

NORTH CAROLINA COURT OF APPEALS

In the Matter of:)
)
T.G. and R.J.,)
Minor Children)
)
)
)

From MECKLENBURG County
No. 02 J 1172-1173

BRIEF OF PETITIONER-APPELLEE
THE GUARDIAN AD LITEM

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BRIEF OF PETITIONER-APPELLEE
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STATEMENT OF FACTS

The Mecklenburg Department of Social Services ("DSS") first became involved with Appellant in 1995, when she was treated for psychotic episodes. (R Ex. pp. 1, 10;¹ T p. 57) (App. pp. 1, 9, 69) DSS next became involved with Appellant following a 27 April 2001 referral that alleged that Appellant had whipped her son, R.J., with a belt and a drop cord, resulting in welts and bruises. R.J. also had scars from prior whippings. Appellant whipped him because she could not find him the prior night. (R Ex. pp. 67, 72; T pp. 35-36) (App. 43, 45, 59-60)

¹The underlying juvenile file has been included as an exhibit to the record on appeal. (R p. 36) This file contains several court orders, including the initial 7-day order, the adjudication order, the disposition order, and permanency planning review orders. (R Ex. pp. 4-9, 10-11, 33-36, 53-56, 62-65, 71-76) (App. pp. 3-8, 9-10, 28-31, 34-37, 39-42, 44-49) At times, these court orders incorporate by reference facts set forth in other pleadings in the juvenile file. In this brief, reference is made to both the factual statement and the court order incorporating it, where appropriate.

DSS next became involved with Appellant approximately one year later, on 16 April 2002, because she left her children, T.G. and R.J., at a shelter for an extended period of time while her whereabouts were unknown. (R Ex. pp. 2, 10) (App. pp. 2, 9) The children were picked up from the shelter by a maternal relative. Appellant later attended a meeting at DSS with T.G., who was then two years old. Appellant informed DSS that she would prefer to have her children placed for adoption, rather than being placed from pillar to post. Appellant then left T.G. at DSS without providing any information regarding her whereabouts. DSS was unable to locate Appellant. (T p. 58, R Ex. pp. 2, 10) (App. pp. 70, 2, 9)

During this time, Appellant's housing situation was unstable. Appellant and her children lived at a shelter, with her mother in various apartments, and in a hotel. (T pp. 38, 58) (App. pp. 62, 70) At the time her children were originally removed from her custody in April 2002, Appellant was employed at Wendy's. (T p. 37) (App. p. 61)

On 6 May 2002, Appellant met with DSS and signed a case plan that included the following objectives:

1. Achieve and maintain sobriety;
2. Learn and demonstrate safe and appropriate parenting skills;
3. Secure and maintain stable employment;

4. Secure and maintain safe and stable housing;
5. Complete a parenting capacity evaluation and obtain individual counseling; and
6. Attend family counseling.

(R Ex. pp. 18-32, 33; T p. 3) (App. pp. 13-27, 28, 52)

Following the removal of her children, Appellant began using powder and crack cocaine. (T pp. 39-40) (App. pp. 63-64) She testified that she did not have a drug problem prior to the removal of her children. (T p. 39) (App. p. 63) From April to October 2002, Appellant was homeless and lived on the streets. (T p. 40) (App. p. 64) As a result, DSS' records during this time indicate that they did not know her whereabouts and that she had failed to make any progress with her case plan. (R Ex. p. 31; T pp. 3-4) (App. pp. 26, 52-53) Appellant's visitation rights ceased because she missed three consecutive visits with her children. (R Ex. p. 31; T p. 4) (App. pp. 26, 53)

On 22 July 2002, the trial court adjudicated both T.G. and R.J. to be neglected and dependent as to their mother. (R Ex. p. 11) (App. p. 10) On 6 August 2002, the trial court held a disposition hearing, and entered an order in which it adopted DSS' recommendation that DSS should proceed with termination of Appellant's parental rights. (R Ex. pp. 15, 36) (App. pp. 12, 31) The court further ordered that the maternal relatives had 90 days to make progress towards obtaining custody of the

children "or the court will move to TPR/adoption." (R Ex. p. 36) (App. p. 31)

The case plan was reviewed by DSS at a meeting on 10 September 2002. Appellant's family was invited to attend, but did not respond to invitations and did not attend. (R Ex. pp. 41, 53) (App. pp. 32, 34)

In October 2002, Appellant entered a detox facility. (T p. 40) (App. p. 64) In November 2002, Appellant began staying at the Halfway House in Second Adam's Ministry and Group Home. Appellant was asked to leave Second Adam's Ministry after less than a month because she had sex with another resident there. After staying with her mother for a short time, Second Adam's Ministry gave her another chance to return. (T pp. 41-42) (App. pp. 65-66)

