to their welfare. The petition further stated that Respondents were violating the January 2005 order. By order filed 15 August 2006, the trial court again adjudicated S.M.B. and T.M.B. neglected. The children were placed in the custody of DSS and reunification efforts with Respondents were ceased. On 18 December 2006, DSS filed a motion to terminate Respondents' parental rights as to both S.M.B. and T.M.B. based on neglect. Respondent-Mother was served with notice of the motion by first-class mail, and she answered the motion on 28 December 2006. At the hearing on the motion to terminate, Respondent-Mother testified on her own behalf and presented testimony from her social worker, friends, and M.B. The trial court concluded that based upon clear, cogent, and convincing evidence, sufficient grounds existed for terminating Respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) in that S.M.B. and T.M.B. were neglected, and the trial court terminated Respondents' parental rights. Respondent-Mother appeals.

---

Respondent-Mother contends the trial court lacked jurisdiction to terminate her parental rights because she was not properly served with notice of the 18 December 2006 motion to terminate in compliance with the service requirements of N.C. Gen. Stat. § 7B-1102. That statute provides:

(a) When the district court is exercising jurisdiction over a juvenile . . . [an] agency

specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights[.]

(b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

(1) Service must be in accordance with G.S. 1A-1, Rule 4, if . . .

. . . .

c. Two years has elapsed since the date of the original action.

N.C. Gen. Stat. § 7B-1102 (2005). Further, "[u]nder N.C.G.S. § 7B-405 [(2005)], an 'action is commenced by the filing of a petition in the clerk's office[.]'" *In re P.L.P.*, 173 N.C. App. 1, 6, 618 S.E.2d 241, 245 (2005).

Respondent-Mother asserts that the 2006 motion to terminate was filed more than two years after the date of the original action, requiring service pursuant to the procedures set out in Rule 4. Respondent-Mother contends that the date of the original action for S.M.B. is 30 January 2003, the date DSS filed its first neglect petition in 03 J 17. Similarly, Respondent-Mother contends the date of the original action for T.M.B. is 29 September 2003, the date DSS filed its first petition in 03 J 108. DSS, however, asserts that the date of the original action in this termination proceeding is 23 June 2006, when DSS filed its second juvenile petition for both children, and that, accordingly, service was proper pursuant to Rule 5(b).

We considered a similar issue in *P.L.P.*, *supra*. In that case, the mother argued service under Rule 4 was required because a 2003

motion to terminate was filed more than two years after the filing of a 1999 juvenile petition by which P.L.P. first came under the jurisdiction of the court. This Court, however, noted that the trial court ordered P.L.P. returned to the mother's custody and closed the juvenile file in December 2000, and that DSS commenced another action in May 2002 when it filed another neglect petition. This Court concluded that May 2002 was the date of the original action in the termination proceeding and service of the 2003 motion to terminate was adequate under Rule 5. *Id.*

In the present case, DSS filed two separate juvenile petitions in 2003 which resulted in both S.M.B. and T.M.B. being adjudicated neglected that same year. By order filed 13 January 2005, the trial court returned legal and physical custody of S.M.B. and T.M.B. to Respondent-Mother. In June 2006, DSS filed another juvenile petition alleging that both S.M.B. and T.M.B. were neglected. Based upon the 2006 juvenile petition, the trial court again adjudicated S.M.B. and T.M.B. neglected. Thereafter, DSS moved to terminate Respondent-Mother's parental rights. Although the trial court did not specifically order the juvenile file "closed" as in *P.L.P.*, the 2003 actions were closed when S.M.B. and T.M.B. were returned to Respondent-Mother's custody, and the June 2006 petition commenced separate and distinct actions from the actions commenced in 2003. Thus, as in *P.L.P.*, service of the 18 December 2006 motion to terminate was adequate under Rule 5. Respondent-Mother acknowledges that she was served with notice of the motion to terminate pursuant to Rule 5. Accordingly, the trial

court had jurisdiction to terminate her parental rights. This assignment of error is overruled.

---

Respondent-Mother next contends the trial court erred by concluding that sufficient grounds existed to terminate her parental rights based upon a finding that the minor children were neglected within the meaning of N.C. Gen. Stat. § 7B-101(15). We disagree.

