

NORTH CAROLINA COURT OF APPEALS

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IN THE MATTER OF: )

)

From Franklin County

I.D. and )

(02-J-13)

)

S.D. )

)

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**JOINT BRIEF OF APPELLEES GUARDIAN AD LITEM  
AND FRANKLIN COUNTY DEPARTMENT OF SOCIAL  
SERVICES**

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## STANDARD OF REVIEW

In making determinations pursuant to the North Carolina Juvenile Code, the best interests of a child are the “polar star” that guides courts in cases of abuse and neglect where custody is at issue. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251-52 (1984). In keeping with the focus of best interests, North Carolina courts conduct a two-step process when terminating parental rights. *See, e.g., In re Locklear*, 151 N.C. App. 573, 575, 566 S.E.2d 165, 166 (2002).

Termination of parental rights is a two-stage proceeding. At the adjudication stage the petitioner must show by clear, cogent and convincing evidence that grounds exist to terminate parental rights. If one or more of the grounds listed in N.C. Gen. Stat. § 7A-289.32 are shown, then the court moves to the dispositional stage “to determine whether it is in the best interest of the child to terminate the parental rights.”

*In re Brim*, 139 N.C. App. 733, 741, 535 S.E.2d 367, 371 (2000) (quoting *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997)).

This Court applies a different standard of review for the adjudicatory and disposition phases of a termination of parental rights hearing. *See In re T.L.B.*, 167 N.C. App. 298, 301, 605 S.E.2d 249, 251 (2004). At the adjudication phase of the termination proceedings, this Court “review[s] the trial court’s findings of fact to determine whether they are supported by ‘clear, cogent, and convincing evidence’ and whether the findings support the trial courts conclusions of law.” *Id.* The

dispositional stage, in which the trial court determines if termination is in the child's best interests, is reviewed for abuse of discretion. *Id.*

In this case, Appellant does not appear to dispute the grounds for termination or take issue with any of the findings of fact and conclusions of law in the termination order. Instead, Appellant takes issue with the trial court's determination that termination was in the children's best interests where the Appellant's mother expressed an interest in taking care of the children. The proper standard of review for this case is, therefore, abuse of discretion.

### **STATEMENT OF THE FACTS**

Respondents S.D. ("Sara"<sup>1</sup>) and I. D. ("Isaac") are four (4) year-old fraternal twins. (R. pp. 2, 3). Sara and Isaac were taken into the custody of the Franklin County Department of Social Services ("DSS") on January 18, 2002, as a result of their mother's incarceration and failure to designate an appropriate individual to care for the children. (R.pp. 3, 8). DSS became aware of the twins after Appellant's mother contacted the agency and expressed her discomfort at Appellant's choice of caregiver. (T.pp. 209, 216). Despite the fact that Appellant had left her other children in her mother's care when she was previously incarcerated, the record reflects that at the time the children came into DSS custody, Appellant Mother was

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<sup>1</sup> The real names of the respondents have been changed to preserve confidentiality.

unable to identify relatives willing to care for the children. (T. p. 208, R.p. 3).

Michael Y., whom Appellant Mother identified as the twins' father, denied paternity of the children. (R.p. 25).<sup>2</sup>

Sara and Isaac were born prematurely at only 22 weeks, and have had serious medical problems since their birth. (T. p. 63-64). Both children had surgery to repair detached retinas. (T. p. 64). Despite this surgery, Sara remains legally blind. (T. p. 64). Isaac has had surgery to correct a hernia, and both children have been on special monitors for apnea, breathing problems, and heart problems. (T. p. 64). The twins' health problems necessitated the services of a physical therapist, occupational therapist, feeding therapist (for Sara), and vision therapist (for Sara). (T.pp. 64-65).

The trial court entered an order adjudicating the twins neglected and dependent on May 21, 2002. (R.p. 18-19). In July of 2002, Appellant Mother was diagnosed with antisocial personality disorder, and she began individual psychotherapy. (R.p. 162). In January of 2003, Appellant Mother was permitted to attend regular therapy visits with the twins to assist her in learning to care for her children. (T. p. 65-66). The social worker assigned to the children monitored these visits at the foster home. (T. p. 68). Of particular concern to the social work was Appellant Mother's failure to properly respond to alarms from the twins' apnea/heart monitor. (T. p. 68). At the termination of parental rights hearing in this case, the social worker testified that

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<sup>2</sup> The putative father has not appealed the termination order.

Appellant Mother “never once” reset the monitors after an alarm, as required. (T. p. 68)

[T]here was one time in particular that it just kept going off, I mean just continued to beep, and [Appellant Mother] didn’t even make any move at all. She was holding [Sara] in her arms, and [Isaac] was in one of the seats on the floor, and his was the one that was going off. And she made no attempt to even look or check on him or anything, and it was for apnea, which means pauses in breathing.

So I ran in there and shook him and got him awake and explained to her - - asked her if she didn’t realize that - - you know, what had been going on and told her that she needed to reset it. And it, later, went off again during the visit, and she didn’t reset it again.

(T. p. 68-69). The social worker testified that the mother also failed to respond to the monitors during medical appointments for the children. (T. p. 69).

The social worker also testified that Appellant Mother failed to take the twins to medical appointments, failed to administer their medication, failed to place the twins on their heart monitors, and failed to make all the appointments scheduled for the children. (T. p. 61). Of the 76 medical appointments scheduled before her incarceration in 2003, Appellant Mother missed 16 appointments. (T. p. 61).<sup>3</sup> Of the 34 visits with the twins Appellant Mother was supposed to attend, she cancelled or failed to show up at 14 visits. (T. p. 63). When she took the twins to medical appointments, Appellant Mother would often give inaccurate medical information to the doctors. (T. p. 75). Appellant Mother was unable to recall the dates of surgery

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<sup>3</sup> Appellant Mother claimed that she had not been notified of all of the appointments, however, the social worker testified that notice of the appointments was sent to both Appellant Mother and her attorney. (T. p. 61).

for the children prior to their coming into custody, and often misreported the twins' weight upon which medical dosing was based. (T. p. 75).

Over the more than four years in which Sara and Isaac have been in the custody of DSS, Appellant Mother identified both her mother and father as possible caretakers for the twins. (R.pp. 30, 64). In a DSS Court Summary report dated September 26, 2006, the social worker indicated that Appellant Mother, "stated that her father is willing to provide proper care for the children." (R.p. 30). The Court Summary clearly indicates that the social worker explained to Appellant "that her father needs to call the Department of Social Services to express his willingness to provide placement and proper care for the children and to begin the process of determining his suitability for caring for the children." (R.p. 30). Identical statements by the social worker are contained in the January 30, 2003 and March 27, 2003 court summaries. (R.pp. 37, 47). The GAL reports from the same time period reference Appellant Mother's statements regarding relatives. (R.pp. 34, 40). Appellant's father never did contact the social worker regarding the possible placement of the children with him. (T.p. 118).

In June of 2002, Appellant Mother's attorney mentioned the grandmother's interest in caring for the twins, at which time the social worker had already left a message asking the grandmother to contact social services regarding a kinship care assessment. (T.p. 121). Despite the fact that Appellant's mother made the initial

report to DSS regarding the twins, it was not until eighteen (18) months after Sara and Isaac came into DSS custody, the children's grandmother, Diane D., notified the social worker that she was interested in having the children placed with her. (R.p. 71). At that time, the social worker, supervisor and program manager for DSS determined that it was inappropriate to move the children from their foster family because the children were "bonded and comfortable" with their foster parents due to the length of their foster care placement. (T.p. 119).

