IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-238

Filed: 1 September 2015

Guilford County, No. 12 JT 512

IN THE MATTER OF: M.P.M.

Appeal by respondent from order entered 12 December 2014 by Judge Michelle Fletcher in District Court, Guilford County. Heard in the Court of Appeals on 27 July 2015.

Guilford County Department of Health and Human Services, by Mercedes O. Chut, for petitioner-appellee.

Mary McCullers Reece, for respondent-appellant.

The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.

STROUD, Judge.

Respondent appeals from an order terminating his parental rights to his child M.P.M. (hereinafter referred to as "May") on the ground that he neglected the juvenile.[1] *See* N.C. Gen. Stat. § 7B-1111(a)(1) (2013). Respondent contends that the trial court erred in (1) making certain findings of fact; and (2) concluding that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect. We affirm.

[1] We use pseudonyms to protect the identity of the juveniles.

I. Background

In 1999, Arlington County Department of Social Services in Virginia took Arnold, Mother's son, into custody. A court in Arlington County adjudicated Arnold to be abused and neglected, and on or about 24 October 2000, the court terminated Mother's parental rights as to Arnold. In 2001, Margaret was born, and in 2003, Carl was born. In 2003, Mother began a romantic relationship with Mr. F. While on probation in Virginia, Mother and Mr. F. moved to Mecklenburg County. In 2005, Katie was born.

In 2006, Mother and Mr. F. were arrested in Mecklenburg County for absconding from their probation. They were extradited to Virginia where they began serving prison sentences for grand larceny by credit card fraud. On or about 1 September 2006, Mecklenburg County Department of Social Services took Margaret, Carl, and Katie into custody. On or about 18 October 2006, a district court in Mecklenburg County adjudicated the juveniles to be neglected and dependent. In December 2006, while in prison, Mother gave birth to Lance. In February or March 2007, Mr. F. was released from prison and moved back to Mecklenburg County. In 2008, Mr. F. gained custody of Margaret, Carl, Katie, and Lance. In July 2009, Mother was released from prison and, in August 2009, she returned to Mecklenburg County.

On or about 14 August 2009, Katie was hospitalized for severe injuries she sustained from being beaten while in the care of Mr. F. Mr. F. coached the juveniles on what to say when asked how Katie was injured. Mecklenburg County Department of Social Services again took custody of Margaret, Carl, Katie, and Lance, and a district court in Mecklenburg County adjudicated the juveniles to be abused, neglected, and dependent. Mother entered into a service agreement with Mecklenburg County Department of Social Services to work toward regaining custody of her children.

In September 2009, Mother moved from Mecklenburg County to Guilford County. In May 2010, Mother began a romantic relationship with Respondent. Shortly thereafter, Mother and Respondent began living together. In November 2010, Mecklenburg County Department of Social Services returned Margaret, Carl, Katie, and Lance to Mother. May, the subject juvenile of this case, was born in February 2011, and Respondent was subsequently determined by DNA paternity testing to be her biological father.

During the period from November 2010 to October 2012 while the juveniles resided with Mother and Respondent, Mother habitually physically and emotionally abused May's four half-siblings. This abuse included beating them, hitting them with items such as shoes, belts, and metal hangers, kicking them in the stomach, screaming at them, and grabbing and pulling them by the hair. Mother often held

her hand over the children's mouths and noses to prevent them from screaming while she beat them. She also often put her foot on their backs to hold them down on the floor so they could not escape. During one incident when Respondent attempted to intervene on behalf of Carl, Mother told him that Carl was her child and that he could leave if he did not like the way she disciplined him. Respondent did leave the home, leaving his daughter May with Mother, and returned the next morning.

At some point between November 2010 and October 2012, Respondent began participating in the abuse of May's four half-siblings. On one occasion, as punishment for playing with matches, Respondent and Mother held Carl's face close to a hot burner. On other occasions, Respondent hit the children with shoes, and on at least one occasion, Respondent hit the children with a copper wire.