A trial court may terminate parental rights upon a finding that "[t]he parent has . . . neglected the juvenile. The juvenile shall be deemed to be . . . neglected if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2005). Section 7B-101(15) defines "[n]eglected juvenile" as follows:

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). To prove neglect in a termination case, there must be clear and convincing evidence that (1) the juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15), and (2) "the juvenile has sustained 'some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment as a consequence'" of the neglect. *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (quoting

*In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). "Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." *Id.* "[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." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984).

If the child has been removed from the parents' custody before the termination hearing, and the petitioner presents evidence of prior neglect, including an adjudication of such neglect, then "[t]he 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." *Id.* at 715, 319 S.E.2d at 232. Thus,

[where] there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

*Reyes*, 136 N.C. App. at 815, 526 S.E.2d at 501.

The trial court entered the following findings to support its conclusion that Respondent-Mother's parental rights should be terminated pursuant to N.C. Gen. Stat. § 7B-1111(a)(1):



12. [Respondents] began living together approximately 17 years ago, and were married in 1994. On numerous occasions over at least 14 years, [Respondents] have engaged in domestic violence, and [M.B.] has had ongoing issues of assaults and criminal behavior arising while he was intoxicated. Although [Respondent-Mother] has taken various criminal assault warrants and 50B domestic violence actions against [M.B.], she has dismissed most of these proceedings and returned to live with [M.B.], despite his history of alcohol abuse and violence.

13. The children subject to the motion for termination of parental rights have previously been adjudicated to be neglected juveniles on two separate occasions. The first adjudication of S.M.B. occurred following a hearing held May 29, 2003, in the action entitled *In the Matter of: S.M.B.* File No. 03-J-17. T.M.B. was adjudicated to be a neglected juvenile following a hearing held October 16, 2003, in the action entitled *In the Matter of: T.M.B.*, File No. 03-J-108. The minor children were most recently adjudicated to be neglected juveniles following a hearing held August 3, 2006, in a proceeding entitled *In the Mattter of: S.M.B. and T.M.B.*, File Nos. 03-J-17 and 03-J-108. The adjudication and dispositional order found both of the minor children to be neglected juveniles as defined by § 7B-101(15), and the custody of both children was placed with the McDowell County Department of Social Services. The adjudication of neglect was based upon the parents' choosing to reside together at the home of the paternal grandfather, J.B. in violation of the prior orders of the court regarding contact with each other, being in violation of the safety plan requiring that [M.B.] not have contact with the minor children, and due to an incident of domestic violence in the home where the children were residing, which occurred after violation of the safety plan by both parties. These facts were similar to the facts that led to the adjudication of H.M.B. as a neglected juvenile, and similar to the factual pattern that led to the prior adjudication of S.M.B. as a neglected juvenile in May, 2003, and

adjudication of T.M.B. as a neglected juvenile in October, 2003.

. . . .

19. [Respondent-Mother] has mostly lived at the residence of her father-in-law, J.B., for approximately 14 years, and has known that each time [M.B.] comes to his father's residence, usually following a release from prison, [Respondents] engage in domestic violence and [M.B.] abuses alcohol. Prior to the children being returned to the custody of [Respondent-Mother] following a hearing on January 15, 2005, Judge Skerrett told [Respondent-Mother] in 2004 on two separate occasions that [she] should not live at the residence of J.B., due to the pattern of domestic violence that ensued when [M.B.] returned to the residence of his father, J.B. After the adjudication of neglect of [S.M.B.] in May, 2003, the social workers along with the presiding judge encouraged [Respondent-Mother] to obtain a residence separate from J.B., and in 2004 J.B. bought a mobile home which was placed at Grandview Trailer Park in order for [Respondent-Mother] to have a separate residence. [Respondent-Mother] and the minor children moved to the mobile home residence at Grandview Trailer Park, and stayed at the residence until some time during the Winter of 2005, when she voluntarily moved back to the residence of J.B.

20. Pursuant to a permanency planning order entered January 13, 2005 *In the Matter of: S.M.B. and T.M.B.*, File Nos. 03-J-17 and -108, the custody of said children, which had been with the McDowell County Department of Social Services, was placed with [Respondent-Mother] upon terms and conditions that included that [she] would not allow the children to be around [M.B.] and that [she] shall not have voluntary contact with [M.B.], and that if [M.B.] contacted [Respondent-Mother] she was to contact law enforcement and take appropriate action if necessary. The permanency planning order required [Respondent-Mother] to maintain a suitable residence for the minor children, and suspended visitation between the children and [M.B.] until he could demonstrate consistent

sobriety and was no longer demonstrating harassing behaviors toward [Respondent-Mother]. At the time the children's custody was returned to [Respondent-Mother] on January 13, 2005, said respondent assured DSS that she did not plan to reunite with [M.B.], and would have no contact with him.

