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NO. COA08-571

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

IN THE MATTER OF: S.R.M., C.P.S.H., S.A.M.

Cabarrus County
Nos. 07 JT 274-76

Appeal by Respondents from judgment entered 14 February 2008 by Judge Donna H. Johnson in Cabarrus County District Court. Heard in the Court of Appeals 28 August 2008.

Juanita B. Allen for Petitioner-Appellee Cabarrus County Department of Social Services.

Pamela Newell Williams for Guardian ad Litem Appellee.

Richard Croutharmel for Respondent-Mother Appellant.

Peter Wood for Respondent-Father Appellant.

STEPHENS, Judge.

On 3 November 2005, the Cabarrus County Department of Social Services ("DSS") filed a juvenile petition alleging the neglect of S.A.M., a three-year-old girl, S.R.M., a six-year-old girl, and C.P.S.H., a fourteen-year-old boy, and the children were placed in the nonsecure custody of DSS on that day. Respondent-Mother, the mother of all three children, and Respondent-Father, the father of S.A.M. and S.R.M., entered into a consent order on 17 November 2005, whereby the children were adjudicated neglected. The permanent plan for the children was reunification with either or both Respondents. Between November 2005 and August 2006, the trial

court reviewed the matter three times without changing the status of the case.

On 17 August 2006, DSS filed a second petition alleging sexual abuse of S.A.M. and S.R.M. by Respondent-Father, and neglect of all three children. Respondents signed a Memorandum of Judgment/Order and the trial court dismissed that petition on 16 November 2006.

Between August 2006 and March 2007, the trial court reviewed the matter five times without changing the status of the case. On 15 March 2007, the trial court changed the permanent plan for the children from reunification with Respondents to adoption, and ordered DSS to take timely steps to achieve that permanent plan. DSS filed a Motion in the Cause to Terminate Parental Rights on 12 June 2007.

The trial court conducted the termination of parental rights ("TPR") hearing between 27 September 2007 and 25 January 2008 in 12 different sessions. The trial court terminated Respondents' parental rights on 25 January 2008 and reduced its order to writing on 14 February 2008. From this order terminating their parental rights, Respondents appeal.

Facts

DSS has been involved with Respondents on multiple occasions since 2001 when DSS received reports alleging neglect and lack of proper care of the children. The family's issues were unemployment, unstable housing, lack of supervision, failure to get the children to medical appointments, failure to ensure the children took their medications, and Respondent-Mother's substance

abuse. DSS received another report on 21 October 2003 alleging that C.P.S.H. had mental health issues which were not being addressed by Respondents.

Respondents thereafter entered into a case plan on 10 December 2003 whereby they agreed to follow through with mental health recommendations, to send the children to school clean, to schedule an eye appointment for S.A.M., and to meet with a social worker to discuss their status.

By March 2004, Respondents had not met their case plan goals. As a result, Respondents entered into another case plan on 10 March 2004. They were referred to six weeks of Family Preservation Services ("FPS"). However, Respondent-Mother failed to keep mental health appointments for herself and for C.P.S.H., tested positive for cocaine, and left an agreed-upon detoxification program after only a few hours.

On 4 June 2004, DSS received another report describing physical abuse of the two girls. Due to Respondents' lack of progress on their case plan, Respondents entered into another case plan on 10 June 2004, and on 11 August 2004, again agreed to work with FPS. Because of continued lack of progress on their case plan, however, Respondents entered into yet another case plan on 10 September 2004. On 15 September 2004, Lisa Fullerton, a DSS social worker, referred Respondent-Mother to Treatment and Education of Autistic and related Communication-handicapped CHildren ("TEACCH")[1]

[1] TEACCH is a service, training, and research program for individuals of all ages and skill levels with autism spectrum disorders.

for an evaluation. Respondent-Mother was not responsive to attempts by TEACCH personnel to contact her.

By 21 September 2004, C.P.S.H.'s outbursts at school were severe. On 23 September 2004, Respondent-Mother admitted that she had failed to take him to his mental health appointments. She also failed to report for a random drug screen on 24 September 2004 and admitted that she was not taking her prescribed mental health medication.

DSS received two reports in June 2005 wherein Respondent-Mother stated S.R.M. said Respondent-Father had hurt her with Respondent-Mother's vibrator. It was also alleged that C.P.S.H. was autistic and that he had admitted to touching S.A.M.'s vagina. DSS substantiated neglect on 20 September 2005 due to Respondents' repeated failure to provide proper supervision and their unstable housing situation.

C.P.S.H. was admitted to Brynn Marr Psychiatric Residential Treatment Facility in Jacksonville, North Carolina, on 26 September 2005 to address his aggressive behaviors and to monitor his medication. He was diagnosed with Asperger's Syndrome,[2] Motor Dyspraxia, Attention Deficit Disorder, and Oppositional Defiant Disorder.

DSS received a report on 19 October 2005 alleging neglect of S.R.M. in that she was sent to school with dirty clothes and smelling badly. She was also urinating frequently in her clothing.

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[2] Asperger's syndrome is an autistic spectrum disorder.

On 3 November 2005, DSS received a new report for improper supervision. Respondent-Mother had been in Cabarrus County criminal court on that day with S.R.M. and had left the child with a total stranger who was observed inappropriately disciplining other children. DSS filed a juvenile petition on 3 November 2005 alleging the children to be neglected, and assumed nonsecure custody of the children that day. After a hearing, the trial court entered an order for continued nonsecure custody on 10 November 2005.

On 17 November 2005, Respondents entered into a consent order whereby the children were adjudicated neglected. The permanent plan for the children was reunification with either or both Respondents. To address the issues which led to the children's removal from their care, Respondents were ordered to comply with the following tasks: 1) submit to a psychological evaluation and follow through with all treatment recommendations; 2) submit to a substance abuse assessment and follow through with any treatment recommendations; 3) submit to random drug screens; 4) attend Alcoholics Anonymous meetings and/or Narcotics Anonymous meetings as recommended by the treatment provider; 5) abstain from using any impairing substances; 6) attend a parenting course and demonstrate the skills learned during visitation; 7) obtain and maintain stable employment; 8) obtain and maintain suitable housing appropriate for the placement of the children; 9) contact the assigned social worker every other week; 10) abide by the visitation plan entered

into with DSS; and 11) utilize their own transportation or the bus system to make any scheduled appointment or meeting.