On 1 October 2012, Mother threatened to strike Carl with an axe. The following day, Margaret disclosed to a social worker the incident with the axe and the daily abuse inflicted upon the children. On or about 3 October 2012, Guilford County Department of Health and Human Services ("DHHS") gained custody of all five juveniles. On 19 December 2012, Respondent signed a service agreement that addressed emotional and mental health, parenting, family relationships, housing, and employment matters. On 7 January 2013, the trial court adjudicated Margaret, Carl, Katie, and Lance to be abused, neglected, and dependent and adjudicated May to be neglected and dependent. The trial court awarded Respondent one hour of

supervised visitation per week. On 23 January 2013, the trial court directed DHHS to proceed with termination of parental rights. On 20 March 2013, DHHS filed a petition to terminate the parental rights of Respondent as to May and the parental rights of Mother as to all five children.

Respondent took a parenting psychological evaluation with Dr. Michael McColloch and a pre-psychiatric evaluation, but he failed to comply with Dr. McColloch's recommendation for a full psychiatric evaluation, because he made it clear that he was unwilling to take any medications, which may be recommended as a result of the evaluation. The parenting psychological evaluation noted "personality difficulties," including depressive, avoidant, and schizoid characteristics.

During a session with his individual therapist, Respondent denied that he had ever hit the children. At the time of the filing of the petition in March 2013, Respondent agreed to move out of Mother's home and to cease all contact with Mother. But Respondent continued to call, text, and send photographs of May to Mother, which he took during his visits with May, until October 2013 when Robert McEntire, the DHHS social worker in charge of the case, discovered their continued contact. During this period, Respondent repeatedly falsely reported to McEntire that he was having no contact with Mother. After McEntire confronted Respondent, Respondent explained that "he felt sorry for her" and that "she ha[d] suffered enough." Respondent also stated that he could resume his relationship with Mother

if he was certain that she had her anger under control, and that the risk of harm to his daughter if she were left alone with Mother "would be no different than leaving her with a babysitter or someone else because you can't predict what someone will do." In April 2014 during a visit with May, Respondent stated that he was open to leaving May in Mother's care during the day because "she would never hurt her."

The trial court conducted the termination hearing on 11 August 2014, 8 September 2014, 9 September 2014, and 7 October 2014. On 12 December 2014, the trial court concluded that Respondent had neglected May, that Respondent neglected May at the time of the termination hearing, and that there is a likelihood of repetition of neglect should Respondent regain custody of May. *See* N.C. Gen. Stat. § 7B-1111(a)(1). The trial court also concluded that termination of his parental rights was in May's best interest. The trial court further concluded that Mother neglected all five children and that termination of her parental rights was in their best interest. Respondent gave timely notice of appeal.

II. Termination of Parental Rights

A. Standard of Review

> Termination of parental rights proceedings are conducted in two stages: adjudication and disposition. In the adjudication stage, the trial court must determine whether there exists one or more grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111(a). This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the

> court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re A.B., ___ N.C. App. ___, ____, 768 S.E.2d 573, 575 (2015) (citations, quotations marks, and brackets omitted).

B. Findings of Fact

Respondent contends that the following findings are not supported by clear, cogent, and convincing evidence:

> (1) Since [May] has been in custody, [Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe in the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option. [Respondent's] explanation for his contact with [Mother] was that he felt sorry for her and that she "has been through enough." [Respondent's] conduct and statements reveal that his concern for [Mother] is greater than his desire to reunify with [May].
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> . . . .
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> (3) It is clear that [Respondent] has not gained an adequate understanding of what unfolded during his relationship with [Mother], the seriousness of what transpired in that home, and the role he played in creating and fostering an injurious and abusive environment for his daughter.
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> (4) [Respondent's] testimony and history reveal that he is unable or [un]willing to protect [May] from abuse and harm, particularly if doing so would require excluding [Mother] from [May's] life. [Respondent] does not have a protective instinct for his child that is strong enough to

> overcome his need to submit to a dominant personality. [Respondent] lacks the ability to protect [May] from a dominant personality such as that of [Mother].