Diane D.'s contact with the children since she expressed an interest in caring for them was sporadic. (R.p. 108). Ms. D. visited the twins three (3) times in January of 2004, and then once in March and once in August of the same year. (R.p. 131). The visits in January 2004 lasted one (1) hour each, but the subsequent visits were for fifteen (15) and thirty (30) minutes, respectively. (R.p. 131).

During the time the children were in DSS custody, the children received social security benefits that were held in a trust account. (T.p. 106). DSS had given Appellant Mother gas vouchers, which DSS paid from the twin's trust account, so Appellant could pick up the children for unsupervised visitation. (T.p. 103). Appellant, who was not a payee on the twin's trust account, used the account numbers to authorize electronic transfers to her creditors to pay for other, unauthorized, transactions totaling more than \$11,000, over a period of several months. (T.pp. 103, 108). Money in the trust account included amounts held in trust

for the twins, as well as other children in the custody of DSS. (T.p. 125). Because of these charges, Mother's parole on earlier offenses was revoked, and she was incarcerated. (T.p. 103). Appellant was later convicted for stealing trust money from Franklin County. (T.p. 125-26).

Despite continued efforts to work with Appellant Mother, both DSS and the GAL determined that it was in the children's best interests to proceed to termination of parental rights. (R.pp. 66, 70). DSS and GAL based their recommendations regarding termination on the Appellant Mother's continued mental health and ongoing legal issues. (*Id.*).

DSS filed a motion to terminate Appellant's parental rights to Sara and Isaac on October, 30, 2003<sup>4</sup>, citing Mother's past neglect and the probability of future neglect if the children were returned to her care. (R.p. 73). The motion also cited Mother's failure to make reasonable progress to correct the conditions that brought the children into care. (R.p. 73).

As of the date of this brief, Sara and Isaac have been in foster care for more than four (4) years. (R.pp. 3, 8).

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<sup>4</sup> The motion included grounds for termination of the biological father's parental rights, as well.

## ARGUMENT

### **I. ARTICLE 11 OF THE NORTH CAROLINA JUVENILE CODE REPRESENTS A DISTINCT STATUTORY SCHEME AND PROCEEDINGS UNDER ARTICLE 9, INCLUDING PERMANENCY PLANNING HEARINGS, ARE NOT PREREQUISITES TO HEARINGS ON TERMINATION OF PARENTAL RIGHTS.**

In *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), the North Carolina Supreme Court distinguished proceedings under Article 11 of the North Carolina Juvenile Code from those arising under Articles 2 through 10.

Aside from its effect, Article 11 differs from Articles 2 through 10 in other important respects. It contains its own provisions regarding legislative intent, jurisdiction, standing, notice, hearing, and appeal. The article includes a host of procedural requirements that, "consistent with due process, . . . protect the various interests of the parties involved." *Montgomery*, 311 N.C. at 108, 316 S.E.2d at 251. These provisions encompass notice requirements and the right to counsel, even legal representation at the state's expense for indigent parents. N.C.G.S. §§ 7B-1106.1, - 1109(b).

*Id.* at 548, 495 (some citations omitted). In keeping with the independent status of Article 11, the statutory language contained in Article 11 is devoid of any requirement that courts must hold permanency planning hearings prior to holding hearings pursuant to Article 11.

This Court has previously held that trial courts are not required to conduct permanency planning hearings before terminating parental rights. *See In re Faircloth*, 153 N.C. App. 565, 571, 571 S.E.2d 65, 69 (2002) ("An adjudicatory hearing on abuse and neglect allegations is not a condition precedent to a termination

hearing.”). *See also In re J.B. and A.B.*, COA04-1325, 2005 N.C. App. LEXIS 2085 (October 4, 2005) (finding no error in trial court conducting Article 9 hearing at the conclusion of a termination of parental rights hearing).<sup>5</sup> In *In re J.B. and A.B.*, this Court noted the “distinct statutory schemes” of Articles 9 and 11, and noted that the two articles “permit simultaneous proceedings.”<sup>6</sup> *Id.* The *J.B.* court held that, where DSS had custody of the children, DSS was a proper petitioner under the termination statute, and an Article 9 proceeding was not a prerequisite to filing a motion or petition to terminate parental rights. *Id.* at \*11-14.

In this case, Appellant has cited no case law or statutory authority to support her argument that the trial court’s failure to conduct a permanency planning hearing is grounds for reversal of an order of termination. Rather, all of the statutes and cases Appellant cites refer to Articles 2 through 9 of the Juvenile Code and the consequences of failing to comply with the statutory requirements of those articles.

Appellant Mother argues that, “The trial court’s failure to hold a permanency planning hearing prior to the filing of the TPR petition . . . deprived the Mother of notice that her parental rights were in jeopardy, and deprived the Grandmother of being considered for relative placement of the twins.” (Appellant’s Brief, p. 18). Appellant’s argument that she lacked “notice that her parental rights were in

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<sup>5</sup> All unpublished cases cited herein are attached as Appendix “A” hereto.

<sup>6</sup> Counsel for Appellant is listed as counsel of record in *In re J.B. and A.B.*, and can hardly be unfamiliar with this Court’s holding in that case.

jeopardy” is disingenuous. In fact, the Juvenile Summons and Notice of Hearing filed with the original juvenile petition in this case, and served upon Appellant on January 18, 2002, clearly states:

If the Court determines at the hearing on the petition that the allegations of the petition are true, the Court will conduct a dispositional hearing to consider the needs of the juvenile and enter an order designed to meet those needs and the objections of the State. ***The dispositional order, or a subsequent order, may: . . . upon a motion in the cause and a hearing, order termination of parental rights.***

(R.p. 6)(emphasis added).

Appellant’s argument that, by failing to hold a permanency planning hearing, the twin’s grandmother was “deprived . . . of being considered for relative placement” belies the apparent lack of interest on the part of the grandmother in having the children placed with her. The record indicates that the social worker made attempts to contact the grandmother prior to the filing of the motion for termination, but the grandmother did not return her calls. (R.p. 64, T.p. 121). In fact, the grandmother, Diane D., did not notify the social worker that she was interested in having the children placed with her until eighteen (18) months after Sara and Isaac came into DSS custody. (R.p. 71). Any deprivation the grandmother suffered was a direct result of her own inaction and apparent lack of serious interest in having Sara and Isaac placed with her.

**II. THE TRIAL COURT'S DELAY IN HOLDING THE HEARING ON THE MOTION FOR TERMINATION OF APPELLANT'S PARENTAL RIGHTS NEITHER RESULTED IN PREJUDICE TO ANY OF THE PARTIES INVOLVED NOR DID IT VIOLATE THE STATUTORY REQUIREMENTS OF ARTICLE 11 OF THE NORTH CAROLINA JUVENILE CODE.**

Appellant argues that, as a result of the alleged failure of the trial court to hold the termination of parental rights hearing within ninety (90) days, this Court should reverse the order of termination. (Appellant's Brief, p. 21). As discussed below, Appellant has waived her right to appeal this issue because she failed to object to the continuances at the trial court level. Even if this Court were to consider the issue of delay, Appellant has failed to show that she or any other parties in interest to these proceedings were prejudiced in any way because of delay. In fact, as discussed below, the majority of delays in the proceedings in this case were as a result of Appellant's incarceration, Appellant's request that her court-appointed counsel be relieved and another attorney appointed in his place, or Appellant's request that a different Rule 17 GAL be appointed in her case. This Court should refuse to allow Appellant to benefit from her own actions in delaying the proceedings by reversing the order of termination in this case.

