

No. COAO6-484

EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS  
\*\*\*\*\*

IN THE MATTER OF  
R.B. and A.M., Minor Children

From Wayne County  
No. 04-JA-244  
No. 04-JA-245

\*\*\*\*\*  
APPELLEE GUARDIAN AD LITEM'S BRIEF  
\*\*\*\*\*

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## STATEMENT OF THE CASE

A Notice of Appeal was entered 31 October 2005 by Respondent-Mother (hereinafter referred to as Mother). Mother is appealing the Order of the Honorable R. Les Turner, District Court Judge, decided on 27 October 2005 and filed 23 November 2005. The Order changed the permanent plan from reunification of the juveniles R.B. and A.M. with their Mother to custody and guardianship with the Steven and Doris Johnson.

Two separate but identical signed and verified Petitions were filed on 10 November 2004 stating the juveniles were neglected and living in environments injurious to their welfare. (R.2-4, 8-10) It must be noted that R.B. and A.M., who are half-siblings, have another half-sibling, L.B. who is the subject matter of an open court case COAO6-483. The Mother was served the Summons and Notice of R.B.'s petition on 16 November 2004. (R.7) The Summons and Notice for A.M.'s petition was served on her father, Matthew Mullins. (R.13) Mother was determined indigent and counsel was appointed for her. (R.16) ,

On 29 November 2004 an adjudication and disposition hearing was held for each child and their identical orders were filed 7 January 2005. (R. 25-26, 28,29) The children were adjudicated to be neglected and dependent juveniles and custody was continued with the Mother. (R. 26,29). A hearing

held on 2 December 2004 and order filed on 7 January 2005 resulted in allowing A.M.'s father supervised visits with the juvenile. (R.31-32) On 20 January 2005, the court on its own motion issued an Order to Show Cause against the Mother requiring her to appear in court on 14 April 2005. (RAO) This was served on Mother 25 January 2005. (RA1) Also issued on 20 January 2005 were orders for Nonsecure Custody for both R.B. and A.M. to be placed immediately in the custody of the Department of Social Services (DSS) (RA 2 43)

The Nonsecure Custody Hearing was held 27 January 2005. DSS, retaining custody and given the authority to place the juveniles, placed them both in the home of Steven and Doris Johnson. (R.62,65) Steven and Doris Johnson are the paternal grandparents of R.B. and also have custody of half-sibling L.B. Review hearings set for 14 April 2005, 9 June 2005 and 14 July 2005 were not held and continuance orders were entered. (R.61-62,64-66;R.78 79,80-81;R.95,96) The review hearing was held on 8 August 2005 and the identical orders were filed 15 September 2005. (R.104-107, 108-111). Court set a permanency planning hearing for 27 October 2005. (R.106 107,110-111) The court's written orders were entered and filed 23 November 2005. (R.122,128) The permanency planning orders in each juvenile's case changed the plan from reunification with the Mother to

custody and guardianship with the Johnsons. (R.126-127,132-133) The Notice of Appeal was filed and served by Mother on 1 November 2005. (R.134-135) Appeal Entries were made 28 November and appellate counsel appointed on 5 December 2005 (R.136-138) the record was settled, served and mailed for filing 4 April 2006. (R.148-149) The record was filed in the Court of Appeals 6 April 2006 and the printed record was mailed by the Clerk 11 April 2006.

#### STATEMENT OF FACTS

Respondent-appellant is the Mother of the two juveniles R.B. and A.M. as well as another juvenile, L.B., whose custody and guardianship are also currently being appealed to this court (COA06-483). Each juvenile has a different father. Currently, all three children are staying with Steven and Doris Johnson. The Johnsons are the paternal grandparents of R.B. When the petitions were filed in November 2004, R.B. and A.M. were still living with their Mother, but L.B. had been removed from the home in August 2004. All three petitions cited the Mother's boyfriend at the time, Josh Ryan, as a reason the children were living in an environment injurious to their welfare. Josh Ryan was a registered sex offender who Mother allowed to live in her home with the three children. (RA)