S.A.M. was initially placed in a foster home. She had crossed eyes and Respondents had failed to follow through with a recommendation that she have surgery to correct the condition. S.A.M. had successful eye surgery after DSS obtained custody of her. S.A.M. was moved to a therapeutic foster home on 8 November 2005 due to her difficult behaviors. After further testing, S.A.M was diagnosed on 30 June 2006 with Pervasive Developmental Delay, Articulation Disorder, and Developmental Coordination Disorder.

S.R.M. was placed in a foster home. She was found to suffer from a severe case of head lice. She was also diagnosed with mild autism, was placed in the Exceptional Children's Program, and an Individual Education Plan was developed for her. On 3 March 2006, S.R.M. was moved to the same therapeutic foster home as S.A.M.

C.P.S.H. remained at Brynn Marr Psychiatric Residential Treatment Facility. On 8 March 2006, he moved to Genesis Family Home in Cabarrus County. He completed all his goals at Genesis and was then placed in a therapeutic foster home through Turning Point Homes, Inc. Although he was doing very well at his placement, the foster home was destroyed by fire on 1 November 2007, and he was moved to another therapeutic foster home, also through Turning Point Homes, Inc.

On 2 February 2006, after finally contacting TEACCH on 5 December 2005, Respondent-Mother was evaluated by TEACCH and diagnosed on that day with high-functioning autism.

After a review hearing conducted on 16 February 2006, the trial court found Respondents had made reasonable progress in addressing the issues that led to the placement of the children and ordered custody of the children to remain with DSS. Visitation with Respondents was allowed once per week for one hour with unsupervised visitation beginning at the discretion of DSS. Visits progressed from unsupervised day visits to unsupervised overnight visits. All three children had their first overnight visit on 15 April 2006. It was reported to DSS that the children came back from their visits with poor hygiene and that S.R.M. and S.A.M. regressed from their potty training, often soiling their clothing after returning from visits with Respondents. S.A.M.'s behavior deteriorated, especially at daycare, after unsupervised visits began.

On 1 May 2006, DSS received a report alleging sexual abuse of the girls by Respondent-Father. It was stated that upon cleaning S.A.M. after she had soiled herself, it was noted that her vaginal area was extremely red. When asked if anyone had touched her down there, S.A.M. did not respond. S.R.M. was taken into a separate room and asked if anyone had touched her down there and S.R.M. responded, "Only daddy[.]" S.R.M. described being outside to play and when she came inside to change, Respondent-Father digitally penetrated her.

At a hearing on 9 May 2006, Respondents voluntarily agreed to supervised visitation until the investigation of the alleged sexual abuse was completed. A hearing on the matter was held on 17 August

2006. The reports of sexual abuse against Respondent-Father were substantiated and, on 17 August 2006, DSS filed a new juvenile petition, and an amended juvenile petition with additional facts, alleging the three children to be abused and neglected.

After a review hearing on 1 September 2006, the trial court entered an order on 22 September 2006 wherein the court found that Respondent-Mother had made progress in addressing the issues which led to the placement of the children, although she had failed to submit to a random drug screen on 4 August 2006, and DSS had concerns about her ability to protect the children from future abuse. The trial court also found that Respondent-Father had made progress in addressing the issues which led to the children's placement, although DSS had concerns about the recent substantiation of sexual abuse. The trial court found that it was possible for the children to return to the home of their parents within the next six months, the permanent plan for the children remained reunification, the trial court continued custody of the children with DSS, and visitation between Respondents and the children was ordered to be supervised.

On 16 November 2006, Respondents signed a memorandum of judgment/order whereby the 17 August 2006 juvenile petition was dismissed, but Respondents agreed to the following: 1) Respondent-Father would work with a therapist at United Family Services until released to learn appropriate boundaries when interacting with his daughters; 2) Respondent-Mother would work with Sims Consulting and Clinical Services, Inc. regarding her ability to protect the

children, in addition to completing and complying with all recommendations from her non-offenders group at United Family Services until released by a therapist; and 3) visitation would remained supervised but could progress to unsupervised at DSS's recommendation.

At a permanency planning hearing on 8 February 2007, the trial court found that Respondent-Mother had not made sufficient progress in addressing the issues which led to the children's placement outside the home. She had not followed through with case management services with Piedmont Behavioral Healthcare, had not seen her therapist, Angie Owen-Killar, regularly since 18 October 2006, and had not followed through with vocational rehabilitation. DSS had concerns that Respondent-Mother may not have an understanding of the importance of keeping her children protected. Respondent-Mother was not employed, although she received a disability check of $494.00. Respondent-Mother was able to work, but she did not follow through with vocational rehabilitation in order to find employment. Respondents had located a one-bedroom apartment, but it would not be appropriate for the placement of the children and Respondents owed $920.00 on that apartment.

The trial court also found that Respondent-Father had not made sufficient progress in addressing the issues which led to the children's placement. Although he had participated in 16 weeks of anger/abuser treatment, he had not completely addressed his issues and it was recommended that he continue treatment. Respondent-Father did not choose to continue treatment. The trial court

concluded that it was not possible for the children to be placed back in the home of their parents within the next six months, although the plan remained reunification, and custody of the children remained with DSS. The trial court also appointed a guardian *ad litem* for Respondent-Mother.

A permanency planning hearing was held on 15 March 2007. Although the trial court found that Respondents had made some progress, Respondents had stopped working on their case plans. The trial court found that the permanent plan for the children should be adoption and ordered DSS to make reasonable efforts toward the children's plan of adoption and to place them in a timely manner according to their permanent plan.

DSS filed a motion to terminate Respondents' parental rights on 12 June 2007, alleging that grounds existed to terminate both Respondents' rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), in that the children were neglected; N.C. Gen. Stat. § 7B-1111(a)(2), in that Respondents failed, for a continuous period of six months immediately preceding the filing of the motion, to pay a reasonable portion of the cost of care for the children although physically and financially able to do so; and N.C. Gen. Stat. § 7B-1111(a)(3), in that Respondents willfully left their 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 in correcting those conditions which led to the removal of the children. DSS also alleged that grounds existed to terminate Respondent-Mother's parental rights under N.C. Gen. Stat. § 7B-

1111(a)(6) in that she is incapable of providing for the proper care and supervision of the children such that the children are dependent within the meaning of N.C. Gen. Stat. § 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future.

The matter came on for hearing at the 23 August 2007 session of Cabarrus County Juvenile Court. However, as discovery had not yet been completed, the trial court ordered that the termination hearing be continued until 27-28 September 2007. The hearing on the grounds for termination of parental rights was conducted over the 27 and 28 September 2007, 11, 12, and 17 October 2007, 29 and 30 November 2007, and 6 and 7 December 2007 sessions of Cabarrus County District Court. By order entered 3 January 2008, the trial court concluded that grounds existed to terminate Respondents' parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (a)(2). The trial court then conducted a hearing on the best interests of the children over the 3, 4, and 25 January 2008 sessions of Cabarrus County District Court. The trial court concluded that it is in the best interests of the children that Respondents' parental rights be terminated.