**A. Appellant Mother Has Waived Her Right To Appeal The Issue Of Delay In Holding The Termination Hearing Because She Failed To Object To The Trial Court’s Continuances.**

Appellant-Mother waived her right to appellate review of this issue by failing to object to the continuances in the termination of parental rights proceedings. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C.R.App.P. 10(b)(1). North Carolina appellate courts have enforced Rule 10(b)(1) to bar arguments on appeal in other juvenile cases, *see In re L.M.C.*, \_\_\_ N.C. App. \_\_\_, 613 S.E.2d 256, 257 (2005) (noting that the “plain error” analysis exception to Rule 10(b)(1) does not apply in civil cases), as well as in cases involving constitutional arguments, *see, e.g., State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 354 (2003).

In the case now before this Court, Appellant Mother’s attorney had ample time and opportunity to object to the continuances in the termination proceedings, but failed to do so. The record reflects that Appellant was represented by counsel at each of the hearings in which the case was continued, and that, when she was not incarcerated, Appellant herself was present in the courtroom. The record is devoid of any objection by Appellant or Appellant’s trial counsel with respect to the

continuances of the termination of parental rights proceedings. For this reason, this Court should refuse to consider Appellant's argument on the issue of delay.

**B. Appellant Mother Cannot Show That She Was Prejudiced By The Trial Court's Failure To Hold The Termination Of Parental Rights Hearing Within The Statutorily Mandated Timeframe, Because The Majority Of The Delays In Scheduling The Hearing At Issue Were Caused By Appellant Herself.**

Should this Court determine that Appellant has properly preserved the issue of delay, this Court should still affirm the order on termination because the Appellant has failed to demonstrate that she was prejudiced by the delay in the termination proceedings.

This Court recognizes that "the purpose of the legislature in including the filing specifications in the statute was to 'provide parties with a speedy resolution of cases where juvenile custody is at issue.'" *In re: B.M., M.M., An.M. & Al. M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005).

[B]y holding that the order terminating parental rights should be reversed simply because it was filed outside of the specified time limit "would only aid in further delaying a determination regarding t[he minor children] because juvenile petitions would have to be re-filed and hearings conducted."

*Id.* This Court should now refuse to reverse the termination of parental rights order in this case, especially where, as discussed below, Appellant Mother herself was the cause of a large number of the delays at the trial level.

This Court has held that delays in holding termination hearings are similar, but not identical, to delays in timely entry of orders following court hearings. *See In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, \_\_\_, 615 S.E.2d 26, 35 (2005). This Court, in *D.J.D.*, recognized that despite the similarities in delays in holding hearings and those in entry of orders, delays in holding hearings do not affect a party's right to appeal. *See id.* This Court further noted that, where the appellant was himself responsible for a portion of the delays, any error was "technical" and any prejudiced appellant suffered was insufficient to warrant reversal of the underlying order. *See id.* Irrespective of the type of delay involved, this Court will not reverse an order for delay unless an appellant shows prejudice as a result. *See id.* In this case, Appellant has failed show that she, or any of the other parties involved in this case, were prejudiced by the delay in holding the termination of rights hearing.

In determining whether Appellant was prejudiced by the delay in holding the hearing on DSS' motion for termination, it is essential to review the procedural history of the termination action in this case. As discussed below, the record reflects that most of the continuances the trial court granted in the termination proceedings were granted at the request of counsel for Appellant Mother or Appellant Mother's Rule 17 Guardian ad Litem.

DSS filed the initial motion for termination in this case on October 30, 2003. (R.p. 72). That same day, the trial court held a hearing and entered an order in which

the court changed the permanent plan for the children to adoption. (R.p. 78). The order entered on the October 30, 2003 hearing indicated that Appellant Mother was not present in court because she remained incarcerated, and set another review hearing for December 19, 2003. (R.p. 78). At the December 19, 2003 hearing, and counsel for Appellant Mother, Charles Draughn, moved to continue the matter because his client was in jail pending “several felony charges.” (R.p. 83).

The next delay in holding the termination hearing was apparently the result of Appellant Mother’s February 20, 2004 request that her attorney, Charles Draughn, be relieved “based on the fact that my parental rights have not been explained to me.” (R.p. 85, 86). The trial court granted Appellant’s request on February 26, 2004, and continued the termination proceedings until April 29, 2004, presumably to ensure that a new attorney was appointed for Appellant. (R.p. 86). On April 5, 2004, Appellant requested that an “out of county attorney” be appointed to represent her or that there be a change of venue in the case. (R.p. 87). On April 29, 2004, the trial court appointed Sheryl Friedrichs to represent Appellant Mother and continued the case until July 1, 2004, presumably to allow Ms. Friedrichs to prepare for the termination hearing. (R.p. 96). On May 25, 2004, Ms. Friedrichs filed a response to DSS’ motion for termination. (R.p. 100). DSS then filed an amended motion for termination of parental rights on July 16, 2004, adding dependency to the grounds listed in the original motion. (R.p. 102). The next order entered continuing the

termination hearing was from a July 1, 2004 hearing, and appears to be based upon Appellant's inability to attend due to her incarceration. (R.p. 109). The order from the July 1st hearing indicates that Appellant Mother's new attorney, Sheryl Friedrichs, was present on behalf of her client, and that all parties consented to the continuance. (R.p. 109). The July 29, 2004 hearing was then continued to August 26, 2004 and, although there is no notation in the court's order regarding the reason for the continuance, the order indicates that both Appellant and her attorney were present in the courtroom and consented to the continuance. (R.p. 110).

The August 26, 2004 hearing was continued until October 28, 2004 and, although there is no indication of the reason for the continuance on the face of the order, the order again indicates that Appellant and her attorney were present in the courtroom and consented to the continuance. (R.p. 122). On October 25, 2004, the trial court, with the consent of all parties, appointed Ms. Friedrichs to serve as both trial counsel and Rule 17 GAL for Appellant Mother. (R.p. 124). In its order entered that same day, the trial court asked Ms. Friedrichs to "submit a report to the court regarding the mother's competence to appear at trial and to assist her attorney in the preparation and trial of this matter. (R.p. 124). Ms. Friedrichs submitted that report to the court on October 26, 2004. (R.p. 126). The trial court apparently reconvened on October 27, 2004 and, at that time, all parties consented that the matter be continued under December 15, 2004. (R.p. 127).

On December 3, 2004, Appellant moved the court to appoint a separate Rule 17 GAL and, on December 6, 2004, the court appointed Joseph Eatmon to act in that capacity. (R. pp. 142-43). The hearing on termination was continued one last time at the December 15, 2005 hearing, apparently based upon the recommendations of Appellant's new Rule 17 GAL, who filed a report with the trial court on December 17, 2004 in which he wrote, "It is my opinion that Angela D. is lacking in mental clarity. She does not possess sufficient contact with the realities of life as it impacts her. Therefore, all court proceedings involving her rights as a parent should be delayed." (R. pp. 147-48). The termination hearing was held February 2-4, 2005 and March 2, 2005. (R. p. 489).

Although the termination hearing in this case was heard more than ninety (90) days after DSS filed the initial motion for termination, the proceedings were continued: 3 times due to Appellant's incarceration; 3 times because Appellant asked that another attorney be appointed to handle her case; and 1 time at the behest of Appellant's Rule 17 GAL. All of the orders continuing the proceedings indicate that all the parties consented to the continuances.