On 6 November 2002, the trial court held a permanency planning hearing. (R Ex. p. 53) (App. p. 34) In its findings of fact following this hearing, the court incorporated DSS' statement that Appellant "has not visited with her children for nearly seven months since their placement in foster case on April 22, 2002." (R Ex. pp. 42, 53) (App. pp. 33-34) The court adopted DSS' recommendation that the goal of the case be termination of parental rights as to Appellant and both fathers. (R Ex. pp. 42, 56) (App. pp. 33, 37) The court also ordered

that DSS was "relieved of further efforts toward reunification with the mother and other family members." (R Ex. p. 56) (App. p. 37)

Consistent with the trial court's order, on 20 November 2002, DSS filed petitions to terminate the parental rights of Appellant to T.G. and R.J. (R pp. 12-18) As the summons to Appellant reflects, her address was "unknown" to DSS at the time of the petition and for several months thereafter. (R pp. 3-11)

In January 2003, Appellant moved to the Cascade substance abuse treatment program. (T p. 42) (App. p. 66) In February 2003, Appellant was in jail for a month for communicating threats. (T pp. 42, 59) (App. pp. 66, 71) In March 2003, Appellant returned to Cascade. (T p. 43) (App. p. 67)

On 7 July 2003, the trial court held a second permanency planning hearing. (R Ex. p. 53) (App. p. 34) In its order, the court incorporated DSS' summary, which indicates that Appellant requested a visit with her children, which was held on 30 June 2003. Fourteen months had passed between DSS removing the children from Appellant's custody and her first visit with them (April 2002 to June 2003). (R Ex. pp. 58, 62) (App. pp. 38-39) The Court noted in its order that "[t]he plan is not reunification. TPR petitions have been filed and service is pending." (R Ex. p. 63) (App. p. 40)

On 2 December 2003, the hearing to terminate Appellant's parental rights began, but was not concluded. (T pp. 2, 32) (App. pp. 51, 58)

On 21 January 2004, the trial court held a third permanency planning hearing. (R Ex. p. 71) (App. p. 44) At this hearing, the court received reports from Cascade and drug court. The court ordered that the goal for both children remain adoption. (R Ex. p. 75) (App. p. 48)

On 10 February 2004, the hearing to terminate Appellant's parental rights resumed. (T p. 32) (App. p. 58) Following this hearing, the court entered an order terminating Appellant's parental rights to T.G. and R.J. (R pp. 26-30) On 29 March 2004, Appellant took an appeal to this Court. (R p. 31)

ARGUMENT

Nearly two years have passed between the removal of T.G. and R.J. from Appellant's custody and the court's order to terminate parental rights (April 2002 to February 2004). During that time, Appellant did not complete any of the terms of her case plan. (T pp. 3-4) (App. pp. 52-53) Instead, she created new problems - an addiction to crack cocaine - that she is still working to overcome. While Appellant's progress in overcoming this addiction is laudable, and while the Guardian ad Litem certainly does not wish to denigrate her progress in this area,

the proper focus of this appeal is on the children involved. As explained by this Court, "the child and her best interests are at issue here, not respondent's hopes for the future." In re Blackburn, 142 N.C. App. 607, 614, 543 S.E.2d 906, 911 (2001).

Sadly, there are times when a parent's inability to appropriately care for a child is caused by circumstances that simply cannot be corrected within a reasonable amount of time to allow for a healthy childhood. Childhood only lasts so long. If a child is to be taken out of a situation where he or she has been neglected or abused and given an opportunity to enjoy a safe, nurturing, and healthy childhood, then the system cannot spin its wheels endlessly, hoping that the parent will eventually turn her circumstances around. It simply is not fair to the child to continually keep him or her in the limbo of foster care while the legal system waits to see if the parent will be able to demonstrate the capacity to parent appropriately.

After DSS has made reasonable efforts over a reasonable period of time to help the parent address the circumstances that are impairing her ability to parent appropriately, then, for the best interests of the child, the court must conclude that reunification efforts should cease.

In this case, DSS and the trial court worked diligently to allow Appellant the opportunity to be reunited with her children. DSS put together a comprehensive case plan with detailed lists of the steps to be completed by Appellant and how DSS would assist her, including making numerous referrals and providing transportation and oversight. (R Ex. pp. 18-32) (App. pp. 13-27) Appellant made DSS' efforts to assist her futile by simply disappearing and leaving DSS no way to contact her. (R Ex. p. 31; R pp. 3-11) (App. p. 26) DSS also tried to work with Appellant's family to place T.G. and R.J. with a relative, but this proved unsuccessful as well. The trial court revisited this matter on several occasions, during the adjudication hearing, the disposition hearing, and three permanency planning hearings.

Finally, in the best interests of T.G. and R.J., the court concluded that enough time had passed with no progress toward reunification. The court ordered that the parental rights of Appellant to T.G. and R.J. be terminated so that DSS can pursue adoption of the children. This order was proper and should be upheld by this Court.²

²The trial court also ordered that the parental rights of the two children's fathers, Reginald Jones and John Biggers, be terminated. (R p. 29) Neither father appealed this order. As a result, the court's order terminating their parental rights is not at issue in this appeal.