Respondent argues that the evidence showed that he followed his case plan by establishing paternity, undergoing mental health evaluations, engaging in parent-centered therapy, completing his individual therapy to his therapist's satisfaction, establishing a home apart from Mother, eventually ceasing contact with Mother, and engaging in regular, appropriate and affectionate visitations with May. He submits that this evidence showed that he had demonstrated "sufficient growth as a parent to merit a chance at reunification with his daughter." Our dissenting colleague agrees with Respondent and takes the position that Respondent is being punished for Mother's actions. Although we agree that Respondent may be a better parent than Mother and that he made some progress, that is not the question before us. The trial court properly addressed the concerns about each parent separately. Ultimately, the trial court based its decision primarily upon Respondent's failure to understand or appreciate the extent and effects of Mother's established pattern of child abuse and his inability to protect May. And this is why Mother's history of child abuse is relevant to the determination about Respondent.

We hold that clear, cogent, and convincing evidence supports the challenged findings of fact. *See id.* at ___, 768 S.E.2d at 575. McEntire, the DHHS social worker who had worked on this case since October 2012 when the children came into DHHS

custody, testified that, during a session with his individual therapist, Respondent denied that he had ever hit the children. McEntire also testified that, after DHHS had filed its petition in March 2013 and Respondent had agreed to cease all contact with Mother, Respondent continued to call, text, and send photographs of May to Mother, which he took during his visits with her, until October 2013 when McEntire discovered their continued contact. McEntire testified that during this period, Respondent repeatedly falsely reported to him that he was having no contact with Mother. McEntire further testified that after he confronted Respondent, Respondent explained that "he felt sorry for her" and that "she ha[d] suffered enough." McEntire also testified that Respondent stated that he could resume his relationship with Mother if he was certain that she had her anger under control, and that the risk of harm to his daughter if she were left alone with Mother "would be no different than leaving her with a babysitter or someone else because you can't predict what someone will do." McEntire further testified that, in April 2014 during a visit with May, Respondent stated that he was open to leaving May with Mother during the day because "she would never hurt her." Finally, McEntire testified that he was concerned that Respondent failed to comprehend the dangers or risks involved in resuming a relationship with Mother or allowing May to remain alone with Mother.

In addition, although Respondent did have a parenting psychological evaluation and a pre-psychiatric evaluation, he failed to comply with Dr. McColloch's

recommendation for a full psychiatric evaluation, because he made it clear that he was unwilling to take any medications, which may be recommended as a result of the evaluation. The parenting psychological evaluation noted "personality difficulties," including depressive, avoidant, and schizoid characteristics. Accordingly, we hold that clear, cogent, and convincing evidence supports the challenged findings of fact. *See id.*, 768 S.E.2d at 575.

C. Conclusion of Law

Respondent next contends that the trial court erred in concluding that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect. To terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the trial court must conclude that the parent has abused or neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1). N.C. Gen. Stat. § 7B-101(15) defines a "neglected juvenile" 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. 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.

Id. § 7B-101(15) (2013) (emphasis added).

"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). The trial court must consider evidence of any changed circumstances since the time of a prior adjudication of neglect and the probability that the neglect will be repeated if the child is returned to the parent's care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In predicting the probability of repetition of neglect, the court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court made the following findings of fact in support of its conclusion of neglect:

> 36. Grounds exist to terminate the parental rights of [Respondent] pursuant to N.C.G.S. § 7B-1111(a)(1). [Respondent] has neglected the juvenile [May], the neglect continues to date, and there is a likelihood of the repetition of neglect if [May] were returned to [Respondent]. [Respondent's] past neglect includes his use of inappropriate discipline on [May's] older siblings with [May] in the home, including hitting the siblings with sandals and assisting [Mother] in holding [Carl's] face close to a hot burner and his failure to protect [May] from the abusive environment of the home he shared with [Mother]. [Respondent] demonstrated a lack of protective instinct and allowed his relationship with [Mother] to dominate over the safety of his child and her siblings. [Respondent] demonstrated poor parenting judgment by leaving the residence during [Carl's] beating and not taking protective

measures such as contacting police or at least removing his own child. When [Respondent] was asked why he did not take the children or at least [May] with him, [Respondent] responded that he did not want to make [Mother] angry. [Respondent's] own fear caused him to leave his daughter and her siblings alone with a violent perpetrator, revealing that his fear is greater than his protective instinct. [Respondent's] neglect of [May] has been ongoing through the present and he is currently neglecting [May] as indicated below.