C. **Appellant Mother Cannot Show That She Was Prejudiced By The Trial Court's Failure To Hold The Termination Of Parental Rights Hearing Within The Statutorily Mandated Timeframe, Because Her Inability To Visit With Her Children Was The Result Of Her Incarceration.**

In her brief, Appellant argues that the trial court's delay in holding the termination of parental rights hearing "severed" her relationship with her children. (Appellant's brief, p. 26). Appellant does not cite to any support in the record for this assertion. In her brief, the only mention of Appellant's inability to visit with her children is found in her Statement of Facts. In that section, Appellant writes that "she wants to see the twins, but VCDSS was denying [Isaac] and [Sara] to visit her in while she has been in prison." (*Id.*, p. 13). A closer review of the testimony to which Appellant cites reveals that her inability to visit with her children resulted, not from the filing of the motion for termination in this case, but from Appellant's continued incarceration. (T. pp.469-473). In fact, Appellant is still incarcerated and was incarcerated at the time the termination hearing was held. (T. p. 470).

Appellant testified that visitation at the prison for children as young as Isaac and Sara could only be accomplished through special visits. (T.p. 472). Appellant herself testified that her mother did not bring her older children to visit at the prison, because, "she doesn't feel that she should continue to bring them because they cry very bad how much they miss me." (T.p. 473). Appellant also testified that it bothered her older children to see their mother in prison. (T.p. 473). Given

Appellant's own testimony regarding the effect of prison visitation on her older children, DSS' refusal to bring her very young twins to the prison seems understandable and can hardly be characterized as "prejudicial" to Appellant.

**D. Appellant Mother Cannot Show That Any Other Parties Were Prejudiced By The Trial Court's Failure To Hold The Termination Of Parental Rights Hearing Within The Statutorily Mandated Timeframe.**

Appellant also argues that the trial court's delay in holding the termination also prejudiced her mother, the foster parents, and the twins themselves. Despite this assertion, Appellant cites no testimony or other evidence in the record to support this conclusion.

With respect to the twins' grandmother, in her Statement of Facts, Appellant herself indicates that her mother visited Sara and Isaac in August of 2004 for the twins' birthday party. (Appellant's Brief, p. 11). This visit with the children was nearly ten (10) months after the motion for termination was filed. Appellant cites no testimony that would indicate the grandmother was precluded from visiting the children during the pendency of the termination proceedings.

The record also reveals that the twins were not prejudiced by the delay in holding the termination hearing in this case. As discussed above, visitation with their mother was limited due to the mother's incarceration, and not because of the pendency of the proceedings. The twins did visit with their grandmother on a number of occasions, but, as discussed above in Section I, it appears that it was the

grandmother's failure to pursue visits with the children that resulted in the limited number visits the children had with her.

Appellant's Statement of Facts is quite telling with respect to the children and the lack of prejudice to them. Appellant writes that, during the period from April 2004 until January 5, 2005, "The twins were three and a half years old, and were progressing nicely and doing very well, gaining weight, their motor skills had improved and they had no developmental delays that they had when they first came into care." (Appellant's Brief, p. 11). The twins were thriving in the care of their foster parents, and the pendency of the termination proceedings in this case did not preclude visitation with their grandmother or their mother.

Finally, Appellant argues that the foster parents in this case were prejudiced by "being kept in limbo" as a result of the delays involved in completing the termination hearing. (Appellant's Brief, p. 26). Here again, Appellant cites no facts to support this assertion. Without such support, Appellant cannot show prejudice to the foster parents. *See S.W., supra.* (rejecting Appellant's general assertions of prejudice as insufficient to warrant reversal of trial court's order).

Appellant has shown no prejudice to any of the parties to this action or the foster parents as a result of the delay in holding the termination hearing. Any "prejudice" Appellant suffered was a result of her own illegal acts, which resulted in her incarceration. Appellant's argument that her mother was prejudiced by the delay

conveniently disregards evidence in the record that the twins' grandmother visited with the children during the pendency of the hearing. Finally, Appellant fails to cite to any evidence in the record that Sara, Isaac, or their foster parents were prejudiced by delays in this case.

**III. THE TRIAL COURT CORRECTLY ADHERED TO THE PROCEDURAL REQUIREMENTS OF N.C. GEN. STAT. § 7B-ART. 11 AND PROPERLY HELD THAT TERMINATION OF APPELLANT'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF THE CHILDREN.**

**A. The Issue Of Relative Placement Is Not Properly Before The Court In An Appeal Of An Order To Terminate Parental Rights.**

The proper focus of a termination of parental rights proceedings focus is not placement of the child, but: (1) whether grounds to terminate parental rights under N.C. Gen. Stat. § 7B-1111 can be established by clear and convincing evidence; and if so; (2) whether termination is in the best interests of the child. *See, e.g., Brim*, 139 N.C. App. at 741, 535 S.E.2d at 371. “During the adjudicatory phase [of a termination proceeding], the trial court does not consider whether there is a relative who can take custody of the minor child, but focuses on whether there is evidence to support termination on the grounds alleged in the petition.” *In re J.A.A. & S.A.A.*, \_\_\_ N.C. App. \_\_\_, 623 S.E.2d 45, 51 (2005). Rather, trial courts consider relative placement in non-secure custody hearings, initial dispositions, review hearings, and

permanency planning hearings. *See* N.C. Gen. Stat. §§ 7B-505, 7B-903(a)(2)(c), 7B-906(d), 7B-907(c).

In her brief, Appellant cites cases stressing the importance of priority placement of relatives. However, Appellant only cites to cases involving relative placement in the context of permanency planning hearings, and not in a termination of parental rights hearing. *See In re L.L.*, \_\_\_, N.C. App. \_\_\_, 616 S.E.2d 392 (2005) and *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003). This analysis of the law regarding relative placement is incorrect.

As discussed in Section I above, Articles 2-10 of the North Carolina Juvenile Code govern court proceedings in juvenile abuse and neglect cases other than termination of parental rights. Article 11 contains provisions relating solely to the termination of parental rights, and differs from Articles 2-10 in important respects, including appeals. *In re R.T.W.*, 359 N.C. 539, 548, 614 S.E.2d 489, 495 (2005). Proceedings under Articles 2-10 prior to the termination of parental rights “afford the trial court multiple opportunities to consider and reconsider whether a child is abused, neglected, or dependent and if so, who should have custody, and give parents time to correct the deficiencies that led to the child’s removal.” *Id.* at 545. The statutorily mandated opportunity to appeal consideration of relative placement, therefore, is an appeal of an order pursuant to Articles 2 through 10. Appellant neither appealed from

earlier orders in this case, nor did she attempt to bring the issue of placement with her mother on for review by the trial court.

In this case, the trial court concluded as a matter of law that there were three grounds for termination in this case under § 7B-1111 and thus appropriately proceeded to the disposition phase of the hearing. (R. pp. 499-500). Although the trial court was not precluded from considering placement of the twins with the grandmother during the adjudication portion of the termination of parental rights hearing, the court did not err in refusing to do so.

Based on the findings of fact and the importance of placing children in safe, permanent homes within a reasonable amount of time, the court below correctly concluded that the juveniles are in need of a permanent plan which can only be obtained by the severing of any relationship between the juveniles and their parents and that it is in the best interest of the juveniles that the parental rights of their mother be terminated. In this case, the trial court properly focused on the best interests of the twins in determining that termination was appropriate in this case. For the trial court to do otherwise would have been improper under Article 11.

**B. The Trial Court's Determination That Grounds To Terminate Appellant's Parental Rights Existed Is Binding On Appeal Because Appellant Does Not Contest The Trial Court's Findings With Respect To Grounds.**

Although Appellant does not clearly state which portion of the termination order she is appealing from, it appears that she only takes issue with the trial court's determination regarding best interests of the children.