I. Appellant Did Not Object Regarding Service of Process; Therefore, She Has Waived Her Alleged Defense of Lack of Personal Jurisdiction.

At the start of the hearing to terminate Appellant's parental rights, counsel for DSS informed the court that "[a]ll parents have been served." (T p. 2) (App. p. 51) Appellant was present at this hearing and was represented by counsel. (T pp. 1, 35) (App. p. 50, 59) At no point during the hearing, did Appellant make any objection regarding lack of service of process. Despite this failure to object at the hearing, Appellant now tries to claim on appeal that the trial court lacked personal jurisdiction over her.

By failing to raise the issue of personal jurisdiction, Appellant waived this defense.

Under Rule 12(h)(1) of the North Carolina Rules of Civil Procedure, the "defense of lack of jurisdiction over the person . . . is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." N.C. Gen.Stat. § 1A-1, Rule 12(h)(1) (2003).

In re J.W.J., 599 S.E.2d 101, 102 (N.C. App. 2004).

In J.W.J., the Court of Appeals held that a respondent-mother, who lived in California, had waived the defense of lack of personal jurisdiction in a proceeding to terminate parental rights where she had failed to timely raise this defense in the

trial court. Id. Appellant did not raise this defense until the appeal to this Court; therefore, she has likewise waived this defense.

Knowing that she failed to raise this issue below, Appellant tries to preserve her personal jurisdiction defense by arguing that a party cannot waive service of process, citing Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984). Maready does not support Appellant's argument. In Maready, the very first pleading filed by the defendants was a motion to dismiss for lack of personal jurisdiction. Id. at 539, 319 S.E.2d at 914-15. In contrast, Appellant did not raise this issue until the appeal to this Court.

Moreover, the fact that Appellant voluntarily submitted to the jurisdiction of the trial court in this matter completely undermines her defense of no personal jurisdiction. "Jurisdiction of the court over the person of a defendant is obtained by service of process, *voluntary appearance*, or consent." Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (emphasis added). Even if Appellant was not properly served, she voluntarily submitted to the jurisdiction of the trial court during a two-day hearing. The court clearly had personal jurisdiction over her.

Appellant also complains about the service of process on the children, T.G. and R.J., and the appointment of a guardian ad litem for the children. Again, no objection was made by any party at any time during the proceedings below. Indeed, Appellant did not even assign error on appeal regarding any alleged failure to appoint a guardian ad litem for the children. (R pp. 39-42)

As acknowledged by Appellant, the children were represented at the hearing below by an attorney advocate for the Guardian ad Litem. (R p. 26) Indeed, throughout the entire process below the children's interests have been represented by the Guardian ad Litem and its attorney advocates. (R Ex. pp. 4, 10, 33, 53, 62, and 71) (App. pp. 3, 9, 28, 34, 39, and 44)

If anyone was going to object on behalf of the children regarding service of process, it would have been the attorney advocate representing the Guardian ad Litem and the children's best interests. See N.C. Gen. Stat. § 7B-601(a) ("The guardian ad litem and attorney advocate have standing to represent the juvenile in all actions under this Subchapter where they have been appointed.") Thus, Appellant did not even have standing to raise such an objection on behalf of the children.

In any event, no such objection was raised by the attorney advocate, Appellant, or any other party. As a result, in

addition to Appellant's lack of standing, Appellant has failed to preserve this issue for appellate review because she did not timely object in the trial court. N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely. . .objection").

II. The Trial Court's Findings of Fact Were Supported by the Evidence.

Appellant has identified seven separate findings of fact that she alleges are unsupported by the evidence. As explained below, Appellant has focused on the wording of the trial court's findings of fact, making arguments about semantics, rather than substance. Moreover, Appellant never shows how any of the alleged unsupported findings are material to the court's order. She never shows how the court's conclusions of law would have changed in her favor if any of the alleged unsupported findings were to be removed from court's order.

In numerous appeals of orders terminating parental rights, this Court has held that a parent must show how an alleged error prejudiced the parent. See, e.g., In re Morales, 159 N.C. App. 429, 433, 583 S.E.2d 692, 695 (2003) (Court held that parent failed to show that "the incompetent evidence caused some prejudice"); In re Nolen, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222 (1995) (Court explained that "respondent must also show that the error was prejudicial"); In re Parker, 90 N.C. App.

423, 432, 368 S.E.2d 879, 885 (1988) (Court held that "the mother has failed in her burden to show that the alleged error was prejudicial"); In re Peirce, 53 N.C. App. 373, 388, 281 S.E.2d 198, 207 (1981) (Court held that "respondents failed to show that they were prejudiced. . .by the erroneous admission of the photographs").