His presence was the main reason L.B. was removed from the home

and one of the two cited reasons for filing the petition on behalf of R.B. and A.M. The second reason for filing the petitions was DSS's concern that Mother was exposing the children to “activities such as Domestic Violence, alcohol and possible drug use.” (R.3,9) The confrontation that spurred the domestic violence incident occurred in late September 2004. The Mother had placed the care of R.B. and A.M. with Matt Mullins (A.M.'s father). Before going further, it is important for the court to know that Mother had previously taken out an ex parte order concerning domestic violence against Matt Mullins in 2003. (R.3,9) Back to September 2004, Mother became concerned with Matt's conduct and wanted her children removed from his care. Mother arrived at Matt's house and found him intoxicated. This led to Mother filing another ex parte domestic violence order of protection against Matt Mullens. (R.72)

At the adjudication and disposition hearing on 29 November 2004, the Mother admitted at the time the petitions were filed each juvenile was a neglected juvenile and there were sufficient facts to make such a finding. (R.25,28) The order from the 29 November 2004 hearing also required mother to comply with the order if she wanted to keep custody of R.B and A.M. (R.25,28)

Time and time again, the court found the Mother had not complied

with the orders. Both orders from 29 November 2004 set a review for 6 January 2005. (R.26,29) DSS and the court had serious concerns when Mother and children disappeared. Mother did not show up for the review on 6 January 2005 and no one knew the whereabouts of her or the children. (R. 33,36) In the DSS report submitted 20 January 2005, SW had been informed by a reliable source that Mother was seen returning to her home on different occasions and removing her belongings. (R.36) The reliable source also informed SW that Mother was seen with Josh Ryan. (R.36)

On 20 January 2005, on the court's own motion, a show cause order was issued to Mother based on her non-compliance with the court orders. (RAO) Also on 20 January 2005, Nonsecure Custody Orders for R.B. and A.M were issued. DSS immediately assumed custody of the children. (RA2,43) When SW went to pick up the children, she asked Mother her previous whereabouts when no one could locate her or the children. Mother became somewhat hostile and refused to provide clothing for the children. (R.59) In the review hearing 27 January 2005, Mother agreed to the continued custody of R.B. and A.M. with DSS. (R.61,64) At this time, the court determined that it would be contrary to the welfare of the children to be placed in the custody of either parent. (R.61,64) DSS placed both children with Steven and Doris Johnson, who also at the time had L.B. living with

them. (R.62,65). The children were together again and reportedly doing well. Both L.B. and her brother R.B. had made the honor roll and all three were receiving therapy. (R.68) The Johnsons were continuing to meet the needs of the children.(R.68) Both fathers of R.B and A.M. have informed SW that they are interested in having their child placed with them. As of April 2005 a Home Study had not been complete for either father. (R.76,78)

In a supervised visit, the children informed the SW that they had spoken with Josh Ryan on the telephone. R.B. told SW that after he had spoken with Josh Ryan, his mother told him to lie and state it was a boy named "Bryan." (R91) As of August, Mother has continued to be non-compliant with certain court orders, although she has chosen a few to check off the list. She has not kept DSS informed of her current address and work situation, has not undergone a psychological evaluation, has not worked with DSS to discuss a case plan nor has she consistently kept up with scheduled visitations (R.IIS). Although Mother had taken some parenting classes and attended therapy. (R.I05,106) A permanency planning hearing was held on 27 October 2005. The court determined that continued reunification efforts would be futile. (R.125, 131) That the Johnsons, who had remodeled their home for the children, were well-bonded with the children and are fit and proper guardians for the children. (R.12S,131)

The Johnsons were awarded custody of R.B. and A.M. and became their guardians. (R.126,132) DSS was relieved of their obligations to continue reunification efforts, Mother was required to continue with therapy and anger management as well as undergo a psychological evaluation. (R.126, 132) A review date was set for 26 January 2006. Mother appealed from these orders on 31 October 2005.