I. Subject Matter Jurisdiction

Respondents first argue that the trial court lacked subject matter jurisdiction to terminate their parental rights to their children because DSS failed to properly verify the 3 November 2005 juvenile petition.

Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789 (2006) (quoting *Black's Law Dictionary* 856 (7th ed. 1999) (defining "judicial jurisdiction")). The court must have subject matter jurisdiction, or "[j]urisdiction over the nature of the case and the type of relief sought," in order to decide a case. *Id.* at 590, 636 S.E.2d at 790 (quoting *Black's Law Dictionary* at 857). Failure to properly verify a juvenile petition divests the trial court of subject matter jurisdiction in the case. *T.R.P.*, 360 N.C. 588, 636 S.E.2d 787.

A juvenile petition alleging abuse, neglect, or dependency must be drawn by the director of the department of social services, verified before an official authorized to administer oaths, and filed by the clerk. N.C. Gen. Stat. § 7B-403(a) (2007). The phrases beginning with "drawn," "verified," and "filed" are separate requirements. *In re Dj.L.*, 184 N.C. App. 76, 646 S.E.2d 134 (2007).

First, N.C. Gen. Stat. § 7B-403(a) requires a juvenile petition alleging abuse, neglect, or dependency to be "drawn by the director." N.C. Gen. Stat. § 7B-403(a). The "director" is defined as the director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in N.C. Gen. Stat. § 108A-14. N.C. Gen. Stat. § 7B-101(10) (2007). The director of a county department of social services may delegate to one or more members

of his staff the authority to act as his representative. N.C. Gen. Stat. § 108A-14(b) (2007). Such delegation may extend to the director's duty to assess reports of child abuse and neglect and to take appropriate action to protect such children pursuant to Chapter 7B. N.C. Gen. Stat. § 108A-14.

Second, N.C. Gen. Stat. § 7B-403(a) requires a petition alleging abuse, neglect, or dependency to be "verified before an official authorized to administer oaths[.]" N.C. Gen. Stat. § 7B-403(a). N.C. Gen. Stat. § 1A-1, Rule 11(b) sets forth the substance of such verification, stating,

> [i]n any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

N.C. Gen. Stat. § 1A-1, Rule 11(b) (2007).

Correspondingly, N.C. Gen. Stat. § 10B-40(d) sets forth a form of verification sufficient for acceptance by North Carolina courts, as follows:

> (d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State . . . if it includes all of the following:
>
> . . . .
>
> (2) Names the principal who appeared in person before the notary unless the name of the principal otherwise is clear from the record itself.
>
> . . . .

> (4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record.
>
> (5) States the date of the oath or affirmation.
>
> (6) Contains the signature and seal or stamp of the notary who took the oath or affirmation.
>
> (7) States the notary's commission expiration date.

N.C. Gen. Stat. § 10B-40(d) (2007).

In *Dj.L.*, this Court concluded that a petition alleging the minor children to be dependent and neglected was properly drawn and verified. The petition stated that "'Betty Hooper, Petitioner, ha[s] sufficient knowledge or information to believe that a case has arisen which invokes the juvenile jurisdiction of the Court.'" *Dj.L.*, 184 N.C. App. at 79, 646 S.E.2d at 137. Betty Hooper signed the document as the "'petitioner'" and listed her address as "'Youth and Family Services,'" a division of the Mecklenburg County Department of Social Services. *Id.* This Court determined that from this language, the trial court could discern that Betty Hooper was an employee of Youth and Family Services who had actual knowledge of the factual basis for the allegations in the juvenile petition, and thus, had the authority to draw the petition under N.C. Gen. Stat. § 7B-403(a).

Here, the juvenile petition alleging the minor children to be neglected reads, "I have sufficient knowledge or information to believe that a case has arisen which invokes the juvenile

jurisdiction of the court[.]" The petitioner is "Cabarrus County Department of Social Services" and the petition is signed by "Justice Johnson . . . 1303 S. Cannon Blvd. . . . Kannapolis, NC 28081 . . . Cabarrus County Department of Social Services[.]" The Title is "Social Worker III[.]" Additionally, the Guardian *ad Litem* Report to the Court dated 8 February 2006, accepted into evidence by the trial court at the 16 February 2006 adjudication hearing, and filed with the 20 February 2006 order adjudicating the minor children neglected, lists Justice Johnson as the DSS Social Worker assigned to the case. Accordingly, as in *Dj.L.*, from the language in the petition and the evidence in the record, the trial court could discern that Justice Johnson was an employee of the Cabarrus County Department of Social Services who had actual knowledge of the factual basis for the allegations in the juvenile petition, and thus, had the authority to draw the petition under N.C. Gen. Stat. § 7B-403(a).

Furthermore, in *Dj.L.* the verification page of the petition filed by the Mecklenburg County Department of Social Services showed the following:

> VERIFICATION
>
> The undersigned Petitioner, being duly sworn, says that the Petition hereon is true to his own knowledge, except as to those matters alleged on information and belief, and as to those matters, he believes it to be true.
>
> Betty Hooper
> Petitioner-Affiant
>
> Sworn to and subscribed before me this the 4th day of June, 2004.

> Roma J. Hester
> Notary Public
>
> My Commission expires: 05-09-2005

Dj.L., 184 N.C. App. at 81, 646 S.E.2d at 138. The notary also stamped the document with her seal, which read "'Roma J. Hester, Notary Public, Mecklenburg County, N.C.'" *Id.* This Court concluded that this verification was proper for the purposes of N.C. Gen. Stat. § 7B-403(a).

In this case, the verification page of the petition filed by DSS showed the following:

> VERIFICATIONS
>
> Being first duly sworn, I say that I have read this petition and that the same is true to my own knowledge, except as to those matters alleged upon information and belief, and as to those, I believe it [sic] to be true.
>
> SWORN AND SUBSCRIBED TO BEFORE ME
>
> Petitioner's Signature
> Justice Johnson
>
> Date 11-3-05
>
> Signature of Official Authorized to Administer Oaths:
> Dorothy L. Wilson
>
> Title Notary Public
> My Commission Expires: 3/31/2010

The notary also stamped the document with her seal, which reads, "Dorothy L. Wilson, Notary Public, Cabarrus County, NC[.]" As in *Dj.L.*, this verification was proper for the purposes of N.C. Gen. Stat. § 7B-403(a). Accordingly, as the 3 November 2005 juvenile petition alleging the minor children to be neglected was correctly drawn and verified, the trial court did not lack subject matter

jurisdiction to terminate Respondents' parental rights to the children.