> k. [(sic)] [Respondent] was not fully forthright and honest with Dr. McColloch or his therapist as required to adequately address his issues. In the report of the Parenting/Psychological Evaluation performed on [Respondent], Dr. McColloch noted that [Respondent] was convincing in his assertion that he could end his relationship with [Mother] and that he had no problem with not having contact with her. Despite appearing convincing to Dr. McColloch, [Respondent] did not cease his contact with [Mother]. Furthermore [Respondent] did not disclose to Dr. McColloch that he had participated in the abuse by hitting [May's] siblings with items such as a sandal and by assisting [Mother] in holding [Carl's] face close to a hot burner. [Respondent] also did not inform his individual therapist of his continued contact with [Mother] until after the Social Worker informed the therapist of the contact and the therapist confronted [Respondent].
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> l. From the outset of the case, [Respondent] was allowed to have supervised visitation with [May] for one hour once a week. Although [Respondent] requested that the Court increase his visits, the Court declined to do so during the two years [May] has been in custody. The Court in the underlying juvenile proceeding never increased [Respondent's] visits and never advanced [Respondent] to having unsupervised visits. It is clear that the Court in the underlying juvenile

proceeding determined that [Respondent] had not reached a point where he could safely and effectively have unsupervised visits with [May].

m. It is clear that [Respondent] complied with the requirements of his service agreement in terms of attending appointments and completing tasks. However, the particular circumstances of this case require more than going through the motions of attending ten therapy sessions and interacting appropriately during one hour weekly supervised visitation sessions. When asked during this trial what he learned from his individual therapy, [Respondent's] response was only that he learned to be patient with the children and to give them things. [Respondent] has not learned that his first responsibility is to protect his daughter. While patience is an important parenting skill, the most crucial parenting skill for the children in this case is to be protected from harm and to be made to feel safe.

> (1) Since [May] has been in custody, [Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe in the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option. [Respondent's] explanation for his contact with [Mother] was that he felt sorry for her and that she "has been through enough." [Respondent's] conduct and statements reveal that his concern for [Mother] is greater than his desire to reunify with [May].
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> (2) The Court observed [Respondent] throughout all of the hearing dates for this trial and throughout all of the testimony that was relayed during this trial. [Respondent] showed no emotion and a complete lack of empathy during the testimony describing what the children went through in his home.

> At the close of the evidence on grounds, when the Court announced its decision that grounds exist to terminate the parental rights of each of the parents, [Respondent] smiled. Upon seeing this, the Court specifically asked [Respondent] if he understood the Court's decision and [Respondent] responded in the affirmative and offered no explanation for his inappropriate expression.
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> (3) It is clear that [Respondent] has not gained an adequate understanding of what unfolded during his relationship with [Mother], the seriousness of what transpired in that home, and the role he played in creating and fostering an injurious and abusive environment for his daughter.
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> (4) [Respondent's] testimony and history reveal that he is unable or [un]willing to protect [May] from abuse and harm, particularly if doing so would require excluding [Mother] from [May's] life. [Respondent] does not have a protective instinct for his child that is strong enough to overcome his need to submit to a dominant personality. [Respondent] lacks the ability to protect [May] from a dominant personality such as that of [Mother].

n. There is a likelihood of the repetition of neglect by [Respondent]. It is reasonably foreseeable that [Respondent's] neglectful behaviors would continue and that he would again allow [May] to live in an injurious environment if [May] were returned to him. Prior to removal, [Respondent] did not believe that [Mother] or the abusive environment in his home posed a risk to [May's] physical or emotional well-being. It is clear from his testimony during this hearing that, despite the therapy he received and the juvenile court proceedings he has participated in, [Respondent] continues to believe that is true.

We hold that the above findings of fact support the trial court's conclusion of law that Respondent neglected May at the time of the termination hearing and that he was likely to repeat the neglect. DHHS removed May from Respondent and Mother's home, because Respondent and Mother severely abused May's siblings. But as discussed above, during an individual therapy session, Respondent denied that he had ever hit the children. From April 2013 to October 2013, Respondent repeatedly reported that he had no contact with Mother, when, in fact, he was calling, texting, and sending her photographs of May. Additionally, Respondent stated that he still believes that allowing Mother to watch May during the day is an appropriate option.