### ARGUMENT

#### A. THE TRIAL COURT MADE SUFFICIENT FINDINGS OF FACT ON WHICH TO BASE THE PERMANENCY PLANNING ORDER.

The permanency planning hearing on 29 November 2004 stated that Mother is a "fit and proper person to have custody of the juvenile if she complies with this order." (R.25#7,28#7) The trial court then goes on to list seven orders which Mother must comply with as a prerequisite to having the court consider whether she will or will not keep custody of R.B. and A.M. They are as follows: Mother will attend therapy with other daughter L.B. as deemed necessary by L.B.'s therapist; will have a complete psychological evaluation and follow recommendations made by evaluator; will cooperate with DSS and the GAL; shall attend and successfully complete anger management classes; shall attend parenting classes; shall submit to random drug tests; and, shall facilitate the visitation between and among her

children. (R.26,29 #'s4,8,9,10,11,12,13) The Appellant points out that the court's orders from 29 November 2004 did not require Mother to keep children away from Josh Ryan. And on this technical detail, Appellant is correct. The court officially ordered the Mother to keep the children away from Josh Ryan in the 8 August 2005 hearing. But Appellant jumps to the conclusion that based on this one detail, the court should overlook the other seven order's listed above and reverse the entire order. (Appellant's Briefp.19) This would be such an offensive disservice to justice. The purpose of the juvenile code is to ensure that the best interests of the juvenile are of paramount consideration by the court. NCGS 7B-100(5) To place the children back with the Mother based on this argument would not serve the best interests of the children.

The petitions for R.B and A.M. both cited that Mother previously had a registered sexual offender, Josh Ryan, living in her home with the children. (RA, 10) But unfortunately for the children, there was more than just the issue of Josh Ryan. DSS was concerned with the mother's poor judgment that exposed her children to domestic violence, alcohol and possible drugs. (R.3,9) The Motion and Order to Show Cause that was issued 20 January 2005 on the court's own motion also referenced Josh Ryan.(RA,10) Again, even though keeping the children away from Josh Ryan was mistakenly

referred to as an order by the court, it is not hard to understand why the court may have done this. Josh Ryan is a registered sexual offender. (RA,10) He is the second reason cited to in R.B. and A.M.'s petition as well as being the main reason for immediate removal of their half-sibling L.B. being removed from the Mother's home. (Juvenile L.B.'s case No. COAO6-483) In the show cause order there were four other orders listed that Mother did not comply with. This is over half of the seven orders initially required by the court.

The Mother was not prejudiced at all. To "have the orders reversed and remanded for a new hearing on this error alone" (Appellant's Brief p.18) would be a grave disservice to justice and the Judicial Code which strives to protect children and serve their best interests. NCGS 7B-100(5)

#### **B. THE TRIAL COURT WAS CORRECT IN REQUIRING MOTHER TO UNDERGO A PSYCHOLOGICAL EVALUATION.**

NCGS 7B-904 describes the authority the court may exercise over parents of a juvenile adjudicated as abused, neglected, or dependent. When looking at the juvenile's best interests, the court under NCGS 7B-904( c) may order the parent to undergo a psychological evaluation directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent. The court found a multitude of reasons to

require Mother to have an evaluation. The following evidence supports the court's decision:

From DSS report 29 November 2004: Mother verbally assaulted SW when SW tried to interview her regarding the allegations. Mother cursed at SW and then yelled that the SW was "worse than a fucking HIV virus."  
(R.17)

\*\*\*\*\*

From DSS report 29 November 2004: That mother had taken out 2 ex parte domestic violence orders against Matt Mullens, and he was cited as one of the reasons why R.B. and A.M.'s petitions were issued, Matt Mullens was at her home with the children when SW arrived to discuss the allegations. Matt left with the children out the back door and would not tell SW where they were going and Mother did nothing to stop him from leaving with her children. (R.1 7)

\*\*\*\*\*

From DSS report 6 January 2005: Mother has not complied with facilitating visitation between her three children. Upon missing visitations, Mother said it was because R.B. and A.M. had the chicken pox. SW called the children's doctor and found out Mother had lied about the children's sickness. (R.23)

\*\*\*\*\*

From DSS and GAL reports both from 20 January 2005; Court Hearing 6 January 2005: Mother disappeared with R.B. and A.M. and no one knew of their whereabouts. (R.33#5,36,39)