. . . .

25. [M.B.] was continuously incarcerated from July, 2005 through January, 2006, when [he] was released and immediately sent to the DART program, where he remained until April 28, 2006. [M.B.] has previously attended the DART program on at least four prior occasions. Upon [his] release from the DART program, he returned to the residence of his father, J.B. where [Respondent-Mother] and the minor children were residing. [Respondent-Mother] knew or should have known [M.B.] would return to the residence of J.B. upon his release from prison. From past history [Respondent-Mother] knew the minor children would be placed at risk for their safety in the event [M.B.] moved back to his father's residence. [Respondent-Mother] failed to notify law enforcement or DSS that [M.B.] had resumed residing with her, and was allowing [him] to have unsupervised contact with the minor children despite her knowledge that the father's presence in the home jeopardized the safety of the children, and violated the prior order of the court. On May 22, 2006, DSS received a referral regarding [Respondent-Mother]. Upon investigation, the social worker found [Respondents] residing together at the home of J.B. At the request of the social worker, [Respondents] agreed to enter into a protection plan for the children, whereby [M.B.] would move from [Respondent-Mother] and not have contact with the children. J.B. paid for his son to move out of his residence, and stay at the Sportsman Inn. On May 25, 2006, [M.B.] was observed to be drinking in his motel room, with several empty beer bottles in the room. On May 31, 2006, [M.B.] was again observed by the social worker to be under the influence of alcohol at his motel room. On June 23, 2006, [M.B.] was at the residence of his father, where [Respondent-Mother] and the minor children

were residing. [M.B.] had been living at the residence of [Respondent-Mother], in violation of the safety plan, for approximately two weeks, except for two days prior to June 23, 2006. On 23 June 2006, [M.B.] returned to the residence where [Respondent-Mother] was staying in the home of J.B., and threatened [her]. Although [Respondent-Mother] immediately took the children to the Sheriff's Department after [M.B.] appeared in the home on June 23, 2006, [she] did not press any charges against [M.B.] or take out a domestic violence restraining order. While both [R]espondents testified [M.B.] was not living at the home of [Respondent-Mother] and children prior to June 23, 2006, the testimony of said [R]espondents was not credible. As a result of violation of the protection plan, DSS sought and obtained non-secure custody of the minor children. On June 23, 2006, the home of [Respondent-Mother] was in substantial disarray, with dirty dishes in various areas of the home, piles of clean and dirty laundry, cigarette butts in the floors and overflowing out of the ashtrays, and a strong, unpleasant odor was in the home. Following DSS taking custody of the [R]espondents' children, [Respondents] continued to reside together at the residence of J.B. until [M.B.] was incarcerated in August, 2006.

. . . .

29. DSS has previously provided intensive supportive services to [Respondents] and the minor children in order to prevent or eliminate the need for the removal of the minor child[ren] outside the home of [R]espondents[.]

. . . .

31. Since the adjudication and dispositional order entered August 3, 2006, adjudicating [S.M.B.] and [T.M.B.] to be neglected juveniles, [M.B.] has been incarcerated serving an active sentence for two convictions of driving while impaired and a conviction of communicating threats. [Respondent-Mother] has continued to reside at the home of [ ] J.B. the father of [M.B.] As of February 8, 2007, [Respondent-Mother] was unemployed. Between

February 8, 2007 and February 26, 2007, [Respondent-Mother] obtained employment of approximately 20 hours per week, as a merchandising assistance [sic]. As of February 26, 2007, [Respondent-Mother] continued to reside at the home of J.B. [M.B.] intends to return to J.B.['s] residence when he is released from prison in 2008. Mr. J.B. has maintained ownership of the mobile home where [Respondent-Mother] previously resided at Grandview Trailer Park, and this residence has been available as a location where [she] could have resided, but chose not to. When [M.B.] was requested by the Department of Social Services to leave the residence of J.B. in May, 2006, [M.B.] attempted to move to the mobile home residence at Grandview Trailer Park, but was not allowed to reside there by the management at the mobile home park due to [M.B.'s] reputation for alcohol abuse.

