NO. COA10-771

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF:

Polk County
Nos. 06 J 15-19

K.B., K.R.B., J.W.B.,
M.J.G.G. and J.G.,
minor children

Appeal by respondents from orders entered 14 October 2009 by Judge Thomas M. Brittain, Jr., and 31 March 2010 by Judge David K. Fox, Jr., in Polk County District Court. Heard in the Court of Appeals 15 November 2010.

*Feagan Law Firm, P.L.L.C., by Phillip R. Feagan and Lora T. Baker, for petitioner-appellee Polk County Department of Social Services.*

*Parker, Poe, Adams & Bernstein, L.L.P., by Kristy L. Rice, for guardian ad litem.*

*Ryan McKaig for respondent-appellant mother.*

*Leslie C. Rawls for respondent-appellant father.*

BRYANT, Judge.

Respondent-parents appeal from a permanency planning order entered 14 October 2009 and from an order terminating their parental rights entered 31 March 2010. As discussed below, we affirm.

*Facts*

Respondent mother has five minor children. Respondent father is the biological father of the two youngest children. The father of the three oldest children also had his parental rights terminated by the 31 March 2010 order but has not appealed. Pursuant to N.C.R. App. 3.1(b), the parties have stipulated to the following pseudonyms for the children, listed in order from oldest to youngest: K.B. shall be referred to as "Kathy"; K.R.B. shall be referred to as "Rick"; J.W.B. shall be referred to as "Jerome"; M.J.G.G. shall be referred to as "Megan"; and J.G. shall be referred to as "James."

Between 3 May 2006 and 11 July 2006, each child was removed from respondents' home and placed in the protective custody of the Polk County Department of Social Services ("PCDSS"). On 15 August 2006, the trial court adjudicated all five children as neglected juveniles. On 8 May 2007, the trial court entered an order returning two of the children, Rick and James, to respondents' home and allowing unsupervised visitation with the other children.

On 1 May 2008, PCDSS received a report alleging that respondent-father had inappropriately touched Megan. On 3 June 2008, respondent-father confessed to penetrating Megan's vagina and anus with his finger on two occasions. Respondent-father was charged with two counts of taking indecent liberties with a minor. Trial on those charges was still pending at the time of the termination hearing. Respondent-mother entered into a safety assessment agreement with the DSS agreeing not to allow respondent-father to have unsupervised contact with her children.

At the conclusion of a permanency planning review hearing on 1 September 2009, the trial court entered an order changing the permanent plan from reunification to adoption. The trial court noted in the order that respondents gave notice of appeal in open court. Each parent also separately filed a "Notice to Preserve Right to Appeal" within ten days after entry of the order.

On 23 November 2009, PCDSS filed a motion in the cause to terminate respondents' parental rights. The motion sought termination of respondent-mother's parental rights on the grounds of abuse and neglect, willfully leaving the children in foster care for more than twelve months without showing reasonable progress in correcting those conditions which led to the removal, and inability to provide proper care and supervision leaving the children dependent. N.C. Gen. Stat. § 7B-1111(a)(1), (a)(2), (6) (2009). The petition alleged the following grounds for termination of respondent father's parental rights: abuse and neglect and willfully leaving the children in foster care for more than twelve months without showing reasonable progress in correcting those conditions which led to the removal. N.C.G.S. § 7B-1111(a)(1), (a)(2).

The trial court conducted hearings on 5 and 19 January 2010. On 31 March 2010, the trial court entered an order finding all of the grounds alleged and terminating respondents' parental rights. Respondents filed notice of appeal from the termination of parental rights order and from the permanency planning order entered at the

1 September 2009 hearing.[1]

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On appeal, respondent-mother argues the trial court erred in: (I) ordering cessation of reunification efforts without a finding that continued efforts would be futile; (II) failing to conduct a hearing about her possible need for a guardian ad litem; (III) determining that grounds existed to support termination of her parental rights; and (IV) determining that termination was in the children's best interest. Respondent-father argues the trial court erred in: (I) incorporating all underlying dispositional review orders, PCDSS reports, and guardian ad litem ("GAL") reports as findings of fact; (II) finding as fact that his statement to the Spartanburg Sheriff's Department amounted to an admission of sexual battery against Megan; and (III)determining that grounds existed to support termination of his parental rights.