In a termination-of-parental-rights case where the appellant-parent argued that several of the trial court's findings of fact were erroneous, this Court again required a showing of how these alleged errors prejudiced the appellant. With regard to an allegation that a portion of a finding of fact was not supported by the evidence, the Court explained:

The evidence supports all aspects of this finding except whether appellant was actually arrested in connection with the shooting. This discrepancy does not rise to the level of prejudicial error.

In re Clark, 72 N.C. App. 118, 126, 323 S.E.2d 754, 759 (1984).

Also, with regard to an alleged error in dates set forth in one of the findings of fact, the Court explained:

[A]ny ambiguity or even error in the dates is not prejudicial to respondent, as all the pertinent substantive matters in this finding of fact are correct and supported by competent evidence.

Id.

Likewise, as explained below, all of the pertinent substantive matters in the trial court's findings of fact are correct and supported by competent evidence. Any errors in the trial court's findings of fact are harmless. Therefore, this argument by Appellant must be rejected.

A. Finding of Fact Number 7.

Appellant claims that the following finding of fact was not supported by the evidence: "Ms. Miller testified that during her involvement with the case, [Appellant] did not complete any of the terms or conditions of her case plan." (R p. 27) On the contrary, this finding of fact was well supported.

Ms. Miller, a DSS social worker, testified that the terms of Appellant's case plan included substance abuse assessment and treatment, housing, employment, individual and family counseling, and a parenting capacity evaluation. (T p. 3) (App. p. 52) This testimony is fully consistent with the underlying juvenile file that was provided to the trial court. (R Ex. pp. 14, 18-32, 33) (App. pp. 11, 13-27, 28) At the hearing, Ms. Miller was asked about each of the terms of the case plan. For each term of the case plan, she testified that, during her involvement in the case, Appellant did not offer any proof that she had satisfied the particular term. (T pp. 3-4) (App. pp. 52-53)

Ms. Miller was involved in Appellant's case from August to December 2002. (T p. 2) (App. p. 51) Appellant testified that she was homeless from April to October 2002. (T p. 40) (App. p. 64) As a result, DSS had no way to contact her during this time. Further, the summons issued by DSS on 25 November 2002 indicates that Appellant's address was "unknown" to DSS at that time. (R pp. 3-11) Thus, other evidence in this case fully supports Ms. Miller's testimony that during her involvement in the case Appellant did not provide proof of her completion of the terms of the case plan.

As acknowledged by Appellant, in a bench trial the judge's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence may sustain contrary findings. Kirkhart v. Saieed, 98 N.C. App. 49, 389 S.E.2d 837 (1990). Clearly, there was ample evidence to support this finding of fact by the trial court.

B. Finding of Fact Number 9.

Appellant claims the trial court erred by finding that "At the time Ms. Miller received the case, [Appellant's] visits with the children had been suspended because [Appellant] had missed three consecutive visits with the children without providing an appropriate reason." (R p. 27) Appellant admits that Ms. Miller testified that Appellant's visits were suspended because

she "missed three visits in succession." (T p. 4) (App. p. 53) Appellant complains that there was no testimony regarding whether or not Appellant *provided a reason* for missing visits.

As an initial matter, Appellant's failure to provide an appropriate reason is arguably implicit in Ms. Miller's testimony. If Appellant had provided an appropriate reason, then it is reasonable to assume that the visits would not have been suspended.

Even if this were error, however, Appellant has wholly failed to show how this alleged error prejudiced her in any way. If this is error, it is clearly harmless error.

C. Finding of Fact Number 12.

Appellant next asserts that there was no evidence to support the court's finding that "Following that hearing Ms. Miller sent a letter to the respondent mother explaining to her what had happened and had no further contact with her." (R p. 27) Specifically, Appellant points to testimony from Ms. Miller that after she sent Appellant the letter "she might have called me and we may have had a brief conversation, but no contact after that." (T p. 8) (App. p. 54)

It is completely immaterial to the court's decision to terminate Appellant's parental rights whether or not there was a brief telephone call between Appellant and Ms. Miller before

Appellant stopped contacting Ms. Miller. Appellant has not even attempted to argue otherwise. To the extent there was any error in the court's omission of this minor point from its finding of fact, this error was, without question, harmless.

D. Finding of Fact Number 14.

Appellant next claims that the following finding of fact is not supported by the evidence: "Since that time respondent mother has generally contacted the social [worker] once a month." (R p. 27) In support of her argument, Appellant points to the testimony of Ms. Novak that most months Appellant called her more than once a month and that some months, "it was only once a month." (T p. 21) (App. p. 57)

Perhaps this finding of fact could have been more precisely worded to reflect the *exact* testimony provided by Ms. Novak. However, a quibble over precise wording is a far cry from there being no evidence to support the finding. Clearly, the testimony supports this finding.

Moreover, Appellant has again failed to show how this alleged trivial error prejudiced her in any way. That is because this particular finding simply is not material. It could be omitted entirely without any effect on the court's order.

