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NO. COA11-26
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

IN THE MATTER OF:	Chatham County
B.E. and B.E.	Nos. 03 JT 23-24

Appeal by respondents from order entered 27 October 2010 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 8 June 2011.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Chatham County Department of Social Services.

Pamela Newell for Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

Richard E. Jester for respondent-appellant father.

ELMORE, Judge.

Respondents appeal from the district court's order on remand terminating their parental rights to their children, B.E.

(Beth) and B.E. (Brian).[1] After careful review, we affirm the order of the trial court.

I. Background

On 31 March 2003, the Chatham County Department of Social Services (DSS) filed petitions alleging that Beth and Brian were neglected, abused, and dependent juveniles. Subsequently, the juveniles were adjudicated neglected juveniles with respondents' consent. On 13 May 2004, the trial court entered an order returning the juveniles to respondents' custody and terminating its jurisdiction.

On 5 August 2005, DSS filed a second set of petitions alleging that Beth and Brian were neglected juveniles. On 8 December 2005, the trial court, with respondents' consent, again adjudicated Beth and Brian to be neglected juveniles. Respondents were provided with services and, eventually, granted a trial home placement with the juveniles. However, on 16 March 2007, the trial home placement failed, and the juveniles were returned to foster care. On 25 January 2008, the trial court relieved DSS of further efforts at reunification and changed the permanent plan to adoption.

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[1] The pseudonyms Beth and Brian are used throughout this opinion to protect the juveniles' privacy and for ease of reading.

On 24 March 2008, DSS filed motions seeking to terminate respondents' parental rights to Beth and Brian. On 11 August 2009, the trial court entered an order terminating respondents' parental rights on the grounds that: (1) respondents had neglected the juveniles within the meaning of N.C. Gen. Stat. § 7B-101(15), and pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); (2) respondents had willfully left the juveniles in foster care for more than twelve months without showing that "substantial" progress under the circumstances had been made in correcting those conditions which led to the juveniles' removal, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); and (3) respondents were incapable of providing for the proper care and supervision of the children such that they were dependent juveniles, within the meaning of N.C. Gen. Stat. § 7B-101(9), and there was a reasonable probability that such incapability would continue for the foreseeable future, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6). Respondents appealed.

On appeal, this Court concluded that the trial court erred by finding each of the grounds for terminating respondents' parental rights. First, with respect to the grounds for termination set out in N.C. Gen. Stat. § 7B-1111(a)(2), this Court stated that the trial court determined that respondents

"had not made 'substantial progress,' a standard which simply does not appear in the relevant statutory language and which suggests that the trial court may have imposed a higher standard upon Respondent Parents than that established by the General Assembly." *In re B.E.*, No. COA 09-1532, 2010 N.C. App. LEXIS 551, *19 (filed 6 April 2010) (unpublished). Additionally, the trial court's findings and conclusions did not "specify the conditions that led to Brian and Beth's removal or the conditions that Respondent Parents had failed to meet." *Id.*

Next, with respect to the trial court's conclusion that respondents' parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), this Court held that, while the evidence presented supported a finding of "temporary incapability," the evidence did "not support a finding of the longer-term incapability required for a finding that a parent's parental rights are subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6)." *Id.* at *22. This Court further concluded that

> the trial court's factual findings simply do not address that portion of N.C. Gen. Stat. § 7B-1111(a)(6) which requires a showing that 'an appropriate alternative child care arrangement' is not available to the parent as a precondition for the termination of his or her parental rights pursuant to this statutory subdivision.

Id.

Finally, with respect to the trial court's conclusion that respondents' parental rights were subject to termination for neglect, this Court held that the trial court's conclusion was not supported by adequate findings of fact. Specifically, this Court noted that the trial court "never found that Brian and Beth had been adjudicated to have been neglected juveniles at an earlier time or that any neglect that they had previously experienced was likely to recur in the event that they were returned to the custody of Respondent Parents." *Id.* at *25. Accordingly, this Court reversed the order of termination and remanded the case to district court for "further proceedings not inconsistent with this opinion." *Id.* at *27.