Respondent Mother's Appeal

*I*

Respondent-mother first argues the trial court erred in ordering cessation of reunification efforts following a permanency planning hearing without a finding that continued efforts would be futile. We disagree.

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a

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[1] Respondent father has not brought forward in his brief any argument with regard to the permanency planning order. "Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a).

reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2009). "In achieving this goal, the court may direct DSS to cease reunification efforts with a parent." *In re Everett*, 161 N.C. App. 475, 478, 588 S.E.2d 579, 582 (2003). This authority emanates from § 7B-507(b), which provides:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
>
> (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;
>
> (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
>
> (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

N.C. Gen. Stat. § 7B-507(b) (2009). The failure to make the required findings may result in reversal of an order permitting cessation of reunification efforts. *In re Weiler*, 158 N.C. App.

473, 480, 581 S.E.2d 134, 138 (2003).

Respondent mother contends that the trial court erred by ordering cessation of reunification efforts without making a finding of fact that continued efforts would be futile. However, subsection(b)(1) requires the trial court to find that reunification efforts would *either* be futile *or* "inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." N.C.G.S. § 7B-507(b)(1). "Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive 'or', application of the statute is not limited to cases falling within both clauses but applies to cases falling within either one of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citations omitted).

The permanency planning order entered following the 1 September 2009 hearing shows that for more than twelve months, reunification had been the permanent plan. Toward achieving that end, certain obligations had been placed upon respondent-mother. By permanency planning order entered 9 December 2008, she was required to have a psychological evaluation and to follow any treatment recommendations made as a result of the evaluation. Although respondent-mother did undergo an evaluation, the trial court determined that insufficient evidence had been presented to demonstrate she had complied with any treatment recommendations. She also failed to comply with the 9 December 2008 order by failing to keep PCDSS informed and updated regarding her finances. She violated a safety assessment plan by

playing a taped message from respondent-father to the children and in setting up MySpace accounts for the two oldest children so that respondent-father could have contact with them. Respondent-mother refused to meet with PCDSS except for a single home visit that occurred in March 2009.

The trial court's findings further show that respondent-mother is unable to control all five children at once, causing visitations to be split so that she visits no more than two children at a time. Respondent-mother suffers from a personality disorder seen in less than one tenth of one percent of the general population and suffers from chronic depression which leads to her being unable to attend to the needs of her children. Each child suffers from psychological issues and respondent-mother is unable to adequately address the children's needs because of her own mental health issues. Long-term therapy of two to three years' duration would be required to bring respondent-mother to a point where she could be reasonably expected to care for the children. The trial court found that "[i]t continues to be contrary to the welfare of the minor children to return to the home of the Respondent[-]Mother and it is not possible nor in the best interests of the minor children to return to the home within six (6) months."

Although not employing the verbatim language of N.C.G.S. § 7B-507(b)(1), these findings show that reunification with respondent-mother would be inconsistent with the children's health, safety, and need for a safe, permanent home within a reasonable period of time. This argument is overruled.

*II*

Respondent mother next argues the trial court erred by failing to conduct a hearing to determine whether she should have a guardian ad litem ("GAL") and by failing to appoint a GAL for her based on her psychological issues. We disagree.

"A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the litigant is *non compos mentis*." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). Whether a substantial question as to the party's competency is raised is a determination within the trial judge's discretion. *Id.*

Upon motion of a party or its own motion, a court "may appoint a guardian ad litem for a parent in accordance with G.S. 1A-1, Rule 17 if the court determines that there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C. Gen. Stat. § 7B-1101.1(c) (2009). An "incompetent adult" is defined as "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2009). "Diminished capacity" has been defined by this

Court as a "lack of 'ability to perform mentally.'" *In re M.H.B.*, 192 N.C. App. 258, 262, 664 S.E.2d 583, 586 (2008) (citation omitted). Appointment of a GAL is not required "in every case where substance abuse or some other cognitive limitation is alleged." *In re H.W.*, 163 N.C. App. 438, 447, 594 S. E.2d 211, 216, *disc. review denied*, 358 N.C. 543, 603 S.E.2d 877 (2004). However, "[a]n allegation under N.C. Gen. Stat. § 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian *ad litem* should be appointed." *In re J.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48.