In her brief, Appellant does not contest that grounds to terminate her parental rights existed. "If Appellant does not contest the grounds of the order, they are binding on appeal.... [and] only one ground is necessary to support the termination." *In re J.A.A. & S.A.A.*, \_\_\_ N.C. App. \_\_\_, 623 S.E.2d 45, 50 (2005). Similarly, failure to assign error to each conclusion of law Appellant believes is not supported by the evidence constitutes acceptance of the conclusion and a waiver of the right to challenge said conclusion. *See* N.C.R. App. P. 10. This Court, therefore, should only review the propriety of the trial court's determination regarding whether termination was in the twins' best interests.

**C. Appellant's Arguments Mischaracterize The Facts Of The Case with Respect to the Grandmother's Actions.**

As discussed above in Subsection B, Appellant does not take issue with the propriety of the trial court's finding of multiple grounds to termination parental rights. Appellant's single focus on appeal is whether the trial court should have considered placement with the twins' grandmother when determining if termination

was in the best interest of the twins. However, in focusing the Court's attention on placement with the grandmother, Appellant mischaracterizes the record in this case. Whereas Appellant attempts to portray the grandmother as singly devoted to caring for the twins in order to bring the family together, the record actually indicates that the grandmother showed little interest in the twins and visited them only sporadically.

Aside from the initial report to DSS in this case, the first time the grandmother is mentioned in the record on appeal is in a DSS Court Summary incorporated into an order from a July 31, 2003 review hearing. (R. p. 64). At that hearing, Charles Draughn, attorney for the mother, asked the mother if the twins had benefited from visiting with their brothers, their aunts and uncles, and their grandmother, to which the mother replied, "Yes, they have," without elaboration. (R. p. 216). Following that hearing, the social worker attempted to contact Appellant's mother to confirm her interest in caring for the twins. (R. p. 64).

A Court Summary almost one year later, dated July 1, 2004, indicates that although the grandmother did eventually notify the social worker to express interest in having the twins placed with her, the grandmother's "subsequent contact with the children [was] sporadic." (R. p. 108). In her deposition on October 21, 2004, Ms. Susan Dietz, Visually Impaired Consultant, testified to the lack of involvement on the part of the grandmother. (R. p. 442). On cross-examination, Ms. Friedrichs, attorney

for the mother, asked Ms. Dietz if the maternal grandmother participated in any of the therapy sessions, to which Ms. Dietz replied:

None. And when I went to the maternal grandmother's house, the only time I saw her she brought a light bulb in the living room and really didn't acknowledge that I was there. Didn't acknowledge [Sara] or [Isaac]. I mean, it's not like, you know, this is my grandchild or isn't she lovely or—she just walked in and walked out.

(R. p. 482).

Despite the grandmother's involvement in the case and her knowledge that the children had been placed in foster care, Diane D. did not actively pursue placement of the twins with her until eighteen (18) months after the children were placed in DSS custody. In the case now before this Court, the trial court properly found that it was in the twins' best interests to terminate Appellant Mother's parental rights.

## CONCLUSION

For these reasons, Appellee Guardian ad Litem, and Appellee Franklin County Department of Social Services, on behalf of the children I.D. and S.D., respectfully ask this Court to affirm the termination of parental rights orders in this case.

Respectfully submitted, this \_\_\_\_\_ day of June, 2006.

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**CERTIFICATION OF COMPLIANCE**  
**OF WORD COUNT**

The undersigned attorney certifies that the foregoing brief in the above-entitled action, in accordance with Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure, contains 6,417 words, which is less than the word count limit of 8,750 for briefs using Times New Roman proportional type (excluding cover, index, table of authorities, certificate of service, certification of compliance). The undersigned relies on the word count reported by Microsoft Word Processing software.

This the \_\_\_\_\_ day of June, 2006.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the foregoing APPELLEE'S BRIEF was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

Janet K. Ledbetter  
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This \_\_\_\_\_ day of June, 2006.

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## APPENDIX A

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-1325

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2005

IN THE MATTER OF:

J.B. and A.B.,  
Minor Children

Rockingham County  
Nos. 03 J 88 and 03 J 89

Appeal by respondent from order entered 19 March 2004 by Judge Richard Stone in District Court, Rockingham County. Heard in the Court of Appeals 16 August 2005.

*Janet K. Ledbetter, for respondent-appellant.*

*Womble Carlyle Sandridge & Rice, P.L.L.C., by John E. Pueschel, for guardian-ad-litem.*

McGEE, Judge.

Respondent is the mother of J.B., a fourteen-year-old girl born on 20 March 1991, and A.B., a thirteen-year-old boy born on 7 March 1992 (the children). Since 1993, several complaints of neglect have been filed against respondent and the children's father with the Rockingham County Department of Social Services (DSS).

In November 1999, DSS substantiated that respondent left the children, then ages eight and seven, alone in a vehicle outside of a bar while respondent was inside "very intoxicated." Respondent again left the children alone and unsupervised at home on 16 April 2000. As a result, DSS removed the children from respondent's home, and the children were adjudicated neglected.

The children remained in foster care for nine months, from April 2000 to January 2001. The children were returned to respondent's custody on 16 January 2001. Respondent's problems with substance abuse continued. In July 2001, respondent was arrested for driving while impaired and was convicted of the charge in December 2001. Respondent completed the required substance abuse classes at Rockingham County Mental Health (mental health) and regained her driver's license in July 2002. However, she failed to follow mental health's recommendation that she continue substance abuse treatment.

In April 2002, DSS substantiated that respondent again left the children alone and unsupervised while she spent the night out of town in Burlington. Respondent's substance abuse continued to impair her ability to care for the children. Respondent signed a services agreement with DSS requiring her to obtain a substance abuse evaluation from mental health and to follow its recommendations. Respondent failed to do so and consistently denied to DSS that she had a problem with alcohol or drugs.

DSS learned in January 2003 that respondent had been arrested in Alamance County for felony possession of cocaine, misdemeanor possession of a Schedule IV controlled substance, and misdemeanor possession of drug paraphernalia. On this occasion, respondent had left the children in the home of her former husband, a convicted felon. DSS learned that respondent had frequently left the children unsupervised with her former husband for entire weekends. In January 2003, respondent sought a substance evaluation from mental health as required by respondent's services agreement with DSS. Mental health recommended that respondent check herself into an inpatient medical detoxification program and continue to receive counseling on an outpatient basis. Respondent failed to comply with these recommendations.

Respondent continued to provide inappropriate care and supervision of the children. Respondent drove while impaired, with the children in the vehicle. Frequently, respondent "passed out" or was otherwise unable to function. This resulted in respondent's failure to help the children with school attendance, homework, and everyday tasks. Respondent's parental responsibilities often fell to J.B. Many times, J.B. was left to care for herself and A.B., her younger brother.

DSS filed a petition alleging the children were neglected on 6 February 2003. Respondent failed to appear at the hearing on 6 March 2003, despite having been served with notice. The trial court entered a nonsecure custody order on 6 March 2003, giving DSS custody of the children and continuing the hearing until 3 April 2003. The children were placed with licensed foster parents.

At the hearing on 3 April 2003, the trial court adjudicated the children as neglected. The trial court found that respondent's substance abuse demonstrated an ongoing inability to provide appropriate supervision and care of the children. The trial court also found that even though DSS had offered respondent resources to address her substance abuse problem, respondent failed to avail herself of those resources and denied she had any substance abuse problem. The trial court specifically ordered respondent to "comply with and complete inpatient treatment and [intensive outpatient treatment] before being allowed any visitation with the . . . children."