On remand, the trial court amended its termination order, without receipt of additional evidence, to comply with this Court's opinion in the matter. The trial court made additional findings of fact and again concluded that grounds existed to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6). Accordingly, on 27 October 2010, the trial court terminated respondents' parental rights. Respondents now appeal.

II. Standard of Review

Proceedings to terminate parental rights are conducted in two parts: (1) the adjudication phase, governed by N.C. Gen. Stat. § 7B-1109, and (2) the disposition phase, governed by N.C. Gen. Stat. § 7B-1110. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Upon review of an order terminating parental rights, this Court must determine (1) whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether the court's findings of fact support its conclusions of law that one or more statutory grounds for termination exist. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000). Findings of fact supported by ample, competent evidence are binding on appeal even though there may be evidence to the contrary. *See In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988) (citation omitted). Once a trial court has determined at the adjudication phase that at least one ground for termination exists, the case moves to the disposition phase, where the trial court decides whether a termination of parental rights is in the best interest of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908; N.C. Gen. Stat. § 7B-1110(a) (2009). The trial court is not required to terminate parental rights, but has the

discretion to do so. *In re Tyson*, 76 N.C. App. 411, 419, 333 S.E.2d 554, 559 (1985). Therefore, this Court reviews the determination for abuse of discretion. *Id.*

III. Arguments

A. Findings of Fact

Respondents first argue that the trial court erred by entering findings of fact 39-43, 46(b)-(k), and 47. Respondents argue that findings of fact 39-43, 46(b)-(f), and 46(k) "address the *current* (date of hearing on remand, October 21, 2010) status of the children[,]" even though the last evidence taken in the case was on 1 April 2009. Respondents argue that these findings cannot be supported by clear, cogent, and convincing evidence given the lack of new evidence that could support the "current" status of the children. We disagree.

The trial court did not conduct a new hearing; it merely amended its previous order, which this Court had held to be deficient. This Court, in its mandate, did not mandate that a new hearing be held or that new evidence be heard. The trial court was, of course, free to hold a new hearing *if* it deemed a new hearing necessary to comply with this Court's opinion, but it was not obligated to. Thus, the trial court's new findings

of fact did not address the status of the children as of the date of the amended order; they addressed the status of the children as of the date of the original order, 29 July 2009.

Respondents argue that findings of fact 46(g)-(i), which address the lack of progress made by respondents in therapy, are not supported by clear, cogent, and convincing evidence. The trial court made the following challenged findings of fact in support of its conclusion that grounds existed to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(2):

> g. Respondent mother was not attending DBT [therapy] sessions consistently until September, 2008, after the TPR hearing in this matter had begun, and she provided a false excuse for why she was not attending.
>
> h. Respondent mother only attended 10 DBT sessions in the one-year period from September 2007 to September 2008. The provider of Respondent mother's DBT therapy indicated in a letter to this court that such therapy is only effective when applied consistently over the course of one year, which encompasses about 50 sessions.
>
> i. Respondent parents have attended individual therapy somewhat regularly since June of 2007, but have still not begun to apply what they have learned as seen by the continued inappropriate behaviors at visits prior to visits being ceased, by their continued avoidance of drug testing, by their poor choices that have resulted in additional criminal charges, and by their

> continued refusal to cooperate with CCDSS (though cooperation tends to ebb and flow, depending on what is happening in the case).

These findings of fact are supported by the DSS report submitted on 24 January 2008. The report noted that both parents were arrested for drug and drug paraphernalia possession on 15 March 2007, and respondent mother was also charged with drug trafficking on that date. Both parents declined multiple drug tests, and respondent father tested positive for marijuana on 23 May 2007. The report explained,

> For nearly two years, this couple has cooperated with Chatham DSS and the therapeutic team just enough to give them chance after chance to parent their children. Despite diligent efforts to provide the couple with family therapy, co-parenting sessions, supervised visits (in settings such as bowling alleys, shopping malls and swimming pools), and unsupervised visits, the couple cannot determine the future of their relationship, cannot keep their relationship from repeated brushes with law enforcement regarding drug use and possession, and cannot sustain minimum standards of stability for their children.
>
> * * *
>
> At this point, the only negative influences in these children's lives are the repeated and sustained oppositional and defiant behaviors demonstrated by [respondent mother] during the children's supervised visits at the Pittsboro Visitation Center.
>
> . . . Time after time, the [therapeutic] team has hoped that this couple would

> internalize the skills to which they were exposed in therapy, and put their children's best interest above their own. Time after time, this couple has failed to do so.