Respondent specifically asserts that the trial court's findings of fact that during the termination hearing, Respondent "showed no emotion and a complete lack of empathy" and that he inappropriately smiled do not support its conclusion of neglect. But "[a]ll of the findings of fact regarding respondent's in-court demeanor, attitude, and credibility . . . are left to the trial judge's discretion." *In re Oghenekevebe*, 123 N.C. App. 434, 440-41, 473 S.E.2d 393, 398-99 (1996). The trial court properly considered respondent's in-court demeanor in determining whether Respondent properly appreciated the harmfulness of his and Mother's prior abuse. In fact, in this particular case, the trial court's evaluation of Respondent's credibility and demeanor was crucial to the issues presented, but even upon our review of the cold written

record, the reasons for the trial court's findings on these facts are entirely supported by the evidence.

Given the severity of Mother and Respondent's abuse of May's siblings, Respondent's dishonesty with respect to his role in the abuse and his continued contact with Mother, and Respondent's continued lack of understanding of the danger that Mother poses to May, we hold that the trial court did not err in determining that "there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *See McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127. Accordingly, we hold that the findings of fact support the trial court's conclusion of law that Respondent neglected May at the time of the termination hearing and that there was a likelihood of repetition of neglect.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order terminating Respondent's parental rights.

AFFIRMED.

Judge GEER concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

The first three pages of the majority's opinion recites the past actions of the mother, who is not before this Court. It is clear the sins of the mother are being heaped upon Respondent by DHHS and the trial court. Despite his best efforts and substantial progress, Respondent never was provided his natural human rights of care, custody and control of his child and any reasonable chance to reunify with his child, as required by law. The trial court's findings of fact are not supported by clear, cogent and convincing evidence and these findings do not support the trial court's conclusion to terminate Respondent's parental rights based upon neglect under N.C. Gen. Stat. § 7B-1111(a)(1) (2013). I respectfully dissent from the majority's opinion and vote to reverse the trial court's error when it terminated Respondent's parental rights.

I. Standard of Review

As stated in the majority's opinion, "our standard of review for the termination of parental rights 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 Baker*, 158 N.C. App. 491, 493, 581 S.E.2d 144, 146 (2003) (citations and internal quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.M.M.,* 179 N.C. App. 383, 385, 633 S.E.2d 715, 716 (2006) (citation and internal quotation marks omitted).

As petitioner, DHHS bears the burden of proving by clear, cogent and convincing evidence the adjudicatory facts to justify termination of parental rights. *In re Nolen*, 117 N.C. App. 693, 698, 453 S.E.2d 220, 223 (1995). Petitioner wholly failed to meet its burden under the statute and our case law.

II. Neglect

Respondent argues: (1) the trial court erred in finding he had not gained an appreciation of the seriousness of the mother's abuse of her four older children, and he would unlikely be able to protect May from harm from a person with a "strong personality" like the mother; and, (2) the trial court erred in concluding May was neglected at the time of the termination hearing and there was a likelihood of future neglect if she were returned to the father. I agree.

The majority's opinion sets forth some of the trial court's findings, but not others. Termination of parental rights based upon neglect may not be based solely upon past conditions, which no longer exist. *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997). To terminate parental rights based upon neglect, the court must find evidence of neglect both at the time of the termination hearing and that repetition is likely to occur in the future. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984).

The trial court may consider a prior adjudication of neglect, but cannot terminate parental rights on those past actions. It must also consider evidence of

changed circumstances and the probability of future neglect. *In re J.G.B.*, 177 N.C. App. 375, 381-82, 628 S.E.2d 450, 455 (2006). Here, the uncontested evidence and the record does not support the finding of neglect existed at the time of the hearing or that there is a reasonable probability Respondent will neglect May in the future.

Respondent and May's mother met in May of 2010 and began living together shortly thereafter. The mother's four older children by other men were in foster care at that time. The four children were returned to their mother's home in November of 2010. May was born in February of 2011.

May and her four older half-siblings were adjudicated neglected and dependent on 6 December 2012. May's half-siblings were also adjudicated as abused. These adjudications were based upon the abuse perpetrated by the mother upon May's half-siblings. The mother was alone with the children most of the week, while Respondent worked out of town.