\*\*\*\*\*

From DSS report 7 April 2005: When SW and Mother attempted to sit down to work on a case plan, SW informed Mother of a parenting class that would be recommended, Mother became very hostile and stated she would not finish the case plan without her attorney present. (R.68)

\*\*\*\*\*

From DSS report 7 July 2005: During a supervised visit, the children told SW that they still spoke to Josh Ryan. and after R.B. had spoken to him, the Mother told him to lie and say he was talking to a boy named 'Bryan.' (R.91 )

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Court Hearing 8 August 2005: Mother had kept R.B.'s father away from the son for a long time and until recently, the father's parents had believed everything Mother told them which caused father to be somewhat estranged from his parents. (R .104 #7)

\*\*\*\*\*

Court Hearing 8 August 2005: Mother has mood disorders and related problems and is taking anti-depressant medication. (R.105 #14)

\*\*\*\*\*

When all of these examples of the Mother's behavior are examined cumulatively, it is clear the court made the right decision in recommending a psychological evaluation. The court must be convinced the parent truly has changed. Proceedings 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.” In re R.T.W., 359 N.C. 539, 548, 614 S.E.2d 489,495 (2005). By having an evaluation, the court would find out if the Mother had indeed changed and corrected certain areas which caused the children to be adjudicated neglected juveniles. The best interest of R.B. and A.M. would be served if their Mother had an evaluation that was directed towards an attempt to remediate or remedying the Mother's behaviors or conditions that led to or contributed to the juveniles' adjudication or to the court's decision to remove custody of the juvenile from the parent. NCGS 7B-904(c).

C. THE TRIAL COURT MADE PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED ON SUFFICIENT CLEAR AND

CONVINCING EVIDENCE TO SUPPORT GUARDIANSHIP AND THE  
PERMANENT PLAN IN THE PERMANENCY PLANNING REVIEW  
ORDER.

Appellant argues that the trial court failed to comply with its statutory responsibility and its duty to make sufficient findings based on sufficient evidence. (Appellant's brief, p. 23) The following statutes are the ones which the Appellant's Brief calls into question: NCGS 7B-507 requires the use of reasonable efforts in working to protect a child and achieve his or her best interests; NCGS 7B-600 grants the court authority to appoint a guardian; NCGS 7B-906 governs the review of juvenile custody orders while NCGS 7B-907 governs permanency planning hearings. The clear language of the statutes has been interpreted to require that the court need only make findings as to relevant criteria; therefore, an order entered under these statutes need not specifically identify a finding directed at each listed criteria in the statutes. See *In re JD.S.*, 164 N.C. App. 96, 106; 595 S.E.2d 155, 161 (2004).

In this case, Appellant argues that there were not sufficient written findings to support the court's conclusions as to why the best interests of the child would be to not return child to Mother's home within the next 6 months. (Appellant's Brief p. 25). The court made numerous sufficient

findings listed below to support the conclusion that return to the home was unlikely within the next six months. Those findings include, among the others listed above in Section B of this Brief:

That the mother is under order to provide the guardian ad litem and the Department of Social services with her current telephone numbers and address, but never gave the social worker her Old Grantham Road address even though she saw the social worker when she visited with the juvenile. (R.122#8, 129#9)

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That the mother has been ordered to undergo a Psychological evaluation but has not done so. (R.123#14; 129#15)

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That it does not appear to the Court that the mother has conquered her anger problems. (R.124#28; 131 #29)

\*\*\*\*\*

That continued reunification efforts would be futile. (R.125#38; 131#39)

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At the permanency planning hearing stage of juvenile proceedings, there appropriately is a shift in balance toward the child. While the parents'

right to maintain the family must be considered, at this stage the child's best interests are paramount. In re T.K. et al., --- N.C. App. ---, 613 S.E.2d 739, 743, affirmed, 360 N.C. 163 (2005). Further, if the interests of the parents conflict with the welfare of the child, the latter should prevail. In re Parker, 90 N.C. App. 423, 431, 368 S.E.2d 879, 884 (1988). In analyzing both the foregoing lists of facts above and in Section B of this brief from the perspective of the children's best interests, the court obeyed the criteria of the statute and came to the only reasonable conclusion.