Respondents argue that the trial court failed to follow this Court's mandate by making finding of fact 47(a), which states in relevant part, "Dr. Karen Yoch, a psychologist, completed a Psychological Evaluation on both parents which found them to be unable to parent the children." In the previous opinion, this Court made the following observations about Dr. Yoch's psychological evaluation and the trial court's use of that evaluation:

> A careful review of the trial court's factual findings . . . reveals that the only apparent support for its "incapability" determination lies in its discussion of the psychological evaluations performed by Dr. Yoch. Although the trial court found that Dr. Yoch had concluded that Respondent Parents were "unable to parent the children," a careful reading of Dr. Yoch's reports concerning both Respondent Mother and Respondent Father indicates that Dr. Yoch concluded that "[t]he prognosis for [Respondent Parents] to make the necessary changes so that [they] can effectively parent [their] children within the next six months is poor and within the next year, guarded, even with [their] full cooperation with the recommendations cited above." Although Dr. Yoch's report clearly supports a finding of temporary incapability, it does not support a finding of the longer-term incapability required for a finding that a parent's parental rights are subject to

> termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(6).

In re B.E., 2010 N.C. App. LEXIS at *21-22. However, contrary to respondents' assertions, the trial court did not violate the mandate by finding, again, that Dr. Yoch's psychological evaluation found both parents "unable to parent the children." The trial court expanded upon its original finding by including the very language we noted in our previous opinion, that respondents' prognosis "to make the necessary changes so that they can effectively parent [their] children within the next six months is poor and within the next year, guarded, even with [their] full cooperation with the recommendations." The trial court followed this by noting that respondents "have not been in full cooperation with Dr. Yoch's recommendations." These findings, taken together, support a finding of longer-term incapability and are consistent with our previous opinion.

B. Grounds for Termination

Respondents next challenge the trial court's conclusions that grounds existed to terminate their parental rights. They argue that the trial court erred by concluding that grounds existed to terminate their parental rights under N.C. Gen. Stat. § 7B-1111(a)(1), § 7B-1111(a)(2), and § 7B-1111(a)(6). However,

"[a] single ground . . . is sufficient to support an order terminating parental rights." *In re J.M.W., E.S.J.W.*, 179 N.C. App. 788, 791, 635 S.E.2d 916, 917 (2006) (footnote omitted). Therefore, if we determine that the findings of fact support one of the grounds, we need not review the other grounds. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426-27 (2003).

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), a "court may terminate the parental rights upon a finding" that "[t]he parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2009).

A neglected juvenile is defined as

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2009).

However, when the child is not in the custody of the parent at the time of the termination hearing, and "has not been in the

custody of the parent for a significant period of time," as in this case, "the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003) (citation omitted). Because the determinative factor is the parent's ability to care for the child at the time of the hearing, we previously have explained that "requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible." *Id.* (citing *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 232 (1984)).

> If there is no evidence of neglect at the time of the termination proceeding, however, 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 parent[].

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232). When considering the likelihood of repetition of neglect, however, "the trial court must also consider evidence of changed conditions[.]" *In re Shermer*, 156 N.C. App. at 286, 576 S.E.2d at 407.

Here, the trial court found that the children had previously been neglected twice, once in 2003 and again in 2005. The trial court also found that the neglect is likely to recur if the children are returned to the care and custody of respondents. The trial court found that neglect was likely to recur because of the failed trial placement in 2007, respondents' drug use and ongoing criminal activity, respondents' inability to meet the children's therapeutic needs, respondents' inability to control the children's behavior, and respondents' failure to take advantage of DSS services. The trial court concluded its reasoning as follows:

> Finally, the parents' choice to put themselves in a situation where they were driving/riding in a car with fictitious tags, a relatively large amount of prescription pain killers, and marijuana residue in the floorboard while Respondent father was on probation and while their minor children were in a trial placement in their care, exhibits to this court that their judgment and ability to apply the lessons they have been provided by numerous service providers has not improved despite the enormous and unsustainable amount of services having been devoted to their family.