E. Finding of Fact Number 20.

Appellant next asserts error regarding the court's finding that "None of the children's parents have provided anything for the children despite having the ability to pay some portion of the cost of care of the children." (R pp. 27-28) In particular, Appellant claims there was no evidence that Appellant had any ability to pay some portion of the cost of care of her children.

On the contrary, at the hearing Appellant testified that in December 2003 and January 2004, she was employed as a cashier at Wendy's. (T pp. 61-62) (App. pp. 73-74) When asked about her employment prior to Wendy's, she testified that she had also worked at McDonald's, Yellow Cab, Prestige Cab Company, Power Gas Station, and at "Crisis." (T p. 62) (App. p. 74) In addition, Appellant testified that she is "saving up money now" and that she has "a savings account." (T p. 59) (App. p. 71) She further testified that she has not paid rent since she moved to Cascade in October 2002. (T p. 57) (App. p. 69) Thus, there was clearly evidence to support the court's finding that Appellant had the ability to pay some portion of the cost of care of the children.

F. Finding of Fact Number 21.

Appellant next complains that there was not evidence to support the court's finding that while in the residential drug treatment program, Cascade, Appellant "has participated in parenting classes but has not completed those classes as of the date the termination proceeding began." (R p. 28)

First, Appellant feigns confusion regarding the time period referenced by the court. It is difficult to believe that this confusion could be sincere since it is obvious from the finding itself that the court is referring to the time during which Appellant was in the Cascade program.

There is ample evidence to support the court's finding that although Appellant has attended some parenting classes while at Cascade, she had not finished those classes when the hearing to terminate parental rights began in December 2003. During testimony on 10 February 2004, Appellant testified "I take parenting classes at Cascade." (T p. 57) (App. p. 69) Notably, she did not say that she had *finished* taking these classes. In addition, Appellant's case coordinator from Cascade, Ms. Perry, was asked whether Appellant was "still involved in parenting classes." Ms. Perry testified that Appellant was *still involved* in these classes. (T p. 68) (App. p. 77) Thus, there was ample

evidence to support the court's finding that Appellant had not yet completed the parenting classes at Cascade.

Further, Appellant has not attempted to show how this alleged error, if any, was prejudicial to her. Without such a showing, this claim of error must be rejected.

G. Finding of Fact Number 27.

Finally, Appellant tries to assert error regarding another of the court's findings of fact by quoting the finding out of context. The full finding of fact that Appellant claims is erroneous is as follows:

[Appellant] testified that she hoped to obtain appropriate, long-term housing through various agencies that work with the CASCADE Program; however, she is not in a position to do that at this time and does not know when she will be.

(R p. 28)

This finding is fully supported by the testimony presented at the hearing. Appellant testified that after she leaves the Cascade program, she plans to obtain housing either through the Charlotte Housing Authority or, with the help of her case manager at Cascade, through a program called Shelter Plus. (T pp. 59-60, 62-63) (App. pp. 71-72, 74-75)

With regard to the Housing Authority, she testified that she has not yet applied because she owes a \$700 bill, and until she pays that bill, she cannot apply. (T p. 64) (App. p. 76)

She further testified that "[i]t takes six months or up to a year to get housing" at the Housing Authority. (T p. 63) (App. p. 75)

Appellant could not explain the Shelter Plus program or how she would get into it. She testified, "Ms. Perry can explain about Shelter Plus more. . . .I don't really know that much about Shelter Plus." (T p. 63) (App. p. 75) When asked what she would need to do to register and qualify for Shelter Plus, she testified, "I really don't know." (T p. 64) (App. p. 76)

Clearly, the testimony at the hearing provided ample support for the court's finding of fact.

It should further be noted that Appellant is incorrect in her assertion that "Appellant testified without contradiction that she would leave Cascade in December of 2005." Appellant's Brief, p. 21. During the cross examination of Appellant's case manager from the Cascade program, Ms. Perry, it was established that Appellant could stay at Cascade until only December 2004, not December 2005. The cross examination proceeded as follows:

Q. All right, Ms. Perry, I'm going to show you Exhibit No. 2, and I'm going to direct your attention to the second paragraph under the Progress Summary. Would you please read the first two sentences of that?

A. "[Appellant] has moved to therapeutic housing at Cascade December 2003."

Q. Keep going.

A. "Which means [Appellant] and her children can live there for a year. After a year, [Appellant] and case manager will work on housing options and referrals."

Q. Okay. Now, you just testified that she could be there until December 2005.

. . .

A. So it's not 2005. It was 2004.

Q. 2004. It's the end of this year?

A. Yes.

(T pp. 77-78) (App. pp. 78-79)

As a result, at the time of the termination hearing, Appellant had less than one year remaining at Cascade and her housing prospects following Cascade were yet to be determined.