The Appellant's Brief further questions why the court did not place R.B and A.M. with a relative. Specifically it is pointed out that the court made no findings in respect to why custody with the maternal grandfather was not considered (Appellant's Brief p. 28). Yet testimony from the trial may have led the court to not consider the maternal grandfather for custody since he has not made Wayne County his permanent residence, he has traveled back and forth from California for the last ten years, and he is retired. (Appellant's Brief pp. 62,63). The Appellant claims that DSS did not make reasonable efforts in assisting Mother with reunification. (Appellant's Brief p. 28) NCGS 7B-907(b)(5) sets the standard for DSS to meet as 'reasonable efforts' to implement the permanent plan for the juvenile. Reasonable is a relative term, and varies depending on the point of view.

Because the focus in the Juvenile Code is on the "juvenile," it is necessary when considering what constitutes "reasonable" from the child's point of view. Reviewing the following findings of fact from the Court Order, the D.S.S. worker used reasonable efforts to the best of their ability in light of the mother's continued uncooperativeness and angry outbursts. From DSS report 29 November 2004: Mother verbally assaulted SW when SW tried to interview her regarding allegations. Mother cursed at SW and then yelled that the SW was "worse than a fucking HIV virus." (R.17)

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From DSS report 6 January 2005: Mother has not complied with facilitating visitation between her three children. Upon missing visitations, Mother said it was because R.B. and A.M. had the chicken pox. SW called the children's doctor and found out Mother had lied about the children's sickness. (R.23)

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From DSS and GAL reports both from 20 January 2005; Court Hearing 6 January 2005: Mother disappeared with R.B. and A.M. and no one knew of their whereabouts. (R.33#5,36,39)

\*\*\*\*\*

From DSS report 7 April 2005: When SW and Mother attempted to sit

down to work on a case plan, SW informed Mother of a parenting class that would be recommended, Mother became very hostile and stated she would not finish the case plan without her attorney present. (R.68)

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That the mother of the juvenile was counseled in Court as to the importance of working with and cooperating with the Wayne County Department of Social Services. (R.26#9; 29#9)

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From DSS report 20 January 2005: SW, along with the help of the police made numerous attempts to track down Mother who appeared to be moving when seen removing belongings from residence.(R.36)

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From DSS report 27 January 2005: Mother was hiding out from DSS. SW received numerous tips that Mother was sneaking her belongings out of her house in an attempt to avoid contact with DSS. (R.59)

\*\*\*\*\*

Appellant contends that the court did not make sufficient findings indicating its obligations to verify that the guardians understood the legal significance of the placement. (Appellant's Brief p 31) In determining who would receive custody of R.B. and A.M., the court was required to verify

that the person or persons receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. NCGS 7B-907(f). The court made sufficient findings when they placed the children in the custody of the Johnsons. From DSS report 7 April 2005: R.B. and A.M. continue to do well in their current placement with the Johnsons. R.B. is doing well in school and made the honor roll for the last reporting period.(R.68)

\*\*\*\*\*

That the juvenile is well bonded with the current custodians who are the grandparents of one of the half-siblings of this juvenile. (R.125#31; 131#32)

\*\*\*\*\*

That Steven and Doris Johnson are fit and proper persons to have the continued custody of the juvenile and to be designated as the guardian of the juvenile. (R.125#32; 131#33)

\*\*\*\*\*

From DSS report 26 October 2005: "The agency has also spoken with the current caretakers about their commitment to these children. The Johnson's have agreed to assume guardianship of all three children. (R.120)

\*\*\*\*\*

That the petitioner recommends that the permanent plan for the juvenile be changed from reunification to placement and guardianship with Steven and Doris Johnson. (R.125#33; 131#34)

\*\*\*\*\*

That the Johnsons have added two bedrooms to their home to ensure that the juvenile and the half-siblings of the juvenile have a place with them. (R.125#35; 131#36)