The trial court held a review hearing on 12 June 2003. At the hearing, respondent declined an opportunity to present evidence to show she was making an effort to remedy her substance abuse problem. Respondent and the children's father indicated "that they did not wish to have a hearing or be heard, and that there [were] no issues they wish[ed] to address."

After the 12 June 2003 review hearing, DSS social worker Bobbie Webster (Ms. Webster) advised respondent how to obtain the required substance abuse treatment. Ms. Webster told respondent that respondent would need to bring verification of treatment in order to schedule visits with the children. However, respondent made no effort to obtain treatment and made it difficult for Ms. Webster to contact her.

DSS filed a petition on 8 October 2003 to terminate the parental rights of respondent and the children's father. The children had been in the custody of DSS since their removal from respondent in March 2003, seven months earlier. As of October 2003, DSS had not heard from respondent for approximately four months.

Respondent contacted DSS in November and December 2003 and asked to visit the children. Ms.

Webster told respondent that respondent would have to provide verification of her substance abuse treatment. Respondent agreed to do so, but failed to provide verification.

DSS filed a motion on 4 December 2003 for a review hearing pursuant to N.C. Gen. Stat. § 7B-906. The motion also requested a permanency planning hearing pursuant to N.C. Gen. Stat. § 7B-907. The trial court scheduled the hearings for 22 January 2004. Initially, a notice of hearing for the termination of parental rights was issued on 19 November 2003 and again on 5 December 2003. The trial court continued the hearing until 22 January 2004. Respondent received notice on 12 January 2004. The hearing began on 22 January 2004, but could not be completed and the trial court continued the hearing until 5 February 2004. Respondent received notice on 2 February 2004. At the 5 February 2004 hearing, Rockingham County District Court files 00 J 35 and 00 J 36 were admitted into evidence. These two files pertained to a prior adjudication of neglect of the children and detailed complaints of prior neglect.

Respondent did not testify at the termination of parental rights hearing. Respondent provided no evidence that she had sought substance abuse treatment other than a report showing she had received treatment in September and October 2003, had skipped treatment in November, and had again sought treatment in December 2003. The report referred to respondent's treatment for alcohol abuse, but did not mention any treatment for cocaine abuse. The guardian ad litem district administrator, Tabetha Delancey, testified that respondent quit the inpatient treatment program because respondent "didn't feel she needed to go."

Evidence at the hearing showed that the children's father also had a history of substance abuse. The children's father had never assumed a parental role with the children. In June 2002, A.B. went to live with his father. DSS substantiated two complaints of neglect of A.B. by his father, including an incident when A.B.'s father held a pillow over A.B.'s face during an argument. A.B. was returned to respondent's custody in December 2002. The children's father testified that his substance abuse made him unfit to have custody of the children. He further testified that he believed it was in the best interests of the children that the parental rights of both he and respondent be terminated. The children's father also testified that he and respondent had consumed alcohol and had used crack cocaine in January 2004, just weeks before the termination hearing.

John W. Grogan, Jr. (Mr. Grogan), a licensed family therapist, testified that he began treating the children in April 2003. He testified that at that time the children demonstrated symptoms consistent with post-traumatic stress disorder, including anxiety, depressed mood, nightmares, flashbacks, and fearfulness, as well as oppositional defiant disorder in dealing with authority figures. Mr. Grogan also testified that the children had improved since their foster care placement, and that J.B. had shown the most improvement and was an honor roll student. The children had become less defiant and argumentative, but expressed anxiety about being with respondent and their father. The children stated to Mr. Grogan that they felt comfortable and safe with their foster parents.

After considering the evidence, testimony, and legal arguments of the parties presented at the adjudication and disposition phases of the termination of parental rights hearing, the trial court terminated the parental rights of respondent and the children's father.

The trial court continued the post-disposition review hearing pursuant to N.C. Gen. Stat. § 7B-906, and the permanency planning hearing pursuant to N.C. Gen. Stat. § 7B-907. Both hearings were continued from 22 January 2004 until 5 February 2004. Respondent received notice of the 5 February 2004 review and permanency planning hearings by certified mail on 24 January 2004. At the conclusion of the termination of parental rights hearing on 5 February 2004, the trial court conducted the review and permanency planning hearings.

The order terminating the parental rights of respondent and the children's father was filed on 19

March 2004. The children's father does not appeal the trial court's order. At the termination of parental rights hearing, respondent orally advised the trial court of her intent to appeal. However, respondent did not file a timely notice of appeal of the 19 March 2004 order terminating her parental rights. Respondent filed a petition for writ of certiorari to this Court on 28 June 2004. By order dated 15 July 2004, our Court allowed respondent's appeal of the 19 March 2004 order terminating respondent's parental rights.

I. Respondent first argues that the trial court erred by failing to conduct a permanency planning hearing and by failing to make findings of fact pursuant to N.C. Gen. Stat. § 7B-907 and N.C. Gen. Stat. § 7B-507 prior to terminating respondent's parental rights. Respondent has cited no statutory requirement that a trial court conduct a permanency planning hearing under N.C. Gen. Stat. § 7B-907 prior to terminating a parent's parental rights. Likewise, respondent has cited no requirement that a trial court make findings of fact pursuant to a permanency planning hearing before termination of respondent's parental rights. Article 11 of the Juvenile Code of the North Carolina General Statutes sets forth the procedure for termination of parental rights. N.C. Gen. Stat. § 7B-1100 *et. seq.* (2004). Article 9 of the Juvenile Code governs dispositions in juvenile proceedings, including review and permanency planning hearings where custody of a juvenile has been removed from a parent. N.C. Gen. Stat. § 7B-900 *et. seq.* (2004).

These two articles establish distinct statutory schemes but permit simultaneous proceedings. N.C. Gen. Stat. § 7B-1103(a)(3) (2004) states that a county department of social services "to whom custody of the juvenile has been given by a court of competent jurisdiction" may file a petition to terminate the parental rights of either parent. Under N.C. Gen. Stat. § 7B-1102(c) (2004),

When a petition for termination of parental rights is filed in the same district in which there is pending an abuse, neglect, or dependency proceeding involving the same juvenile, the court on its own motion or motion of a party may consolidate the action pursuant to G.S. 1A-1, Rule 42.

In the present case, DSS was a proper petitioner to file a termination petition under N.C.G.S. § 7B-1103(a)(3) because DSS had custody of the children at the time it filed the termination petition. The trial court initially granted DSS custody of the children on 6 March 2003. The trial court ordered that DSS retain custody of the children on 13 March 2003, 3 April 2003 and again on 12 June 2003. Therefore, DSS had custody of the children when it filed the petition to terminate the parental rights of respondent and the children's father on 8 October 2003, and was a proper petitioner under the statute.

The trial court had discretion under N.C.G.S. § 7B-1102(c) to consolidate the review and permanency planning hearings of the neglect proceeding with the termination of parental rights proceeding. The neglect proceeding commenced on 6 February 2003 when DSS filed a petition alleging that the children were neglected. The trial court concluded that the children were neglected juveniles as defined by N.C. Gen. Stat. § 7B-101 on 3 April 2003. The trial court held a review hearing on 12 June 2003 and set the matter for hearing within six months. Therefore, the neglect proceeding was pending when DSS filed its petition to terminate parental rights on 8 October 2003, and the trial court decided not to consolidate the two separate proceedings. The trial court properly adjudicated the article 9 proceeding according to the procedural requirements of that article and decided the termination proceeding in accordance with the dictates of article 11.