Respondent-Father additionally asserts that DSS lacked standing to file the motion to terminate his parental rights because DSS failed to properly verify the 3 November 2005 juvenile petition.

> A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may . . . be filed by . . . [a]ny county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.

N.C. Gen. Stat. § 7B-1103(a) (2007). As we have concluded that the trial court had jurisdiction over this matter, and the trial court had granted custody of the children to DSS, DSS therefore had standing to file the motion to terminate Respondent-Father's parental rights.[3] Accordingly, Respondents' arguments are overruled.

II. Jurisdiction with Regard to C.P.S.H.

Respondent-Mother next argues that the trial court lacked subject matter jurisdiction to terminate her parental rights to C.P.S.H. because Petitioner failed to serve notice of the TPR motion on the minor child.

Pursuant to N.C. Gen. Stat. § 7B-1106.1,

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[3] We note that DSS had standing to file the motions to terminate both Respondent-Mother's and Respondent-Father's parental rights, but only Respondent-Father appealed this issue.

> (a) Upon the filing of a motion [to terminate parental rights] . . . the movant shall prepare a notice directed to . . . :
>
> . . . .
>
> (5) The juvenile's guardian ad litem if one has been appointed . . . .
>
> (6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

N.C. Gen. Stat. § 7B-1106.1 (2007). Where service of the required notice pursuant to N.C. Gen. Stat. § 7B-1106.1 is not made on the necessary parties, such service can be waived by appearance and failure to raise an objection. *In re I.D.G.*, __ N.C. App. __, 655 S.E.2d 858 (2008) (citing *In re J.S.L.*, 177 N.C. App. 151, 628 S.E.2d 387 (2006)). Furthermore, "[o]nly a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Id.*

In *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005), respondent asserted that the trial court lacked jurisdiction to terminate her parental rights where a TPR petition was filed but no summons was issued to the juvenile or the juvenile's guardian *ad litem*, as required by N.C. Gen. Stat. § 7B-1106(a) (2003). The summons was served upon the guardian *ad litem's* attorney advocate rather than the guardian *ad litem*. This Court stated, "Assuming *arguendo* that this was error, we note that the guardian *ad litem* did not object at trial to the sufficiency of service, nor does the

guardian *ad litem* argue on appeal that the trial court lacked jurisdiction over [the juvenile]." *Id.* at 8, 616 S.E.2d at 268-69. In overruling respondent's argument, this Court concluded that "respondent failed to demonstrate any prejudice to her resulting from the alleged failure to properly serve [the juvenile]. Thus, we are unable to conclude that respondent was 'directly and injuriously' affected by the alleged error[.]" *Id.* at 8, 616 S.E.2d at 269.

In this case, the record reflects that C.P.S.H. was born in March 1991 and was 16 years old when DSS filed the motion to terminate Respondent-Mother's parental rights on 12 June 2007. Thus, N.C. Gen. Stat. § 7B-1106.1 required that notice be served upon both the guardian *ad litem* appointed for C.P.S.H. and C.P.S.H. While the notice was served on the guardian *ad litem*, notice was not served on C.P.S.H.

Although C.P.S.H. did not attend the TPR hearing, as in *J.B.*, neither his guardian *ad litem* nor the attorney advocate for the guardian *ad litem* who attended the hearing on behalf of C.P.S.H. objected to the sufficiency of notice. Furthermore, as in *J.B.*, neither the guardian *ad litem* nor the attorney advocate argues now that the trial court lacked jurisdiction over C.P.S.H. Moreover, we are unable to conclude that Respondent-Mother was "directly and injuriously" affected by the alleged error. *Culton*, 327 N.C. at 625, 398 S.E.2d at 324. As it is C.P.S.H., and not Respondent-Mother, who is the aggrieved party in this instance, Respondent-

Mother lacks standing to appeal this issue. Accordingly, we overrule her argument.

III. Termination of Respondents' Parental Rights

Respondents next argue that the trial court erred in terminating their parental rights to the children.

A termination of parental rights proceeding involves a two-stage process. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). The initial stage is the adjudicatory stage whereby the petitioner must establish by clear, cogent, and convincing evidence that at least one of the statutory grounds for termination listed in N.C. Gen. Stat. § 7B-1111 exists. N.C. Gen. Stat. § 7B-1109 (2007); *In re Anderson*, 151 N.C. App. 94, 564 S.E.2d 599 (2002). Appellate review of a trial court's determination at the adjudicatory stage is whether the trial court's findings of fact are based upon clear, cogent, and convincing evidence and whether the findings support the conclusions of law. *In re Pope*, 144 N.C. App. 32, 547 S.E.2d 153, *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

If the trial court finds that at least one ground for terminating parental rights exists, the trial court proceeds to the dispositional stage where it must determine whether it is in the child's best interest to terminate parental rights. N.C. Gen. Stat. § 7B-1110(a) (2007); *In re Brake*, 347 N.C. 339, 493 S.E.2d 418 (1997). In making the best interest determination, the trial court shall consider:

> (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). "The trial court does not automatically terminate parental rights in every case that presents statutory grounds to do so." *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). The trial court has discretion, if it finds that at least one of the statutory grounds exists, to terminate parental rights upon a finding that it would be in the child's best interest. *Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906. A trial court's determination at the dispositional stage is reviewed on appeal for abuse of discretion. *Anderson*, 151 N.C. App. 94, 564 S.E.2d 599.

A. Adjudicatory Stage

Respondent-Mother contends that the trial court erred in finding and concluding that sufficient grounds existed to terminate her parental rights. Respondent-Father makes no such argument on appeal. Preliminarily, although the trial court concluded that grounds existed to terminate Respondent-Mother's parental rights pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) and (2), we note that competent evidence supporting either one of these statutory grounds requires us to affirm the trial court's order. *In re Pierce*, 67 N.C. App. 257, 312 S.E.2d 900 (1984).

The trial court may terminate parental rights upon a finding that a parent neglected a juvenile. N.C. Gen. Stat. § 7B-1111(a)(1). 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 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[.]

N.C. Gen. Stat. § 7B-101(15) (2007).

Although "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), "[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) (citation omitted). Where the child has been removed from the parent's 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." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 (citation omitted). 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 her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citation omitted).