\*\*\*\*\*

1. NCGS 7B-905 of the Juvenile Code Governs the Trial Court's Decision Regarding Visitation.

Appellant contends the trial court erred in ordering visitation between Mother and R.B. and A.M. to be at the discretion of the guardians. (Appellant's Brief p. 27) Section 7B-905 of the Juvenile Code provides in pertinent part: Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. NCGS 7B-905(c). Where custody is removed from a parent, the court must conduct a review hearing

within ninety days from the date of the dispositional hearing. NCGS 7B-906(a). The trial court's order in this case placed custody of R.B. and A.M. with the Johnson's and named them as their guardians. (R.161) The Wayne County D.S.S. was relieved of the obligation of continuing reunification efforts between the children and their Mother. (R.161) But neither the GAL nor DSS was released from the case. The trial court is continuing to review the matter and set the next review date for 26 January 2006. The court, in following the requirement of N.C. Gen. Stat. 7B-906(a) to conduct a review hearing within 30 days and not releasing the Guardian ad Litem or DSS from the case, has left the door open to revise the visitation issue later.

In the order entered 27 October 2005, the trial court ordered that "visitation between the juvenile and the mother shall be supervised by the custodians and shall be in the discretion of the custodians, but shall not be unreasonably prevented." (R.127 # 13; 133# 13) Appellant argues that the trial court erred by delegating visitation decisions to the custodians. (Appellant's Brief p. 27). We agree. The trial court should have entered a visitation schedule supervised by the court. The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child. *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). The trial court may also in its order,

however, grant some "good faith" discretion to the person in whose custody the child is placed to suspend visitation if such visitation is detrimental to the child. See *Woncik v. Woncik*, 82 N.C. App. 244, 250, 346 S.E.2d 277, 281 (1986).

The trial court was correct in coming to the conclusion that the Johnsons should be granted custody and guardianship of R.B. and A.M. This was the proper result based on the best interest of the children. However, the trial court improperly gave the Johnsons discretion over visitation instead of making the required findings of fact. This portion of the dispositional order should be reversed and remanded to the trial court for proceedings regarding visitation.

D.THE TRIAL COURT MADE PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED ON SUFFICIENT CLEAR AND CONVINCING EVIDENCE TO SUPPORT GUARDIANSHIP AS THE PERMANENT PLAN IN THE PERMANENCY PLANNING REVIEW ORDER AND HAD PROPER AUTHORITY TO INCORPORATE DSS AND GAL REPORTS BY REFERENCE.

The court has the discretion to incorporate reports and summaries submitted by the GAL and DSS into its findings of fact. Under NCGS 7B-907(b), the court is

given discretion to base its findings on "... information from the parent, the juvenile, the guardian, any foster parent, relative or pre-adoptive parent providing

care for the child, the custodian or agency with custody, the guardian ad litem, and

any other person or agency which will aid it in the court's review. The court may

consider any evidence, including hearsay evidence as defined in G.S. 8C-I, Rule

801, that the court finds to be relevant, reliable, and necessary to determine the

needs of the juvenile and the most appropriate disposition." And absent "any bright line rule of reversal that assures all of the ultimate facts and logical reasoning process that persuade a trial court's disposition in a case are \Illy and

patently set forth in the actual written orders, broad incorporations will continue..." (Appellant's Brief p. 33).

Appellee is unaware of any blanket prohibition against using language from

other documents to form the basis of a trial court's order. In fact, this Court,

In re

S.L.G, T.R.G, recently wrote:

:"

Respondent-father notes that certain findings in the termination order are practically identical to certain allegations in DSS's motion to terminate his parental rights as to T.R.G. and that the court's findings set forth some of the procedural history of the case. These observations are immaterial to a determination as to whether the trial court made adequate factual determinations. The court was neither precluded from finding that the allegations in DSS's motion were correct, nor forbidden to make findings substantially similar to those allegations; rather, the court was precluded from terminating respondent-father's parental rights if it did no more than indicate that DSS had alleged certain facts. Likewise, the court was not precluded from setting forth the procedural history of the case so long as it made findings as to the ultimate facts arising in the case pending before it.

In re SL.G, TR.G, COA05-458, 2006 N.C. App. LEXIS 492, at \*15-16 (March 7, 2006) (citations omitted) (emphasis added).