Our Court previously addressed an issue similar to that raised by respondent and determined that an article 9 review hearing was not a prerequisite to the termination of parental rights in *In re Faircloth*, 153 N.C. App. 565, 571, 571 S.E.2d 65, 69 (2002). In *Faircloth*, the trial court terminated the parental rights of the respondent. *Id.* at 567, 571 S.E.2d at 67. On appeal, the

respondent argued that the trial judge erred by refusing to recuse himself from hearing the termination of parental rights petition. *Id.* at 569, 571 S.E.2d at 68. In support of this contention, the respondent argued that the trial court erred by not holding a rehearing in the abuse and neglect proceeding prior to the termination proceeding. *Id.* at 569, 571 S.E.2d at 69. In rejecting this argument, our Court held:

[The respondent] has failed to show error arising from the trial court's failure to hold a rehearing in the abuse and neglect proceeding prior to the instant case. An adjudicatory hearing on abuse and neglect allegations is not a condition precedent to a termination hearing. In fact, N.C. Gen. Stat. § 7B-1111 provides grounds for terminating parental rights which are not conditioned on a determination that a child is abused or neglected. N.C. Gen. Stat. §§ 7B-1111(3), (5), (6) (2001). We further note that N.C. Gen. Stat. § 7B-1102 allows parties to file motions to terminate parental rights in pending child abuse or neglect proceedings and gives the trial court authority to consolidate the actions pursuant to N.C.R. Civ. P. 42. N.C. Gen. Stat. § 7B-1102(a), (c) (2001). A review of N.C.G.S. § 1102, as well as the rest of Chapter 7B, Article 11, reveals no requirement as suggested by [the respondent]. Here, such a hearing on abuse and neglect may well have been merely redundant with parts of the termination hearing.

*Id.* at 571, 571 S.E.2d at 69.

In the case before us, the trial court conducted the termination of parental rights hearing on 22 January 2004 and 5 February 2004. At the conclusion of the termination of parental rights hearing on 5 February 2004, the trial court conducted the article 9 hearings. As we held in *In re Faircloth*, the article 9 hearings were not prerequisites for the termination of parental rights hearing. Therefore, the trial court did not err by conducting the termination of parental rights hearing prior to the article 9 hearings.

II. Respondent next contends that the trial court violated her Fourteenth Amendment due process rights by failing to comply with "the statutory review timelines" in N.C. Gen. Stat. § 7B-906 and N.C. Gen. Stat. § 7B-907 before terminating her parental rights.

This argument fails for the reasons stated above. Article 11 and article 9 proceedings under the Juvenile Code are separate proceedings. Respondent has not demonstrated that the trial court failed to comply with the procedural requirements of article 11 of the Juvenile Code. Rather, respondent seeks to add a requirement, not contemplated by the General Assembly, to the procedure established under article 11. Therefore, we overrule this assignment of error.

III. Respondent next contends "[t]he trial court lacked subject matter jurisdiction when it terminated [respondent's] parental rights before conducting a timely permanency planning hearing." In support of this contention, respondent argues that "because [DSS] had no authority to file the TPR Petition in the first place without a directive from the trial court, the TPR Petition is not a valid pleading, and therefore, the trial court did not have jurisdiction to enter the TPR Order."

Respondent has cited no statutory requirement that DSS must receive a "directive" from the trial court before filing a termination of parental rights petition. To the contrary, N.C.G.S. § 7B-1103(a)(3), as discussed above, clearly provides that a county department of social services "to whom custody of the juvenile has been given by a court of competent jurisdiction" may file a petition to terminate the parental rights of either parent. DSS had custody of the children on 8 October 2003 when it filed the petition to terminate the parental rights of respondent and the

children's father and it was a proper petitioner under the statute. Respondent's argument is without merit.

IV. Respondent also argues that the trial court erred by failing to specify the grounds upon which it terminated respondent's parental rights within its conclusions of law or in the decretal section of the order to terminate parental rights. Termination of parental rights is a two-step process. *In re Faircloth*, 153 N.C. App. at 575, 571 S.E.2d at 72. "At the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists." *Id.* If a ground for termination is established, the trial court proceeds to the dispositional hearing to consider the best interests of the child. *Id.* "Unless the trial court determines that the best interests of the child require otherwise, the termination order shall be issued." *Id.*

A trial court may terminate parental rights upon a finding of one or more of the grounds set forth in N.C. Gen. Stat. § 7B-1111(a) (2004). The grounds relied upon by the trial court in the present case are:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

....

(3) The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a). A neglected juvenile is defined as follows:

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

N.C. Gen. Stat. § 7B-101(15) (2004). Pursuant to N.C. Gen. Stat. § 7B-1109(e) (2004),

The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent. The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

In the present case, the trial court identified the particular grounds for termination of respondent's parental rights in its findings of fact. The trial court made a finding that "[t]here exist grounds for termination of . . . [respondent's] parental rights with respect to the juveniles, J.B. and A.B. The children have been neglected by their parents and have been left in placement outside the home for more than twelve months without making reasonable progress." The trial court clearly identified two specific statutory grounds for termination of respondent's parental rights within its findings of fact. The trial court's order complied with the requirements of N.C.G.S. § 7B-1109(e) that the trial court "shall take evidence, find the facts, and shall adjudicate the existence . . . of any of the

circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e).

V. Finally, respondent argues that the trial court erred by making findings of fact that were not supported by clear, cogent and convincing evidence. Our Court must determine "whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 374, 547 S.E.2d 9, 9-10 (2001)). We are bound by the findings of the trial court "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). We will affirm an order terminating parental rights when the findings of fact support a conclusion of law as to one or more of the grounds stated in N.C.G.S. § 7B-1111. *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 34-35 (1985).

When deciding a petition to terminate parental rights, a trial court must determine the fitness of the parent to care for the children at the time of the termination proceeding. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). A trial court may consider "evidence of neglect by a parent prior to losing custody of a child--including an adjudication of such neglect . . ." *Id.* A trial court may also examine evidence of events which occurred before the prior adjudication of neglect. *Id.* at 716, 319 S.E.2d at 232-33. However, a trial court must make its decision based upon the best interests of the children at the time of the termination proceeding and consider "any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232.

The existence of one of the statutory grounds for termination under N.C.G.S. § 7B-1111 is sufficient to support a termination of parental rights. *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). For the reasons set forth below, we hold that the trial court's findings of fact that respondent neglected the children are supported by clear, cogent and convincing evidence. Therefore, having found that respondent neglected the children in accordance with the terms of N.C. Gen. Stat. § 7B-1111(a)(1), we need not address the remaining ground for termination found by the trial court. *See In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990); *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983).

Respondent specifically assigns error to the following findings of fact contained in the order to terminate parental rights:

4. The minor children were adjudicated to be neglected on April 3, 2003, and were neglected pursuant to North Carolina General Statute 7B- 101, due to [respondent's] inability to provide proper care, supervision, or discipline for the children, due in large part to her drug and alcohol abuse. Specifically, [respondent] neglected the children in that:

i. On several occasions, while [respondent] was out of the home in search of or using illegal drugs, she left the children either completely unsupervised in the home or inappropriately supervised in the home of her ex-husband Manley May, who was a convicted felon; and in that,

ii. [Respondent] was unable to help the children with everyday tasks when they lived with her because she was often "passed out." The elder of the two children, J.B. often had to assume parental duties.

6. Both parents have willfully left the children in foster care or placement outside the home for more than twelve months without showing that reasonable progress has been made in correcting the conditions that led to the children's removal.