The record shows that at several junctures in the proceedings, the issue of whether a GAL should be appointed for respondent-mother was discussed and each time it was decided that appointment of a guardian was not necessary. At the initial adjudication and disposition hearing, all of the parties stipulated that appointment of a GAL for either respondent was unnecessary as they were competent and able to cooperate with and assist their attorneys. At the termination hearing, the parties stipulated that appointment of a GAL for the respondents, with specific reference to respondent-mother, was not necessary in order to represent their interests despite allegations of dependency. The transcript of the termination hearing shows that when the issue of appointment of a GAL for respondent-mother arose, the attorney for respondent-mother stated that respondent-mother was "able to participate and communicate with" the attorney "as a responsible adult person[.]"

Nothing in the record indicates that respondent-mother is

incompetent or has diminished capacity as defined hereinbefore. To the contrary, she cogently testified on her own behalf at the hearing without demonstrating any lack of understanding of the proceedings. We conclude the trial court did not err. *See In re C.G.A.M.*, 193 N.C. App. 386, 390, 671 S.E.2d 1, 4 (2008) (holding a court does not abuse its discretion by failing to appoint a GAL when nothing in the parent's conduct at the hearing raised a question about his competency, and the parent testified on his own behalf and asserted his own interest in retaining his parental rights); *In re D.H.*, 177 N.C. App. 700, 709, 629 S.E.2d 920, 925 (2006) (holding a trial court does not err by failing to appoint a GAL in a termination of parental rights proceeding when the parent does not request appointment of a GAL, the petition does not allege that the parent is incapable of parenting or is incompetent, and the record does not otherwise indicate that the parent is incompetent within the statutory definition).

*III*

Respondent-mother next contends that the court erred in determining that grounds existed to justify terminating her parental rights. We disagree.

Parental rights may be terminated if the court determines by clear, cogent and convincing evidence that one or more grounds authorizing termination of parental rights exists and that termination of rights is in the best interests of the child. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997). The appellate court is bound to affirm the trial court's order terminating

parental rights when the trial court's findings of fact are based upon clear, cogent, and convincing evidence and the findings of fact support the conclusions of law. *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004)(citation omitted). Here, the court terminated respondent mother's parental rights on three grounds: (1) she neglected the children; (2) she willfully left the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress is being made in correcting the conditions that led to the removal of the children; and (3) she is incapable of providing for the care and supervision of the children such that the children are dependent and there is a reasonable probability that such incapability will continue for the foreseeable future. N.C.G.S. § 7B-1111.

The first ground for termination found by the trial court, that respondent mother neglected the children, is authorized by N.C.G.S. § 7B-1111(a)(1) if the trial court determines that the child is a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101. A neglected juvenile is defined, in part, as one "who does not receive proper care, supervision or discipline from the juvenile's parent ... 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.G.S. § 7B-101(15) (2009). "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. at 248, 485 S.E.2d at 615. If the child is removed from the parent before the termination hearing, 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." *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (citation omitted). When the child does not reside in the home, the determination of whether the child is neglected "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based upon the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Respondent-mother argues there is no likelihood of repetition of neglect because it is possible for her to overcome her psychological issues through counseling. However, the trial court's findings show that, although respondent-mother has completed the psychological evaluation, the trial court was unable to find that she has complied with any treatment recommendations made as a reuslt of the evaluation. The trial court's findings also show that respondent-mother refused to meet with PCDSS except for one home visit in March of 2009. She failed to work with PCDSS to address the safety risks that have kept the children in foster care for more than three years. Respondent-mother is unable to control all five children at one time and, because of this, visitations are limited to a maximum of two children per visit. Respondent-mother suffers from chronic depression which causes her to be unable to attend to