The trial court's order contains ample findings of fact to support the court's determination that giving the Johnson's custody was in R.B. and A.M.'s best interests.

## CONCLUSION

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Ajuvenile's best interests are controlling in a permanency planning review hearing. Taking into account R.B. and A.M.'s best interests, the trial court was correct in awarding custody and guardianship to the Johnson's. The trial court's

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order should be affirmed except for the portion delegating visitation decisions to

theJohnson's. This should be reversed and remanded to the trial court for

.."

proceedings regarding visitation.

Respectfully submitted, this \d- day of June, 2006.

zv-Q-J

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#### CERTIFICATE OF TYPE STYLE FILING AND SERVICE

, This is to certify pursuant to Rule 28G)(2)(A)(2) of the North Carolina Rules of Appellate Procedure that the foregoing Appellee's Brief contains 5,020 words, which is less than the word count limit of 8,750 for briefs using Times New Roman proportional type. The undersigned relies on the word count reported by Microsoft Word Processing software.

A copy of Appellee's Brief has been duly filed with the North Carolina Court of Appeals and 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:

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Respectfully submitted, this i?- day of June, 2006.

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APPENDIX TO APPELLEE'S BRIEF

Un12ublished Case

In the Matter alS.L.G, TR.G, COA05-458, 2006 N.C. App. LEXIS 492,

at \* 15-16 (March 7, 2006)

Testimony from Transcript

Mother, Respondent-Appellant

Transcript pp.41-42 (denoted here in Appendix as pp.62,63)

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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. COA05-458

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NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

IN THE MATTER OF S.L.G.

T.R.G.

Halifax County Nos. 03 J 10, 11

Appeal by respondents from judgments entered 15 July 2004 by Judge H. Paul McCoy, Jr., in Halifax County District Court. Heard in the Court of

Appeals 7 December 2005.

Jeffery L. Jenkins for Halifax County Department of Social Services  
petitioner appellee.

Michael J Reece for respondent-mother appellant.

Richard E. Jester for respondent-father appellant.

McCULLOUGH, Judge.

The present appeal arises from district court orders terminating the parental rights of respondentmother as to the minor children S.L.G. and T.R.G. and terminating the parental rights of respondentfather as to the minor child T.R.G. Respondents appeal, and we affirm.

#### Facts

S.L.G. is the biological child of respondent-mother. Respondent-father's paternity ofS.L.G. has not been conclusively established. T.R.G. is the biological child of both respondents.

S.L.G. was born in March of 2001. At this time, respondent- mother was receiving case management services from the Halifax County Department of Social Services (DSS), which includedreferrals for respondent-p1other to receive inpatient and outpatient substance abuse treatment. However, respondentmother continued to abuse cocaine and marijuana. T.R.G. was

born seven weeks premature in January of 2003. Both T.R.G. and respondent-mother tested positive for cocaine at the time of T.R.G.'s birth.

Respondents' relationship has been violent at times, and in 2003, they were living apart. At some point, respondent-mother and S.L.G. lived with the child's maternal grandparents, who were not able to care for the child because of their age and medical conditions, and respondent-father lived in a house with no electricity. In early 2003, each respondent was on criminal probation. Both juveniles were placed in the nonsecure custody of DSS in February of 2003 based on DSS's allegations that the children were neglected and dependent.

During a 10 February 2003 child planning conference, respondent-mother agreed to enter a residential substance abuse treatment program, and respondent-father agreed to undergo an assessment to determine the need for substance abuse treatment. Respondent-mother began an inpatient substance abuse treatment program and, thereafter, an intensive outpatient program. The terms of her criminal probation required drug and alcohol testing. Drug screens conducted pursuant to the terms of respondent-father's criminal probation revealed the presence of cocaine in his system; however, respondent-father consistently denied using illegal drugs. Following a hearing held on 27 March 2003, a district court

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judge entered orders adjudging S.L.G. and T.R.G. to be neglected and dependent juveniles. The court also entered dispositional orders which required the children to remain in the custody of DSS and in the foster care which DSS had arranged for them, but permitted supervised visits between the children and respondents and set a goal of reunification between the children and respondents. Both respondents were directed to complete substance abuse treatment, submit to random drug testing, attend parenting and domestic violence classes, secure and maintain stable housing, and cooperate with child support establishment and enforcement orders. The disposition orders also provided for the suspension of visitation privileges for either respondent who tested positive for drugs or alcohol.