In the case at bar, the trial court made the following relevant findings of fact concerning the grounds for terminating Respondents' parental rights to the children based on neglect:

> b. A petition was filed [by DSS] on November 3, 2005, alleging the children to be neglected. An order for non secure custody was granted on that day.
>
> c. On November 17, 2005, the juveniles were adjudicated neglected.
>
> d. To address the issues which led to placement, [Respondent-Mother] agreed to and was ordered to complete certain tasks aimed at addressing the issues which led to placement. [Respondent-Mother] was to:
>
> > 1) complete a psychological evaluation and follow through with recommendations,
> >
> > 2) complete a substance abuse assessment and follow through with recommendations,
> >
> > 3) cooperate with random drug testing,
> >
> > 4) abstain from the use of any impairing substance and not misuse prescription medication,
> >
> > 5) complete parenting classes and be able to demonstrate the skills learned in the parenting class,
> >
> > 6) maintain stable housing,
> >
> > 7) contact the social worker every other week and report any changes in her circumstances and any progress,
> >
> > 8) abide by a visitation plan, and

> 9) provide her own transportation or call the social worker for possible assistance.

e. Ms. Owen-Killar, a therapist who was familiar with autism, conducted a psychological intake on November 8, 2005. [Respondent-Mother] was "alert, relatively articulate" but she had poor hygiene. Individual counseling was recommended and a referral to Piedmont Behavioral Healthcare for services was made. Ms. Owen-Killar knew about [Respondent-Mother's] referral to TEACCH by the Department. [Respondent-Mother] received individual counseling from Angie Owen-Killar from November 8, 2005 until June 28, 2007. The therapy focused on coping strategies and helping to adjust to [Respondent-Mother's] diagnosis of autism. [Respondent-Mother] had trouble [with] depression and organization skills.

f. At first, [Respondent-Mother] made good progress with Ms. Owen-Killar by implementing recommended change, but then she regressed. Her subsequent progress would be followed by periods of regression. On November 15, 2005, [Respondent-Mother] agreed to keep a journal of all contacts and to organize her appointments with a calendar. On November 29, 2005 [Respondent-Mother] went for her therapy appointment well groomed. She demonstrated progress in her organization skills by maintaining a daily planner. On December 14, 2005, [Respondent-Mother] demonstrated that she had maintained her journal and calendar.

g. Finally, on December 5, 2005, [Respondent-Mother] contacted TEACCH and scheduled an intake appointment on February 2, 2006, which she attended. [Respondent-Mother] was diagnosed with high[-]functioning autism spectrum disorder. However, [Respondent-Mother's] ". . . (i) intelligence screening showed solidly average skills in both verbal and visual modalities . . . ." The TEACCH program recommended that [Respondent-Mother]:

> 1) Continue with Vocational Rehabilitation,

> 2) continue with therapy with Angie Owen-[Killar],
>
> 3) seek support and assistance with money management,
>
> 4) Participate in diabetes management education, and request a case manager through Developmental Disability Services through Piedmont Behavioral Healthcare.

h. [Respondent-Mother] would report that she was having difficulty finding a job, but there is no[] indication that she diligently pursued employment. On February 2, 2006, [Respondent-Mother] contacted vocational rehabilitation. However, she did not maintain contact with them and their attempts to contact her were unsuccessful until June 27, 2007.

i. . . . [O]n March 5, 2007, Dr. Nancy Dartnall from TEACCH attempted contact[] with [Respondent-Mother] but her contact information was out of date.

j. The first review following the adjudication was held on February 16, 2006. The Court found . . . [Respondent-Mother] had made reasonable progress in addressing the issues which led to placement.

k. She had subsequent appointments with Ms. Owen-Killar . . . . As of March 14, 2006, [Respondent-Mother] still had not met her goals. . . . [O]n May 6, 2006, [Respondent-Mother] was still having issues with her hygiene. She had not maintained her medication because she had not maintained the necessary funding for her continued therapy. As part of her plan, she was to make contact with vocational rehabilitation and reinstate funding for her medication. By July 18, 2006, [Respondent-Mother] had not made contact with vocational rehabilitation and she reported difficulty accessing services. On August 29, 2006, [Respondent-Mother] reported that she was taking her medication and that she had reunited with her husband. On November 1, 2006, [Respondent-Mother] called to cancel her appointment because "it is such a pretty day outside." Ms. Owen-Killar discussed [Respondent-Mother's] history of cancellations

and no shows. On December 6, 2006, [Respondent-Mother] did not show for an appointment and did not return to counseling until February 28, 2007. On February 28, 2007, [Respondent-Mother] had not been compliant with her medication regime and appeared to be severely depressed. On March 14, 2007, [Respondent-Mother] had made "great strides" since her previous appointment.

. . . .

n. On June 29, 2006, [Respondent-Mother] sought help with Kannapolis Crisis Care after she began having suicidal ideations. . . .

o. From August 18, 2005 to March 28, 2007, [Respondents] requested and received a total of $4,000.00 in assistance from their church. On August 18, 2005, [Respondent-Mother] asked for $685.00 to pay for their rent and S.A.M.'s glasses. She reported a monthly income of $1,225.00 with $900.00 in monthly expenses for her and [Respondent-Father]. On September 1, 2005, [Respondent-Mother] asked for $750.00 for past rent and rent deposit. She reported that she and [Respondent-Father] were homeless and without jobs. On October 3, 2005, [Respondent-Mother] asked for $250.00 for help with their rent. She reported a monthly income of $1,581.00 with $1,080.00 in monthly expenses for her and [Respondent-Father]. On February 6, 2006, she asked for $120.00 for a Duke Power bill and $267.95 for the City of Kannapolis. On June 9, 2006, she asked for $660.00 for rent and $245.00 for court costs. [Respondent-Mother] claimed on her application that she had borrowed $300.00 from her father and if she did not receive the money she would go to jail for a broken tail light. On August 3, 2006, [Respondent-Father] requested $575.00 for deposit and rent. He maintained that he was separated from [Respondent-Mother]. On February 7, 2007, [Respondent-Father] requested $389.80 for his car. After an investigation, the church personnel determined that the car had been repossessed for failure to make a payment. The car payment was not paid because [Respondent-Mother] had been ". . . going out to eat and not watching how they spend money. . . ."

p. . . . [Respondent-Mother] failed to submit to a drug screen on August 4, 2006.