In the adjudication order, the trial court found that Respondent had acknowledged the mother needed help in parenting her other children and that he had intervened at times when the mother disciplined them. The mother testified she had hidden her abuse from Respondent and when he saw her questionable behavior, Respondent told her to seek help.

In the dispositional order, the trial court found that "[d]ue to the severe and continuous abuse which has resulted in multiple interventions by various

Departments of Social Services with this family and the issues still not being resolved by the parents, this Court feels that the permanent plan of adoption should be considered very early in this case." The other multiple interventions by various departments of social services pertained solely to May's half-siblings, and all events occurred before Respondent met the mother and May was born.

At the first review hearing on 7 January 2013, only a month following the adjudication, the court established the permanent plan for the juveniles as adoption with a concurrent plan of reunification. The trial court ordered DHHS to proceed with termination of parental rights within sixty days. DHHS filed the petition to terminate parental rights on 20 March 2013, three months after the adjudication.

Despite the trial court's order directing DHHS to proceed with termination of parental rights just a month following the adjudication, the uncontested evidence shows Respondent continued to comply with and meet the goals of his case plan in order to reunify with his child.

Respondent entered into a case plan with DHHS in December of 2012, very soon after the adjudication. Under the case plan, Respondent agreed to: (1) obtain a parenting and psychological evaluation; (2) obtain a psychiatric evaluation and comply with mental health counseling if recommended; (3) participate in two sessions with the children's therapist for the purpose of determining whether an "apology session" would be in the children's best interest; (4) complete a parenting education

program; (5) permanently discontinue his relationship with the mother; and, (6) maintain employment and independent housing.

Respondent promptly complied with all aspects of his case plan except number 5. He obtained a paternity test and established paternity of May within a few weeks of May's placement in the custody of DHHS. Respondent obtained a psychological evaluation following the adjudication. The clinical psychologist who administered the evaluation opined that Respondent displayed "some personality difficulties, having depressive, avoidant and schizoid characteristics," held a "generally adequate" knowledge of parenting, and "appeared willing to permanently separate from [Mother.]" The evaluator recommended Respondent undergo a psychiatric evaluation to assess his need for medications or therapy. The evaluator believed Respondent's reunification with May was reasonable, if he continued to refrain from contact with the mother. Respondent was found to be of average intelligence, possessed adequate judgement, and reported no substance abuse issues.

Respondent subsequently submitted to a psychiatric evaluation and met the criteria for "Major Depressive Disorder Recurrent Moderate." In the termination of parental rights order, the trial court found medication had been recommended for Respondent's depression, but he was unwilling to take it. According to the social worker's testimony at the hearing, Respondent's therapist did not believe his "unwillingness to take medication was a critical issue." With regard to Respondent's

hesitation about taking medication, the social worker testified, "I have never heard anything from [Respondent] or seen anything that would suggest that he has not been able to function day-to-day," and "[h]is functioning has not been impaired as far as we know."

Respondent began participating in individual therapy in August of 2013 and was successfully discharged by his therapist. The court's findings state Respondent was not forthright with his therapist regarding his use of physical discipline and his ongoing contact with the mother.

Respondent moved out of the mother's home on 2 March 2013, shortly after the adjudication. After moving out of the mother's home, Respondent exchanged text messages with the mother, sent her photographs of May, their daughter, and spoke with her on the telephone. He acknowledged through a translator that his communication with the mother was "a failure on my part." At first, he stated he was "too embarrassed" to admit that he had any contact with the mother.

In a letter dated 7 November 2013, Respondent's therapist wrote that he "demonstrates awareness of his inability to protect the children resulting in the separation of the family. The incidents have been revisited and feelings resolved." The therapist further wrote that "[t]he allegations of inappropriate use of discipline were discussed and resolved. During sessions, the incidents were revisited and [Respondent] was able to demonstrate appropriate use of discipline."

Respondent's therapist also noted that Respondent admitted to contact with the mother through text messages. The therapist noted, "[b]oundaries have been discussed during sessions and how these may affect the case and having access to the child. It is my understanding that [Respondent] does not have or intends to have a relationship with child's mother."

At the conclusion of Respondent's therapy, his therapist felt he had actively engaged with her and complied with the recommendations. He "demonstrated knowledge and ability to use appropriate parenting skills and discipline." This evidence is not contested.