Accordingly, we hold that the trial court's conclusion that grounds exist to terminate respondents' parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) is supported by findings of

fact, which are, in turn, supported by clear, cogent, and convincing evidence.

C. Guardian ad Litem

Respondents next argue that the trial court erred by not conducting an inquiry into whether a guardian ad litem (GAL) should have been appointed to respondent father. Although the trial court concluded that the children were dependent because of respondent father's incapacity pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), the trial court did not hold a hearing pursuant to N.C. Gen. Stat. § 7B-1101.1(c) to determine whether a GAL should be appointed. Respondents argue that the trial court "so focused on [respondent father]'s addictions and mental health concerns that the . . . grounds to terminate based upon neglect and lack of progress are inextricably linked to the dependency and the order must be vacated."

General Statute subsection 7B-1101.1(c) provides:

> On motion of any party or on the court's own motion, the 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. The parent's counsel shall not be appointed to serve as the guardian ad litem.

N.C. Gen. Stat. § 7B-1101.1(c) (2009). "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 to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, ___ N.C. App. ___, ___, 694 S.E.2d 508, 511 (2010) (citation omitted). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted). "This Court has also reviewed findings of diminished capacity for abuse of discretion." *In re A.R.D.*, ___ N.C. App. at ___, 694 S.E.2d at 511 (citing *In re M.H.B.*, 192 N.C. App. 258, 266, 664 S.E.2d 583, 588 (2008)). "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*, 312 N.C. at 777, 324 S.E.2d at 833.

Under N.C. Gen. Stat. § 35A-1101, an incompetent adult is defined as

> an adult . . . 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).

Although, as a general rule, "[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[,]" *J.A.A. & S.A.A.*, 175 N.C. App. at 71, 623 S.E.2d at 48, the particular allegation in this case did not raise a substantial question as to respondent father's competency. In its motion to terminate parental rights, DSS noted respondent father's "history of abusing drugs" and characterized his psychological evaluation as demonstrating that he did "not have the capacity to parent due to his long, chronic history of drug use and criminal activity." The psychological evaluation also concluded that respondent father's "childhood did not prepare him for being a parent and has affected his ability and capacity to make good judgment and parental decisions." However, DSS

specifically noted, "respondent father is not incompetent." DSS also stated in its motion that respondent father had no known mental disability and had been "gainfully employed throughout the juveniles' placement in foster care." Here, DSS clearly limited its allegation of incapability to respondent father's drug history and upbringing, specifically explaining that the allegation of incapability was not based on mental illness or mental incompetence. Accordingly, the trial court did not abuse its discretion by not inquiring into whether respondent father required a GAL.

D. Statutory Changes to N.C. Gen. Stat. § 7B-1110

Respondents next argue that changes to N.C. Gen. Stat. § 7B-1110 prevent us from affirming the termination order based only on one ground. Respondents argue that, if we determine that the trial court gave weight to a single improperly found ground for termination, we must order the trial court to reconsider all of the remaining grounds to determine if the termination of parental rights still has merit. This argument lacks merit.

Section 7B-1110 was last amended in 2005. It added the six factors that a trial court must consider when determining

whether termination is in the child's best interest. Of apparent relevance was the deletion of this language:

> Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated.

N.C. Gen. Stat. § 7B-1110(a) (1999). And its replacement with this language: "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2009).

Respondents offer no cogent explanation of why this change, effected nearly six years ago, should affect our entrenched jurisprudence that affirmation of one ground for termination is sufficient to affirm a trial court's conclusion that one or more grounds for terminating a parent's rights exist. No such explanation is apparent to us. We hold that this argument lacks merit.

IV. Conclusion

Accordingly, we affirm the order of the trial court.

Affirmed.

Judges HUNTER, Robert C. and CALABRIA concur.

Report per Rule 30(e).