. . . .

r. A permanency planning hearing was held on February 8, 2007. The Court found that, despite earlier progress, [Respondent-Mother] had not made sufficient progress in address[ing] the issues which led to placement of the children. The Court made extensive findings of fact. . . . [Respondent-Mother] had not followed through with case management services with Piedmont Behavioral Healthcare, which was scheduled to begin [on] November 1, 2006. As of January 30, 2007, the case manager had not been able to make contact with [Respondent-Mother]. [Respondent-Mother] had not seen her therapist, Angie Owen-Killar, regularly since October 18, 2006. . . . [Respondent-Mother] had not followed through with Vocation[al] Rehabilitation. . . . [Respondent-Mother] had secured a one room apartment through Newton Properties since September 2006 with [Respondent-Father]. However, the apartment was not appropriate for the placement of the children. They owed $920.00 in back rent.

s. On March 15, 2007, a permanency planning review was held. Although the children had been in the custody of the Department for over sixteen (16) months, still [Respondent-Mother] had not complied with recommendations from her psychological evaluation. She had not addressed her issues of employment or housing.

. . . .

t. On March 28, 2007, [Respondent-Mother] requested $1,256.78 for past due rent. They had received an eviction notice. [Respondent-Mother] acknowledged that they were behind again even though [Respondent-Father] was employed because of poor planning. The church agreed to assist them with $1,006.78 provided they attend budgeting classes.

u. They participated in budgeting counseling as required by their church. . . . [Respondent-Father] reported to the counselor on May 24, 2007 that he and [Respondent-

Mother] would not attend future counseling because he lost his job. . . .

v. On May 4, 2007 a person centered plan was developed for [Respondent-Mother] by Excel Personal Development. James Laxton became her one-on-one worker for a period of one year. Goals were developed with and for [Respondent-Mother] as follows: she was to learn to organize her finances and appointments, she was to keep up with appropriate levels of cleanliness for her home and person, she was to participate in appropriate activities in the community, she was to find a job, and she was to take care of her dental needs.

w. On June 5, 2007, [Respondent-Mother] reported that she was working with vocational rehabilitation once again. She reported that she had no problem with keeping her appointments. Her hygiene was poor on that day. However, she did not appear at the vocational rehabilitation office until August 8, 2007. She was inappropriately dressed. Although she had been diagnosed as autistic on February 2, 2006, she stated that she had just learned [of] her diagnosis. Because of her attire she was asked to attend a two[-]day class to learn how to dress appropriately for job interviews. [Respondent-Mother] completed the class, but she did not contact vocational rehabilitation afterwards so they could help her get a job.

x. On July 11, 2007, [Respondent-Mother] began seeing Dr. Jennifer Sadoff for individual counseling. On that day, [Respondent-Mother] stated that she had [run] out of her medication but provided no excuse. [Respondent-Mother] attended another session on August 8, 2007. However, she did not appear for her August 22, 2007 session. Instead of returning to see Dr. Sadoff, [Respondent-Mother] made an appointment to see Tom Moon at NorthEast Psychiatric Services. She attended [four] sessions with him . . . . However, she failed to attend appointments on October 10, 2007, October 16, 2007 and November 27, 2007. She did not notify the Department about her intention to see Mr. Moon so that the Department could provide background information to him. In addition,

> [Respondent-Mother] failed to tell Mr. Moon that she had been diagnosed as having autistic characteristics.
>
> y. Even after the motion in the cause to terminate her parental rights was filed on June 12, 2007, [Respondent-Mother] has failed to address the issues of housing and complete the recommendations of her psychological evaluation.
>
> . . . .
>
> 5) [Respondent-Mother] signed a voluntary support agreement on September 1, 2007. She is behind in her child support obligation by $50.00.

Respondent-Mother did not assign error to any of these findings and, therefore, "such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (quotation marks and citation omitted).

Respondent-Mother argues the trial court erred in concluding that grounds existed to terminate her parental rights based on neglect "because she had done most, if not all, of what the trial court ordered her to do to effect reunification." However, the children were adjudicated neglected on 17 November 2005 and Respondent-Mother failed to rectify the conditions that led to that adjudication. She failed to follow through with psychotherapy services with Angie Owen-Killar, failed to follow through with Vocational Rehabilitation, failed to consistently follow her medication regimen, appeared severely depressed and suffered from suicidal ideations, failed to consistently exhibit proper hygiene, failed to dress appropriately even after attending classes to help

her do so, failed to maintain stable housing suitable for the children, failed to maintain employment, failed to manage her finances, failed to submit to a drug screen, failed to follow through with case management services with Piedmont Behavioral Health, and failed to maintain contact with DSS as ordered. The trial court's unchallenged findings evidence past neglect and a probability of repetition of neglect if the juveniles were returned to Respondent-Mother. Accordingly, the trial court did not err in concluding that grounds existed to terminate Respondent-Mother's parental rights to her children.

B. Dispositional Stage

Respondents next argue that the trial court abused its discretion in concluding that it was in the children's best interests to terminate Respondents' parental rights.

1. Respondent-Mother

First, Respondent-Mother argues that the trial court abused its discretion in terminating her parental rights to S.A.M. and S.R.M. "in light of making [the] fatal legal error [of] proceeding without subject matter jurisdiction." As we have previously concluded that the trial court had subject matter jurisdiction over the case, we reject this argument. Respondent-Mother advances no additional argument concerning the trial court's best interests determination as to S.A.M. and S.R.M. Accordingly, we affirm the trial court's TPR Order as to the two girls.

However, we are persuaded by Respondent-Mother's contention that the trial court abused its discretion in terminating her parental rights to C.P.S.H.

> "As our Supreme Court noted in *In re Montgomery*, the legislature has properly recognized that in certain situations, even where the grounds for termination could be legally established, the best interests of the child indicate that the family unit should not be dissolved."

In re J.A.O., 166 N.C. App. 222, 227, 601 S.E.2d 226, 230 (2004) (quoting *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910 (citing *In re Montgomery*, 311 N.C. 101, 107, 316 S.E.2d 246, 251 (1984))). This case presents the situation contemplated by our legislature and recognized by the North Carolina Supreme Court in *Montgomery*.

In *J.A.O.*, this Court determined that the trial court abused its discretion in terminating respondent-mother's parental rights to her minor child, Jeff. At the time of the termination proceeding, Jeff was 14 years old,[4] weighed over 200 pounds, and had a history of being verbally and physically aggressive. He was diagnosed with bipolar disorder, attention deficit hyperactivity disorder, pervasive developmental disorder, borderline intellectual functioning, non-insulin dependent diabetes mellitus, and hypertension. He had been in foster care since the age of 18 months and had been placed in 19 different treatment centers during that time. We reasoned:

> Respondent, Jeff's biological mother, is the only family member connected to and interested

[4] At the time of the filing of the opinion by the North Carolina Court of Appeals, Jeff was 16 years old.