H. The Underlying Juvenile Files Are Not Needed to Substitute for Proper Findings of Fact.

Appellant argues that the underlying juvenile file cannot be used to substitute for proper findings of fact. There is no need to resort to the underlying juvenile file for any findings of fact because the findings in the court's order are entirely sufficient to support the court's conclusions of law. To the extent the underlying juvenile file matters at all in this case, it simply provides *additional* evidentiary support for some of the court's findings of fact. It does not replace any of the court's findings of fact because there is no need to do so.

III. The Court Properly Concluded that Appellant's Parental Rights Should Be Terminated Based on Her Neglect of Her Children.

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), the court may terminate parental rights upon a finding that the parent has neglected the child. Appellant appears to suggest that in order to prove "neglect" for purposes of terminating parental rights, there needs to be a showing of some *current* neglect. This is not so, for obvious reasons.

"Following a loss of custody, parents likely will not have extensive contact with the child; therefore, new evidence of neglect will, of course, be limited." In re Johnson, 70 N.C. App. 383, 389, 320 S.E.2d 301, 306 (1984). As a result, "[i]t is not essential that there be evidence of culpable neglect following the initial adjudication." In re Caldwell, 75 N.C. App. 299, 302, 330 S.E.2d 513, 516 (1985). Instead:

If there is no evidence of neglect at the time of the termination proceedings, . . . parental rights may nevertheless 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 the parent.

In re Pope, 144 N.C. App. 32, 37, 547 S.E.2d 153, 156 (2001) (emphasis added).

The court concluded that there was sufficient evidence of the probability of the repetition of neglect by Appellant to

justify termination of parental rights. At the close of the hearing, the judge specifically noted that "the conditions that took the children into custody have not been sufficiently alleviated to make the Court think that it would not occur again." (T p. 91) (App. p. 81)

When determining the probability of a repetition of neglect, the court must consider (1) whether conditions have changed since the removal of the children from custody, (2) the parent's current fitness to care for the children, and (3) the best interests of the children. As explained by the North Carolina Supreme Court in the seminal case of In re Ballard:

The trial court must . . . consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. The determinative facts must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

In re Ballard, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)(citations omitted)(emphasis in original).

In this case, Appellant did not rectify the conditions that led to the removal of T.G. and R.J. from her custody. In addition, the evidence showed that she is not currently in a position to properly care for these children. It is, therefore, in the children's best interests to terminate parental rights and move forward with adoption.

Not only did Appellant not rectify the conditions that resulted in her loss of custody, she actually made the conditions worse. After T.G. and R.J. were taken into custody by DSS, Appellant began using powder and crack cocaine. She did not have a drug problem prior to removal of the children. This addiction led to her being homeless for seven months. (T pp. 39-40) (App. pp. 63-64) Appellant was in and out of substance abuse treatment and jail. (T pp. 40-43) (App. pp. 64-67) For fourteen months, Appellant did not visit her children. (R Ex. pp. 58, 62) (App. pp. 70, 74) This was not the fault of DSS since during much of this time Appellant simply disappeared and provided DSS no way to contact her. (R Ex. pp. 31, 53; T p. 40) (App. pp. 26, 34; 64) Only recently has Appellant made progress in overcoming her drug addiction, which arose *after* her children were removed from her custody.

Appellant was employed at the time the children were removed from her custody. (T p. 37) (App. p. 61) Though she had been intermittently employed while the children were in custody, Appellant was not employed at the time of the hearing to terminate her parental rights. (T pp. 61-62) (App. pp. 73-74) This further shows that Appellant changed her circumstances for the worse, which indicates a probability of a repetition of neglect.

In addition, Appellant did not complete the terms of her case plan that she agreed to with DSS. She has not secured stable employment to financially provide for her and her children (T pp. 61-62) (App. pp. 73-74), she has not secured stable housing (T pp. 59-60, 62-63) (App. pp. 71-72, 74-75), she has not completed a parenting capacity evaluation (T pp. 56-57) (App. pp. 68-69), and she has not completed parenting classes (T pp. 57, 68) (App. pp. 69, 77). Although she has recently made progress with her substance abuse treatment, her overall situation remains quite tenuous. (T pp. 90-93) (App. p. 80-83)

In In re Smith, the Court considered an order terminating a mother's parental rights where the mother had made strides beyond what Appellant has done in this case. In Smith, the mother had obtained a residence, secured a job, and had begun showing independence. In re Smith, 114 N.C. App. 727, 732, 443 S.E.2d 101, 104 (1994). Despite this, the trial court concluded that "[t]he 'probability of a repetition of neglect,' . . . is great in the opinion of the Court if the mother. . . had the stress of dealing with her two children thrust back on her." Id. Likewise, if Appellant were to be awarded custody of her two other children at this time, the probability for the repetition of neglect would be substantial.

While Appellant may have made improvements regarding the problems created *after* her children were removed from custody, she certainly has not rectified the conditions that led to removal of custody in the first place. As noted by this Court in another case involving the termination of parental rights:

[N]othing in the order suggests any real improvement in the respondent's condition. . . . The evidence clearly showed that the problems which caused the injurious environment had continued and probably would recur.