The record shows any disclosures Respondent made or failed to make to his therapist regarding disciplining the children or maintaining contact with the mother were addressed and concluded in therapy. Uncontested evidence also shows the therapist specifically acknowledged having addressed these issues with Respondent prior to releasing him from therapy, and the issues were "resolved."

The trial court's authority over the parents of juveniles adjudicated as abused, neglected or dependent is set forth in N.C. Gen. Stat. § 7B-904 (2013). Under the statute, the court may order the parent to take the necessary steps to remedy the conditions which led to the removal of the child, including mental health treatment and parental responsibility classes. N.C. Gen. Stat. § 7B-904(c) and (d1).

In cases where there is no evidence of domestic violence or any history of severe discord between the parents, which led to the removal of the child, the statute does not authorize either the court or DHHS to order the parents to cease any and "gag" all contact between each other. Respondent entered into his case plan immediately after the adjudication prior to the permanent plan for the juveniles being established as adoption with a concurrent plan of reunification. While discontinuing Respondent's cohabitation and romantic relationship with the mother may have been "appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication," forbidding any and all types of communication between the parents was not. N.C. Gen. Stat. § 7B-904(d1)(3). Parents have a right to communicate concerning their mutual defense and the ongoing status and well-being of their children. In the absence of any history of violence between the parents, to impose such a "gag order" would deny the parents both their First Amendment and Due Process rights. *In re Cogdill*, 137 N.C. App. 504, 508, 528 S.E.2d 600, 603 (2000) ("trial court may not order a parent to undergo any course of conduct not provided for in [N.C. Gen. Stat. § 7B-904]").

The trial court found Respondent stated that if May were returned to his care, he planned to leave her with the mother while he worked, if the mother had her "anger under control." The court further found "[Respondent] never demonstrated that he learned anything from therapy in terms of how he would keep [her] safe in

the future. To the contrary, [Respondent] has continued to believe that allowing [Mother] to watch [May] while he works is a viable option."

These findings find no support in the evidence. The social worker testified:

> Q: And did he indicate on that June date anything about the mother possibly watching the child if she could prove that she could control her anger?
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> A: That conversation occurred on April 4th, 2014 is referenced to being to consider [sic] leaving [May] with [Mother] during the day while he was working because she would never hurt her and to resuming a relationship with [Mother] if she could prove that she changed he said, meaning that her anger [sic].

Respondent testified through a translator:

> Q: Now is it correct that as recently as May of 2014 you shared I think with the social worker if Miss Lebaron could get her anger under control you would let her visit with your daughter?
>
> A: Well, she, the social worker, asked me a question, the therapist, and I said, well, maybe, if everybody could assure me that she was, she had changed her mind about how treating, about how to treat children maybe I would consider it.

No evidence shows Respondent intends to allow May to visit with the mother. Rather, Respondent stated he would only consider this possibility as an alternative in the unlikely event the therapist and DHHS believed it would be safe to leave May in the mother's care. Furthermore, when asked what Respondent would do with May while he worked, he testified, "like any other parents I would find daycare for her."

At the time of the termination of parental rights hearing, which was held in August, September and October of 2014, no evidence was presented of any communication between Respondent and the mother since the text messages were sent a year earlier in October of 2013.

When asked his plans, if he were reunited with his daughter, May, Respondent discussed moving to Pennsylvania to be nearer to his family or seeking the assistance of the mother of his grown children. Respondent also testified he would report the mother to the police or DHHS if confronted with the same conditions that led to the adjudication.

Respondent is Hispanic and an illegal alien. He attempted and was willing to participate in parenting classes, but the social worker was not able to find any bilingual classes for him to attend. The social worker testified that Respondent was allowed to address the parenting issues in individual counseling, which "often turns out to be more effective than classes." Respondent properly completed all of his therapy sessions and scheduled visits with his daughter.

Respondent has no drivers' license and depends on coworkers and others for transportation to work and his sessions and visitations. While maintaining independent employment and residence, Respondent attended all of his sessions and visit weekly with May, without his own vehicle or transportation. These actions

clearly demonstrated the degree of care, concern, and love Respondent has for his daughter.