the needs of her children. For respondent-mother to improve her condition to the point she could reasonably be expected to care for the children, she would require long term care and/or therapy. Since the time respondent-father was ordered to leave the home in June 2008, respondent-mother has been unable to demonstrate an ability to provide a safe, stable environment for the children or parenting skills to meet the needs of her children, who have significant mental health needs of their own. Respondent-mother told PCDSS after the father left the home that she had not tried to parent the children on her own in seven years and that she did not know if she could do it by herself. Respondent-mother does not challenge the foregoing findings of fact, and therefore, they are binding. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In turn, these findings support the trial court's conclusions that the children are neglected and that there is a probability of repetition of neglect. Because a finding of only one statutory ground is necessary to support termination of parental rights, we need not consider the other two grounds found by the trial court. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005), *affirmed per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

*IV*

Respondent-mother also argues the court erred in determining that termination of her parental rights was in the best interests of the children. We disagree.

The trial court's determination as to whether termination of parental rights is in the best interest of the child is reviewed by

this Court for abuse of discretion. *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

After determining that a ground exists for terminating parental rights, the trial court is required to consider whether termination of parental rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2009). Factors the trial court must consider in making this determination include the age of the juvenile, the likelihood of adoption, the role of termination of parental rights in the accomplishment of the permanent plan for the juvenile, the bond between the juvenile and the parent, the quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement, and any other relevant consideration. *Id.* "The children's best interests are paramount, not the rights of the parent." *In re Smith*, 56 N.C. App. 142, 150, 287 S.E.2d 440, 445, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).

The trial court made findings of fact about the ages of the children, the likelihood the children could be adopted, the desire of the foster parents to adopt the children, the bond between the children and their foster parents, and the status and well being of the children. Specifically, the trial court found that the children are doing well and are happy in their foster placements; that each

foster parent except one, who is a therapeutic foster parent for Joe, wishes to adopt the children in their care; and that each foster home appears to be a good, secure and stable placement for the children. The foregoing findings reflect a reasoned decision by the trial court, and we see no abuse of discretion. This assignment of error is overruled. We affirm the trial court's termination of respondent-mother's parental rights.

Respondent Father's Appeal

*I*

Respondent-father argues the trial court erred by incorporating as findings of fact all underlying dispositional review orders and all PCDSS and guardian ad litem reports and by finding as fact that each order was supported by the evidence offered. We disagree.

The finding of fact to which respondent-father takes exception states:

> 37. The Court takes judicial notice of the Adjudication Order entered in this matter and each subsequent disposition order contained in the file of this matter, along with each DSS and Guardian Ad Litem Court Report incorporated by reference into said Orders. The Court finds as fact and incorporates by reference the matters therein, in support of this Order and further finds that each said prior Order in this matter was supported by the evidence offered and incorporated in said Orders.

Respondent-father contends the trial court lacked the authority to review and determine the validity of prior orders entered in the case. He also asserts the trial court improperly incorporated the prior orders because they were based upon a lesser standard of proof.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2009). In a termination of parental rights proceeding, prior orders in the case comply with Rule 201 because they are not subject to reasonable dispute and, therefore, they may be judicially noticed. *In re J.W.*, 173 N.C. App. 450, 456, 619 S.E.2d 534, 540 (2005), *affirmed*, 360 N.C. 361, 625 S.E.2d 780 (2006). The trial court may take judicial notice of prior orders even when those orders are based on a lesser evidentiary standard. *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005). Further, the trial court "is presumed to have disregarded any incompetent evidence" and to have conducted "the independent determination required when prior [] orders have been entered in the matter." *Id.* (internal citations and quotation marks omitted). This argument is overruled.

*II*

Respondent-father next argues the trial court erred by finding as a fact that a statement he made to the Spartanburg Sheriff's Department amounted to an admission that he committed a sexual battery upon the child Megan. We disagree.

The trial court admitted the statement into evidence and incorporated it by reference into the order. In pertinent part the statement reads as follows:

> The truth is that there have been two occasions where my bare hand and fingers have come in contact with [child's] vagina and anus. The anus occasion was the second to last visitation

> when [child] went to the bathroom. While cleaning her, my middle finger did go into her anus. . . . On her last visitation I helped [child] bathe. Although [child] has been bathing herself for a couple of years now, on this night for some reason I began to wash her. With soap on my right hand I washed between her legs and the middle finger went inside her vagina.