32. [Respondents] have had a pattern of conduct, extending several years, whereby [Respondent-Mother] has remained unemployed, and lives at the residence of J.B. the father of [M.B.], despite diligent efforts on the part of the Department of Social Services to assist [Respondent-Mother] in finding a separate residence. Despite [Respondent-Mother] knowing that [M.B.] frequently becomes intoxicated and engages in domestic violence with [her] and threatens the children, [Respondent-Mother] has persisted in remaining with the children at the residence of J.B., where [M.B.] returns after each period of incarceration. On each occasion after [M.B.] has been incarcerated and has returned to the residence of his father, where [Respondent-Mother] and the children have resided, incidents of domestic violence have occurred putting the children's safety in jeopardy. Prior court orders have noted the risk to the children that is presented by [Respondent-Mother] continuing to maintain a relationship with [M.B.] and by residing with and being financially dependent on J.B. [Respondent-Mother] is under no disability and is capable of gainful employment so that she could establish a residence independent from the home of J.B. the father of [M.B.] [Respondent-Mother], since approximately 2004,

has had a mobile home residence available for her use which is owned by her father-in-law, J.B. [M.B.] is a threat to the minor children due to his substance abuse, and threatening, violent, and aggressive behavior after drinking. The above pattern of behavior by [Respondents] has continued for at least twelve years, despite the intervention of DSS and the court system. [Respondents] have chosen to continue their relationship with each other, knowing that the children are placed at risk due to the above pattern of behavior. The court has considered the testimony and evidence presented by [Respondent-Mother] and her counselor, Sarah Wells, but finds the conduct of [Respondent-Mother] of repeatedly exposing her children to the threat of domestic violence to be wilful.

Of these findings, Respondent-Mother challenges only finding of fact thirty-two in her brief. Thus the remaining findings are presumed to be correct and supported by the evidence. *In re Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982). In addition, a review of the record and transcript shows that each of the trial court's findings is based upon competent evidence, including the numerous court orders and DSS and Guardian ad Litem reports entered in the case.

Respondent-Mother points to her counselor's testimony regarding Respondent-Mother's progress as evidence that the probability of neglect would not occur. Respondent-Mother, however, testified that she still resided at the paternal grandfather's house at the time of the termination proceeding despite M.B.'s history of residing there upon release from prison. Respondent-Mother's choice to continue living with the paternal grandfather, and her failure to obtain appropriate housing and employment, as ordered by the court and recommended by DSS, supported the court's determination that there was a probability

that neglect would be repeated in the future. Further, because of the similarities to H.M.B.'s situation, we find the evidence regarding Respondent-Mother's other child to constitute relevant circumstances and events which bear upon the probability of a repetition of neglect. The trial court was free to conclude, as it did, that M.B.'s pattern of alcohol abuse suggested a probability that domestic violence in the presence of the children would recur. We therefore hold that the trial court's findings of fact were based on clear, cogent, and convincing evidence. We further hold that these findings support the court's conclusion that grounds justifying termination existed under N.C. Gen. Stat. § 7B-1111 (a) (1).

---

Respondent-Mother also contends the trial court erred in determining that it was in the children's best interests to terminate her parental rights. We disagree.

In determining whether terminating parental rights is in a juvenile's best interest, the court shall consider the following:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2005).

Here, to support its determination that it was in the children's best interests to terminate Respondent-Mother's parental rights, the trial court made the following finding of fact:

33. Since the minor children were placed in foster care on June 23, 2006, the children have done well in their placement. The children are ages [] and [], and have no medical, psychological, or behavioral problems that would prevent the minor children from being readily adopted. It is likely that if the parental rights of [Respondents] were terminated, the children could be adopted. The permanent plan for the children is adoption, and the termination of the parental rights of [Respondents] will aid in the accomplishment of the children's permanent plan. The children have a moderate to strong bond with [Respondent-Mother], and a weak bond with [M.B.] Since the children have come into the care of the Department of Social Services they have resided in the same foster home. The present foster care placement for the minor children is a potential adoptive placement for the children should the parental rights of [Respondents] be terminated. The quality of the relationship between the children and their foster parents, which is a possible adoptive placement, is good.

Based upon the trial court's finding, which addresses the statutory factors in section 7B-1110(a) and is supported by the evidence as Respondent-Mother concedes, we conclude that the trial court did not abuse its discretion in determining that terminating Respondent-Mother's parental rights was in the best interests of the children.

The orders terminating Respondent-Mother's parental rights to S.M.B. and T.M.B. are

AFFIRMED.



-17-

Judges CALABRIA and GEER concur.

Report per Rule 30(e).