At the termination hearing, Respondent was questioned about the parenting skills he had learned during his therapy sessions. Through his interpreter, Respondent testified, "we talked a lot about being patient and how to educate children and the way you should deal with children when like they're having a tantrum for example." When asked what Respondent discussed with his therapist regarding discipline of a child, he responded, "[m]ore than anything she taught me that I need to talk to my children and be patient and teach them the things they shouldn't do." With regard to this response, the court found, "[w]hile patience is an important parenting skill, the most crucial parenting skill for the children in this case is to be protected from harm and to be made to feel safe."

Given the mother's anger and frustration with her other children prior to the adjudication, patience was an appropriate focus for Respondent's therapy and improving his parental skills. While the court's finding summarized Respondent's answers to this line of questioning, no evidence supports the conclusion that he was simply "going through the motions" with regard to his therapy, visitation with his daughter, or attendance at and compliance with all the valid requirements of his case plan.

When Respondent regularly visited with May, he brought food, diapers, clothing, and toys to her. The uncontroverted evidence also shows Respondent engaged in "appropriate, positive, affectionate" interactions with May. The court denied his requests for increased visitation without explanation. At the time of the termination of parental rights hearing, the court found May continued to "share a strong bond" with Respondent, a statutory factor the trial court ignored.

Under *de novo* review, the trial court's conclusions that Respondent "never demonstrated that he learned anything from therapy in terms of how he would keep [May] safe," "his concern for [Mother] is greater than his desire to reunify with [May]," he "had not gained an adequate understanding of . . . the seriousness of what transpired in [the] home, and the role he played in creating and fostering an injurious and abusive environment for his daughter," and, generally, that "he is unable or [un]willing to protect [May] from abuse and harm" is wholly subjective, and not supported by clear, cogent and convincing and objective evidence.

An objective case plan was established with objective criteria. Respondent completed all objective and lawful requirements of the plan. Respondent did have limited contact with the mother by telephone conversation, sending a photograph of the child, and exchanging text messages in contravention of an unlawful condition in the case plan. The last contact occurred almost a year prior to the termination of

parental rights hearing. All of the objective evidence supports continued efforts by DHHS to reunify Respondent with his daughter.

The mother's abuse of her children and her significant history with child protective services led DHHS to remove May from the home. Respondent urged the mother to get help, tried to intervene, and moved out of the home shortly after the adjudication. No evidence shows he had resumed a romantic or close relationship with the mother. No evidence showed he had any communication with the mother after October of 2013, almost a year prior to the termination of parental right hearing. Due to the history of the mother with child protective services, the trial court ordered DHHS to file for termination of parental rights only a month after the adjudication, leaving Respondent little real hope of reunifying with May. No evidence or adjudication shows May was ever abused.

Nevertheless, Respondent underwent multiple evaluations, completed therapy, established a separate residence, maintained employment, and visited, supported and maintained a strong appropriate bond with May without his own transportation. This objective evidence shows Respondent's compliance with his case plan, efforts to achieve reunification with his daughter, and to remedy of the conditions that led to May's adjudication. DHHS failed to present any clear, cogent and convincing evidence to show neglect at the time of the hearing or the probability Respondent will neglect May in the future. All of the findings of fact supporting the

trial court's conclusion that Respondent is likely to neglect May in the future are speculative and subjective.

"[T]he law requires compelling evidence to terminate parental rights. The permanent removal of a child from its natural parent requires the highest level of scrutiny and should only occur where there is compelling evidence of potential risk of harm to the child or their well-being." *In re Nesbitt*, 147 N.C. App. 349, 361, 555 S.E.2d 659, 667 (2001). The trial court's determination that Respondent had "gone through the motions" of his case plan, but does not have the ability to keep May from harm, is also wholly subjective, speculative, unsupported by and is contrary to the record evidence. This unsupported notion does not support a conclusion to terminate parental rights under our statutes and case precedents.

The trial court's findings of fact are not supported by clear, cogent and convincing evidence, and no evidence supports the conclusion that there was neglect present at the time of the termination of parental rights hearing, or there is a likelihood of future neglect if May was reunited with her father. *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232.

III. Conclusion

For these reasons, I vote to reverse the trial court's order terminating Respondent's parental rights based upon either neglect or dependency and remand

for entry of an order to require DHHS to make continued efforts to reunify May with Respondent. I respectfully dissent.