Finding of fact 40(c) states: "Pursuant to N.C.G.S. § 7B-111(a)(1), [respondent-father] has abused the juvenile, [Megan], by committing sexual battery upon said child." In finding 41(d), the trial court also used the term "sexual battery" in referring to respondent-father's sexual abuse of Megan. Respondent-father argues that the foregoing statement does not establish all of the statutory elements of sexual battery, specifically, the elements that the accused "engages in sexual contact" with another person "for the purpose of sexual arousal, sexual gratification, or sexual abuse . . . ." *See* N.C. Gen. Stat. § 14-27.5A(a) (2009). We reject this argument.

Sexual contact is defined as the touching of another's sex organ or anus. N.C. Gen. Stat. § 14-27.1(5). Penetration of another person's anal or genital opening by any object, except for accepted medical purposes, is defined by our criminal statutes as a sexual act. N.C.G.S. § 14-27.1(4) (2009). In addition, the purpose or intent to arouse or gratify sexual desire may be inferred from one's actions. *State v. Rhodes*, 321 N.C. 102, 105, 361 S.E.2d 578, 580 (1987). Respondent-father articulated no medical reason for inserting his bare middle finger into the child's anus and vagina. Respondent-father also later confessed in the statement that what he did "was not the right thing to do" and he promised

that "it will never happen again."

Further, under subsection 7B-111(a)(1), sexual battery need not be shown to support a finding of abuse. Section 7B-101 defines abuse as including, *inter alia*, commission of a variety of sexual offenses against the juvenile including indecent liberties. Respondent-father does not challenge his statement to law enforcement, which the trial court incorporated by reference, or the trial court's finding that he was facing two counts of indecent liberties with a child in connection with the actions described in the statement. Even assuming, *arguendo*, that the portion of the trial court's findings referring to "sexual battery" were not supported by clear, cogent and convincing evidence, respondent-father does not explain how he was prejudiced thereby. The unchallenged findings regarding his sexual contact with Megan fully support the trial court's finding of abuse under N.C.G.S. § 7B-111(a)(1).

*III*

Respondent-father lastly argues the trial court erred in finding the existence of grounds for terminating his parental rights to his two children. We disagree.

Here, the trial court terminated his parental rights on the grounds he (1) neglected both children, (2) abused Megan, and (3) willfully left both children in foster care for at least twelve months without making reasonable progress in correcting the conditions that led to the children's removal.

We first address the ground of abuse or neglect. Parental

rights may be terminated if the trial court finds the parent abused or neglected the juvenile. N.C.G.S. § 7B-1111(a)(1). A juvenile is abused if the juvenile's parent or custodian "[c]ommits, permits, or encourages the commission of a violation of" a number of sex-related crimes involving the juvenile as the victim, including taking indecent liberties with a minor. N.C.G.S. § 7B-101(1)(d).

The trial court's findings of fact show that respondent-father voluntarily admitted to wrongdoing by inserting his finger into Megan's anus and vagina, that Megan was four years old at the time, and that respondent-father is awaiting trial on charges of taking indecent liberties with a minor arising out of the incidents. Since his arrest, respondent-father has not been available to provide his children with proper supervision, care, and discipline. The court found that respondent-father has failed to comply with a request to undergo a psychosexual evaluation and has "opted out of all opportunities to pursue reunification" and that, as a result, the trial court "can forecast no reasonable time period when he may ever be able to accomplish reunification." Respondent-father has not challenged these findings and therefore they are binding on appeal. *Koufman,* 330 N.C. at 97, 408 S.E.2d at 731.

"In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C.G.S. § 7B-101(15). James was living in the home when respondent father

perpetrated the sexual abuse upon Megan.

We hold the court's findings of fact support its conclusion of law that respondent-father's parental rights be terminated on grounds he neglected and abused his children. Having upheld termination on this ground, we need not consider the remaining ground. *In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d 241 at 246.

Affirmed.

Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).