In re Caldwell, 75 N.C. App. 299, 302, 330 S.E.2d 513, 516 (1985).

In its Findings of Fact numbers 6, 7, 21, 24, 25, and 27, the trial court properly found that Appellant had not completed the terms of her case plan; was not currently employed; and although she currently had housing through Cascade, she had not yet obtained appropriate, long-term housing.³ (R pp. 26-28) These findings support the trial court's conclusion that Appellant had neglected T.G. and R.J. based on the probability of a repetition of neglect. As a result, the court's decision to terminate Appellant's parental rights was proper and should be upheld by this Court.

³Appellant tries to argue that some of the trial court's findings of fact are not proper because they are phrased in terms of what a particular witness "testified." This is another argument by Appellant about mere semantics that attempts to place form over substance. It is clear from the order that these are facts that the court found to have been supported by "clear, cogent, and convincing evidence." (R p. 26)

IV. The Court Properly Concluded that Appellant's Parental Rights Should Be Terminated Based on Her Failure to Pay a Reasonable Portion of the Cost of Care of Her Children.

In addition to neglect, the court found a second statutory basis for the termination of Appellant's parental rights: willful failure to pay a reasonable portion of the cost of care for her children while in DSS custody, although physically and financially able to do so, pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). (R p. 29)

It should be noted that this is an independent, alternative grounds for terminating parental rights. The statute permits the court to terminate parental rights "upon a finding of one or more" of the enumerated grounds for termination. N.C. Gen. Stat. § 7B-1111(a) (emphasis added). As described by this Court:

Since we hold the trial court's findings of fact support its conclusion of law that the mother's parental rights could be terminated under [one statutory subdivision], it is unnecessary to determine if termination was proper pursuant to the other subdivisions.

In re Parker, 90 N.C. App. 423, 424, 368 S.E.2d 879, 880 (1988).

Likewise, because the trial court properly terminated Appellant's parental rights based on "neglect" under N.C. Gen. Stat. § 7B-1111(a)(1), it is unnecessary to also consider whether termination was proper pursuant to N.C. Gen. Stat. § 7B-1111(a)(3). To the extent the Court chooses to reach this

issue, however, the trial court did not err in concluding that this was an additional proper basis on which to terminate Appellant's parental rights.

Appellant argues that the proper time periods to consider are the six month period prior to 14 July 2003 (January to July 2003) and the six month period prior to 9 September 2003 (March 2003 to September 2003). See Appellant's Brief, pp. 32-33. Appellant further argues that there is no evidence regarding Appellant's ability to pay during these time frames. She argues that "Appellant did not have a job during those time periods because she was in the initial phases of residential drug treatment at Cascade." Appellant's Brief, p. 34.

Assuming that Appellant's assertions in this regard are correct, decisions of this Court make it clear that a parent in a termination of parental rights hearing cannot use as a defense his or her inability to provide a portion of the cost of care when that inability is caused by the parent's own misconduct. This Court has explained:

[W]hen a parent has forfeited the opportunity to provide some portion of the cost of the child's care by her misconduct, she "will not be heard to assert that . . . she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount."

In re Tate, 67 N.C. App. 89, 96, 312 S.E.2d 535, 540 (1984) (quoting In re Bradley, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802-03 (1982)).

Appellant made the choice to use powder and crack cocaine. This misconduct led to her confinement in a residential substance abuse treatment program where, according to Appellant, she was unable to work during the initial phases of her treatment. Appellant also made the choice to communicate threats, which led to her confinement in jail during February 2003. (T pp. 42, 59) (App. pp. 66, 71) Because Appellant forfeited the opportunity to provide some portion of the cost of her children's care by her own misconduct, she cannot now be heard to claim that she is excused from contributing any amount to her children's care.

The uncontroverted testimony showed that Appellant had paid nothing towards the \$18,000 that DSS had spent on the children's care. (T pp. 17-18) (App. pp. 55-56) As a result, the trial court properly terminated Appellant's parental rights on this alternative basis.

Appellant also argues that the trial court did not make a specific finding regarding "willful" nonpayment by Appellant. There is no requirement that DSS provide any type of notice to

Appellant of her obligation to pay some reasonable amount toward the cost of her children's care.

This Court was faced with a similar argument in In re Wright, where the father argued that the Court could not rely upon this basis for termination of parental rights because "the statute does not require notice that payment is due, no notice was received by him, and because he had received public assistance all of his life, he was unaware that anything was expected or required of him." In re Wright, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983). The Court found this argument unavailing. The Court explained:

Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.

Id. Appellant's argument must likewise fail. The fact that Appellant paid absolutely nothing towards the cost of her children's care is sufficient evidence of her willful failure to pay.

Appellant next argues that the trial court could not rely upon this grounds for termination of her parental rights because the petition filed by DSS did not specifically allege this as a basis for termination. This argument also must fail.