> in Jeff. His biological father was not present at the termination proceeding and could not be located through judicial summons. Although Jeff's foster family has shown support and care for him, they are unwilling to adopt him and undertake the important responsibilities associated with caring for an individual who possesses significant and life-long debilitating behaviors. . . . As the guardian ad litem argued at trial, it is highly unlikely that a child of Jeff's age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family.

Id. at 227-28, 601 S.E.2d at 230. This Court thus reversed the trial court's order terminating respondent-mother's parental rights to Jeff.

In this case, at the time of the termination proceeding, C.P.S.H. was 16 years old, weighed 215 pounds, and had a history of being sexually deviant and physically aggressive. He had sexually abused his sister and was so aggressive toward others at school that he had to be taught at home for a period. Even when placed back at school as late as October 2007, he continued to be suspended for aggression toward others. He has been diagnosed with Asperger's Syndrome, motor dyspraxia, oppositional defiant disorder, and attention deficit disorder. He often has an offensive odor as a result of his refusal to bathe or brush his teeth, and lacks social skills. Consequently, he is often ridiculed by his peers.

C.P.S.H. has been placed in several psychiatric facilities while in DSS's custody and his foster parents do not want to adopt him. C.P.S.H.'s biological father's parental rights have been terminated and Respondent-Mother is the only family member

connected to and interested in C.P.S.H. Respondent-Mother attended and had been an active participant in C.P.S.H.'s Individual Education Plan meetings and his healthcare team meetings at Brynn Marr until DSS took over. Respondent-Mother has continued to visit C.P.S.H. throughout the proceedings and the visits have gone well for both C.P.S.H. and Respondent-Mother.

When the trial court terminated Respondent-Mother's parental rights to C.P.S.H., he was a month shy of his seventeenth birthday. This left the parties with about a year to secure an adoptive family before he aged out of the juvenile system.[5] Furthermore, C.P.S.H. does not want to be adopted, saying that he would refuse to consent to adoption, and wants to return to the care of his mother.

As in *J.A.O.*, it is highly unlikely that a child of C.P.S.H.'s age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family. While the court is not required to find that a child is adoptable before the court terminates parental rights to the child, *In re Norris*, 65 N.C. App. 269, 310 S.E.2d 25 (1983), *disc. review denied*, 310 N.C. 744, 315 S.E.2d 703 (1984), the trial court must consider, *inter alia*, the age of the juvenile and the likelihood of adoption of the juvenile when determining if termination is in the best interest of the child. N.C. Gen. Stat. § 7B-1110(a). "[W]e are unconvinced that the remote chance of adoption in this case justifies the

[5] We note that at the time of the filing of this opinion, C.P.S.H. has passed his eighteenth birthday and has aged out of the system.

momentous step of terminating [Respondent-Mother's] parental rights." *J.A.O.*, 166 N.C. App. at 228, 601 S.E.2d at 230. Thus, in "balancing the minimal possibilities of adoptive placement against the stabilizing influence, and the sense of identity, that some continuing legal relationship with [Respondent-Mother] may ultimately bring, we must conclude that termination would only cast [C.P.S.H.] further adrift." *Id.* (quotation marks and citation omitted). Accordingly, as it cannot be in C.P.S.H.'s best interest to terminate Respondent-Mother's parental rights, thereby rendering C.P.S.H. a "legal orphan," *id.* at 227, 601 S.E.2d at 230, we conclude the trial court abused its discretion in terminating Respondent-Mother's parental rights to C.P.S.H. and reverse the trial court's TPR order as to C.P.S.H.

2. Respondent-Father

Respondent-Father argues that the trial court erred in finding that "[t]ermination would further the goal of [S.A.M. and S.R.M.] which is adoption" and in concluding that "it is in the best interest of the juveniles that [Respondent-Father's] parental rights be terminated."

In determining that it was in the best interest of S.A.M. and S.R.M. to terminate Respondent-Father's parental rights, the trial court made the following relevant findings of fact:

> 3. S.R.M. is eight years old. S.A.M. is five years old.
>
> 4. S.R.M. and S.A.M. are placed together in a therapeutic foster home. They have been in this placement for two years. The children's behaviors are stable. There are no other children in the home. They are bonded to the

foster mother and the foster mother's extended family. She provides care, support and security for the children. She [e]nsures their medical and mental health needs are met. They continue to have regular therapy sessions with Tonya Brown. When S.R.M. first came into care, she was not on grade level and she needed speech therapy. She is in the second grade and nearly on grade level now and she attends regular speech therapy. Although S.R.M. is still not potty trained, she has made progress. S.A.M. is in kindergarten where she is making good progress. Both children attend an afterschool program during the school year for two hours per day.

. . . .

6. The girls are bonded to their parents and their parents love them. The girls are pleased to see their parents, but they separate from their parents easily at the end of visitation. . . .

7. [S.R.M. and S.A.M.] need permanence after over two years in the custody of the Department. [Respondents] have not addressed the issues which led to the removal of the children from their home. They have not completed their own mental health treatment. [Respondent-Mother] just started a job recently after a long period of unemployment. [Respondent-Father] has an unstable work history and is currently unemployed. Therefore, they have not demonstrated that they can maintain stable employment to meet the children's basic needs plus their therapy needs. They remain behind in their rent, which places them at risk for eviction.

. . . .

9. . . . [O]n July 14, 2001, [Respondent-Mother] reported to the social worker that [Respondent-Father] had hurt S.R.M. with her vibrator.

10. [Respondent-Father] testified that, over the past five years, he has worked as a truck driver, in security, in construction, with the state of North Carolina and with a sprinkler company. He is currently unemployed and

> attending community college in the welding program. . . . Despite the overwhelming evidence of [Respondents'] past housing problems, [Respondent-Father] denies any prior evictions. And, he stated that he owed only $250.00 for November 2007 rent. He testified that he feels he has done what the Department has asked him to do, despite repeated testimony regarding his lack of successful completion of anger management or individual counseling. When he was asked why he did not attend individual counseling while the termination was ongoing, he stated he was "busy with school work stuff." When he was asked if he was willing to attend anger management classes, he replied "I will go back as long as it does not interfere with my schooling."
>
> 11. Termination would further the goal of the children which is adoption. . . .

As Respondent-Father did not assign error to findings of fact numbers 3, 4, 6, 7, 9, or 10, "such findings are presumed to be supported by competent evidence and are binding on appeal." *Baker*, 312 N.C. at 37, 320 S.E.2d at 673 (quotation marks and citation omitted).