8. [Respondent] has in the past denied having a drug or alcohol problem, although [DSS] received several complaints, going back to 1993, concerning situations similar to the one which most recently brought the children into foster care. During the most recent neglect proceeding, [respondent] signed a services agreement with [DSS] but has failed to comply with its recommendations with any consistency and has in the past denied having an alcohol or drug problem. At the last review hearing, on June 12, 2003, the Court made visitation between [respondent] and the juveniles contingent on her completion of both in-patient and out-patient drug and alcohol treatment programs. Shortly after said review hearing, social worker Bobbie Webster advised [respondent] on how to seek such treatment and told her to bring verification of treatment in order to begin scheduling visits. [Respondent] did not provide verification about having begun treatment until the first morning of this hearing.

9. [Respondent] has also failed to keep social workers informed of her whereabouts during much of the time since the last review hearing. Bobbie Webster went to visit [respondent] at her previous address, on Vera Drive in Reidsville, North Carolina, and found only a sign on the door saying that [respondent] no longer lived there. Several months later, in November 2003, [respondent] left a message for Bobbie Webster, stating that she was living with [the father's] father in Greensboro, North Carolina. However, when Ms. Webster would call that telephone number, she could never reach [respondent] there and could only leave a message on the answering machine. [Respondent] was eventually served with a copy of the petition at that address, but as it took some time to do this, Ms. Webster had not known if that was indeed where she was living.

10. [Respondent] briefly reestablished contact with [DSS] in December 2003 when she called Bobbie Webster and promised to bring verification of drug treatment with her when she brought the children's Christmas gifts to the agency. In talking to Ms. Webster, [respondent] was vague about where she had been to treatment and how long she had been there. When she brought the gifts, [respondent] failed to bring the verification of treatment.

11. [Respondent] began a detox and treatment program at Alcohol and Drug Services of Guilford County on December 13, 2003, but has not completed the treatment recommended. She has presented verification of her treatment to the Court and to her social worker for the first time on January 22, 2004.

12. The discharge summary from Alcohol and Drug Services mentions alcohol dependency and withdrawal, but does not mention cocaine use. However, [respondent] and [the father] used crack cocaine together two or three weeks before this hearing commenced.

16. There exist grounds for termination of the respondents' parental rights with respect to the juveniles, J.B. and A.B. The children have been neglected by their parents and have been left in placement outside the home for more than twelve months without making reasonable progress. Both parents have substance abuse problems which have not been adequately addressed.

21. The parental rights of [respondent] and [the father], with respect to [J.B.] and [A.B.], should be terminated and it is in the minor children's best interests that the parental rights of the respondents be terminated.

With respect to finding of fact four, respondent abandons her sufficiency argument and asserts that the finding does not pertain to current conditions of her parental fitness. However, as our Supreme Court has made clear, a trial court may consider evidence of neglect prior to a respondent's loss of custody, including prior adjudications of neglect. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d

at 232. Finding of fact six relates to the additional ground for termination found by the trial court under N.C.G.S. § 7B-1111(a)(3), which we need not address here.

Respondent next challenges findings of fact eight, nine and ten. Respondent also abandons her sufficiency argument with respect to these findings and challenges them on the ground that they are not evidence of neglect nor evidence of the probability of a repetition of neglect. This contention lacks merit. Findings of fact eight and ten go to the heart of the trial court's conclusion that respondent neglected the children. Respondent's neglect of the children stems from her alcohol and drug abuse. Yet, respondent has consistently failed to address her substance abuse problems. As a result, there is a great probability of a repetition of neglect.

Since 1993, DSS has received several complaints alleging that respondent neglected the children due to respondent's substance abuse problems. Respondent entered a services agreement with DSS in which she agreed to undergo treatment for alcohol and drug abuse, but she failed to abide by that agreement. Respondent has also failed to comply with the trial court's order that she undergo substance abuse treatment and provide verification of that treatment in order to visit with the children. Because of respondent's untreated alcohol and drug abuse problems, the children are neglected juveniles in that they do "not receive proper care, supervision, or discipline from [respondent]" and live "in an environment injurious to [their] welfare." N.C.G.S. § 7B- 101(15). As to finding of fact nine, although it is supported by the testimony of Ms. Webster, it is not a necessary finding to conclude that respondent neglected the children.

Respondent next asserts that finding of fact eleven is not supported by clear, cogent and convincing evidence because respondent actually began a detox and treatment program on 27 September 2003 rather than 13 December 2003, as stated in the finding. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2004), a trial court sitting without a jury must: "(1) find the facts specially; (2) state separately the conclusions of law resulting from the facts so found; and (3) direct the entry of the appropriate judgment." *In re Anderson*, 151 N.C. App. 94, 96, 564 S.E.2d 599, 601-02 (2002) (citing *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)). A trial court should find the specific ultimate facts necessary to support its judgment and those facts must be "sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). However, only those findings of fact which constitute ultimate facts need be supported by clear, cogent and convincing evidence. Subsidiary or evidentiary facts do not have to be so supported. A trial court need not state the evidentiary facts relied upon because Rule 52 "does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts." *In re Anderson*, 151 N.C. App. at 97, 564 S.E.2d at 602 (quoting *Quick*, 305 N.C. at 452, 290 S.E.2d at 658).

Respondent here challenges an evidentiary fact included by the trial court in its findings of fact. The date respondent began treatment does not constitute an ultimate fact necessary to prove that respondent neglected the children. Because this fact was not necessary to the trial court's ultimate determination, it is not required to be supported by clear and convincing evidence.

Respondent also argues that finding of fact twelve is not supported by clear and convincing evidence. The trial court found that respondent and the children's father used crack cocaine together two or three weeks before the termination of parental rights hearing. Respondent challenges the finding on the basis that the children's father was not a credible witness. However, it is the "function of trial judges in nonjury trials . . . to weigh and determine the credibility of a witness." *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996) (citing *Ingle v. Ingle*, 42 N.C. App. 365, 368, 256 S.E.2d 532, 534 (1979)). The children's father testified that he and respondent used crack cocaine on 12 January 2004. He admitted that he consumed five beers before coming to

court, but he testified that he was not drunk. The children's father also conceded that he might have misstated the date on which he and respondent consumed the crack cocaine. The children's father did not, however, repudiate his testimony that he and respondent consumed crack cocaine within several weeks before the termination of parental rights hearing. Because there is clear and convincing evidence to support this finding of fact, this argument fails.

Finally, respondent challenges findings of fact sixteen and twenty-one. These findings should properly be labeled conclusions of law, and we will treat them as such. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646 (2000). In finding sixteen, the trial court determined that respondent neglected the children and had not adequately addressed her substance abuse problems. In finding twenty-one, the trial court further determined that the parental rights of respondent and the children's father should be terminated and that it was in the best interests of the children that the parental rights of respondent and the children's father be terminated.

The trial court's findings of fact clearly support these conclusions. Prior to the adjudication of neglect in March 2003, respondent had neglected the children by leaving them either completely unsupervised or inappropriately supervised with a convicted felon. While the children were in her care, respondent was often impaired by her substance abuse and was unable to assist the children with daily tasks. After the adjudication of neglect, respondent failed to comply with the services agreement she entered with DSS. She never completed the inpatient treatment ordered by the trial court as a prerequisite to visitation with the children, nor did she seek treatment for her drug problem. Finally, respondent smoked crack cocaine with the children's father two or three weeks before the termination of parental rights proceeding.

The challenged findings of fact contained in the order to terminate parental rights are supported by clear, cogent and convincing evidence. The mislabeled conclusions of law are supported by the findings of fact. Accordingly, we overrule respondent's assignments of error on this issue.

Affirmed.

Judges HUNTER and LEVINSON concur.

Report per Rule 30(e).

\*\*\* *Converted from WordPerfect* \*\*\*