As an initial matter, the petition filed by DSS asks for the parental rights of all parents to be terminated and specifically refers to both grounds for termination: neglect and failure to pay reasonable cost of care. (R p. 17) DSS was careful, however, to not limit itself to the relief specifically set forth in the petition. Instead, the petition also prays "that the Court grant such other relief as the Court may deem just and proper." Id. Thus, the petition in no way limited the court to terminating parental rights on only the specific grounds cited in connection with each parent.

Moreover, it is simply inconsistent with the statute governing the termination of parental rights to argue that the court's power is limited by the specific citations set forth in the petition. Rather, the statute clearly states that "[t]he court may terminate the parental rights upon a finding of one or more of the following. . ." N.C. Gen. Stat. § 7B-1111(a). Nowhere in this statute does it limit the court to only those subdivisions that have been cited in a petition. Instead, if the court finds that such a basis exists, then the court is expressly empowered to terminate parental rights on that basis.

Because this statute does not contain the limitations asserted by Appellant, the Court should not superimpose such limitations.

When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are *without power to interpolate, or superimpose, provisions and limitations not contained therein.*

State v. Jarman, 140 N.C. App. 198, 205, 535 S.E.2d 875, 880 (2000) (emphasis added).

Finally, Appellant also argues that the trial court erred because its order did not contain a citation to the precise subdivisions pursuant to which it ordered Appellant's parental rights terminated. Significantly, the trial court did more than merely cite a particular subdivision; it employed the precise language from the statute regarding "neglect" and the "failure to pay a reasonable portion of the cost of care." (R p. 29)

Appellant relies on Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988), to support her argument. The Court's decision in this case is not helpful to Appellant. Rather, the Court reached the unremarkable conclusion in Appalachian Poster that a bare conclusion of law unaccompanied by supporting grounds for that conclusion does not comply with N.C. R. Civ. P. 52, which requires that conclusions of law be supported by findings of fact. Id. at 480, 366 S.E.2d at 707. Here, the trial court's conclusions were fully supported by its findings of fact.

Again, Appellant has tried to elevate form over substance. The trial court properly made clear, detailed conclusions of law that were supported by ample findings of fact. The lack of citations to precise statutory subdivisions is hardly grounds for reversible error.

CONCLUSION

It was nearly two years after the removal of T.G. and R.J. from Appellant's custody due to Appellant's neglect of them until the court's decision to terminate Appellant's parental rights. During this time, Appellant had ample opportunity to avail herself of the resources being offered by DSS to change the circumstances that had resulted in the removal of T.G. and R.J. Appellant did not avail herself of these resources, nor did she make the necessary changes in her circumstances. Instead, she turned to cocaine and wasted precious time while her children were consigned to foster care. As a result of her decision to not work with DSS towards reunification, Appellant did not even visit T.G. and R.J. for fourteen months after they were removed from her custody.

Today, she has made progress in correcting the new problems she created after her children were removed from her custody. For her recent progress, she is to be commended. However, at the time of the termination hearing, Appellant still was not

employed, still had not secured appropriate, long-term housing, still had not obtained a parenting capacity evaluation or completed parenting classes, and was still undergoing treatment for her cocaine addiction. Because she had failed to rectify the conditions that led to removal of T.G. and R.J. and because she was not in a position to take on the responsibility of parenting two additional children, it was clearly in the best interests of the children to terminate Appellant's parental rights so that DSS could move forward with efforts to adopt them into a safe, nurturing, permanent home. (T p. 96) (App. p. 84) Although we may hope and expect that Appellant will continue to progress towards independence and the ability to parent appropriately, at the time of the termination hearing it was, without question, in the best interests of T.G. and R.J. to finally end the limbo of foster care and move towards a permanent placement with an appropriate adoptive family.

Accordingly, this Court should affirm the trial court's order terminating Appellant's parental rights.

Respectfully submitted this the ____ day of November, 2004.

NELSON MULLINS RILEY & SCARBOROUGH,
L.L.P.

Wallace C. Hollowell, III
N.C. State Bar No. 24304

By: _____

Wallace C. Hollowell, III
4140 Parklake Avenue
GlenLake One, Suite 200
Raleigh, North Carolina, 27612
Tel: (919) 877-3803
Fax: (919) 877-3823

ATTORNEYS FOR NORTH CAROLINA GUARDIAN
ad LITEM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing BRIEF OF PETITIONER-APPELLEE THE GUARDIAN AD LITEM was served on the persons indicated below by placing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

Edward Yeager
Assoc. County Attorney
Youth and Family Services
720 E. Fourth Street
Charlotte, North Carolina, 28202

Mr. Matthew McKay
720 E. Fourth Street, Ste 202
Charlotte, NC 28202

Ms. Mercedes O. Chut
201 West Market Street, Suite 409
Greensboro, NC 27401

This the _____ day of November, 2004

Wallace C. Hollowell, III