Respondent-Father contends that finding of fact number 11 is not supported by the evidence. We reject this contention. By order entered 12 April 2007, the trial court found that "[t]he permanent plan should be adoption for the children" and thus ordered DSS to make "reasonable efforts toward their permanent plan of adoption[.]" In order for DSS to place the children with adoptive parents, Respondent-Father's parental rights must be terminated. N.C. Gen. Stat § 48-3-203(a) (2007) ("An agency may acquire legal and physical custody of a minor for purposes of adoptive placement only by means of a relinquishment pursuant to

Part 7 of this Article or by a court order terminating the rights and duties of a parent or guardian of the minor."). Furthermore, the girls' foster mother plans on adopting them if they become legally cleared for adoption. Accordingly, finding of fact number 11 is supported by competent evidence.

Given the girls' ages, the length of time they have been in DSS custody, their need for permanence, the stability of their current placement, their progress academically and medically while in their placement, and their foster mother's interest in adopting them together, as well as Respondent-Father's failure to address the issues which led to the children's placement two years ago, we discern no abuse of discretion in the trial court's conclusion that termination of Respondent-Father's parental rights is in the best interests of S.A.M. and S.R.M. Accordingly, we overrule Respondent-Father's argument.

V. Adjudication Hearing Dates

Respondent-Father further argues that the trial court erred by not holding the adjudication hearing within 90 days of the filing of the motion to terminate.

"The hearing on the termination of parental rights . . . shall be held . . . 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) (2007). Continuances are permitted "for good cause shown . . . for up to 90 days from the date of the initial petition [or motion]" and those that "extend beyond 90 days after the

initial petition [or motion] 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." N.C. Gen. Stat. § 7B-1109(d) (2005). In addition to showing that the trial court failed to meet the timeliness requirement of the statute, Respondent-Father must show that he was prejudiced by that delay. *In re S.W.*, 175 N.C. App. 719, 625 S.E.2d 594, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

The motion to terminate Respondents' parental rights was filed 12 June 2007. A pre-trial conference was held on 6 July 2007, and a pre-termination hearing was scheduled for 26-27 July 2007.[6] At the 16 and 17 August 2007 session of district court, "[t]he parties [were] addressing issues of discovery in preparation for the termination hearing" scheduled for 30-31 August 2007. A visitation review hearing took place on 23 August 2007. On that date, in addition to entering a visitation order, the trial court also entered a continuance order finding that "[a] motion in the cause to terminate [Respondents' parental] rights has been filed . . . [but] the entire discovery has not been received and copied for the parties to be prepared for trial[,]" and ordering "[t]hat for good cause shown, the termination hearing is continued until September 27-28, 2007." The hearing was then commenced on 27 September 2007 and completed on 25 January 2008. As a result, although the

[6] The record is silent as to whether this pre-termination hearing took place.

hearing was initially scheduled within the 90-day period prescribed by statute, the hearing commenced 17 days after the statutory 90-day period and was completed 137 days beyond the 90-day statutory period. Although the trial court issued continuation orders "for good cause" after the hearings held during the September, October, November, and December 2007 sessions of district court, and "for extraordinary cause" after the hearing held during the 3-4 January 2008 session of district court, the trial court was only authorized to continue the matter beyond the 90-day period for "extraordinary circumstances[.]" N.C. Gen. Stat. § 7B-1109. As the trial court erred in continuing this matter beyond the 90-day period only "for good cause[,]" and thus failed to comply with N.C. Gen. Stat. § 7B-1109, we must determine whether Respondent-Father was prejudiced by this infraction.

While Respondent-Father asserts that "the delay in the present case was over almost eight months" and, thus, prejudice is presumed, we note that the hearing commenced only 17 days after the statutory 90-day period. Regardless, "[t]he passage of time alone is not enough to show prejudice[.]" *In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006).

In *In re D.J.D.*, 171 N.C. App. 230, 243, 615 S.E.2d 26, 35 (2005), the petition to terminate respondent-father's parental rights was filed on 1 May 2003. A permanency planning review hearing order, entered 25 June 2003, *nunc pro tunc* 13 June 2003, noted that the original termination hearing was scheduled for 21 July 2003, within the statutory requirements. The order also

scheduled the TPR hearing for 13 September 2003, 90 days from the date of the permanency planning review hearing, but 44 days after the termination hearing should have been held. While this Court acknowledged that the delay was a technical error, this Court determined that it did not amount to an "egregious, prejudicial delay[.]" *Id.* This Court further noted that during the delay, the trial court continued to review the case on the permanency planning schedule.

In this case, the TPR hearing was scheduled to begin 17 days after the hearing should have been held, a much shorter delay than the 44-day delay this Court determined not to be prejudicial in *D.J.D.* Furthermore, similar to *D.J.D.*, the trial court continued to review the matter with regard to visitation and permanency planning while conducting the termination proceedings. Although Respondent-Father alleges he was prejudiced by the delay because "[v]isitation had ended[,]" the record reveals Respondent-Father maintained visitation rights with the children by order entered 14 September 2007, even though DSS had requested his visitation cease due to his "blatant disregard as to what has been requested of him during visitation with his children and his manipulative behaviors to wait until the end of visits to kiss the girls on the mouth so his visit will not get cut short[.]" As Respondent-Father has failed to demonstrate prejudice as a result of the trial court's infraction, his argument is overruled.

Respondent-Father also alleges that he was prejudiced by the trial court's continuing the TPR hearing multiple times. While an

unnecessarily long continuance once a trial has begun may be error, the complaining party must show prejudice as a result of the continuance. *See In re T.C.S.*, 148 N.C. App. 297, 558 S.E.2d 251 (2002) (concluding the complaining party had failed to show prejudice as a result of a three-month continuance).

This case was heard on 12 different days between 27 September 2007 and 25 January 2008. The adjudicatory hearing spanned nine days and the dispositional hearing spanned three days. Respondent-Father argues that the court could have managed its time better. A review of the record reveals, however, that the matter was heard at every assigned and available trial session of juvenile court, giving consideration to other scheduled matters, administrative matters, and the availability of all parties involved. The continuances were necessary to complete the lengthy trial, as demonstrated by the 1139-page transcript, and thus, to properly administer justice. We conclude that Respondent-Father has failed to show prejudice as a result of the trial court's thorough attention to this matter. Respondent-Father's argument is overruled.

AFFIRMED IN PART and REVERSED IN PART.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).