During the ensuing ninety days, both respondents completed parenting classes and made progress in their respective housing situations. Respondent-father completed an outpatient substance abuse treatment

program; however, respondent-mother failed to complete her outpatient program. Both respondents tested positive for cocaine in May of 2003, and their visitation with the juveniles was suspended.

After a 26 June 2003 review hearing, the court determined that the plan for the juveniles would remain reunification with respondents, but the court ordered that no visitation take place between the children and respondents until each respondent tested negative for illegal drugs in two consecutive drug tests. The court also directed respondents to continue with substance abuse treatment, to attend Alcoholics Anonymous ("AA") and Narcotics Anonymous ("NA") meetings three times per week, to submit proof of AA and NA attendance, and to continue to submit to random drug screens.

The evidence at a 24 November 2003 review hearing tended to show that respondent-mother tested positive for cocaine in September of 2003 and that respondent-father had not complied with the order to submit to drug tests, even though a DSS social worker made repeated requests that he do so. Accordingly, neither parent visited with the children. Further, neither parent had submitted proof of AA or NA attendance. Following the 24 November 2003 hearing, the court ordered that the juveniles remain in the custody of DSS, suspended visitation pending further review, and set a date for a permanency planning hearing to determine a new permanent plan for the

juveniles.

The evidence at an 8 January 2004 permanency planning hearing tended to show that respondentmother had re-entered a drug treatment program, but left without completing it. Respondent- mother provided evidence that she had been attending AA and NA since December of2003. Respondent-father testified that he had been attending AA and NA meetings during December, but he did not provide any documentation in support of his testimony. As of the 8 January 2004 hearing, the children had been in foster care for eleven months and had not visited with respondents for eight months. Following this hearing, the court directed DSS to determine whether the children could be placed with respondentfather's mother, but also permitted DSS the discretion to file a motion for termination of parental rights.

DSS contacted respondent-father's mother and determined that she was unwilling and unable to provide a permanent home for the children. Therefore, on 11 February 2004, DSS filed motions to terminate the respondents' parental rights as to S.L.G. and T.R.G. At an 8 April 2004permanency planning hearing, the children's maternal aunt, Barbara Dominguez appeared and testified that she was willing to provide a home for the children. The court determined that Dominguez had medical problems which prevented her from caring for the juveniles. The court changed the

plan for the juveniles to adoption. .

Following a hearing on 10 June 2004, the trial court found that the following grounds existed to terminate respondents' parental rights: (1) the children were neglected, and there was a reasonable probability that the neglect would continue; (2) the children had been left in foster care for more than twelve months, and the respondents had failed to make reasonable progress towards correcting the conditions which led to the children's removal; and (3) the children had been in the custody of DSS for at least one year. But respondents paying a reasonable portion of the cost of child care despite an ability to do so: The court determined that a termination of parental rights would serve the best interests of each child. Accordingly, the court terminated the parental rights of respondent-mother as to both S.L.G. and T.R.G. and terminated the parental rights of respondent-father as to T.R.G.; the motion to terminate respondent-father's parental rights as to S.L.G. was dismissed because there had been no

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determination that he was the father of S.L.G.

Respondents now appeal.

## Discussion

### Respondent-mother's Appeal

#### I.

On appeal, respondent-mother first contends that the trial court erred by determining that grounds existed to terminate her parental rights as to both children. This contention lacks merit.

This Court reviews an order terminating parental rights for whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental rights should be terminated for one of the grounds set forth in the General Statutes. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). Where a trial court concludes that parental rights should be terminated pursuant to several of the statutory grounds, the order of termination will be affirmed if the court's conclusion with respect to anyone of the statutory grounds is supported by findings of fact which are appropriately grounded in the record. *In re Swisher*, 74 N.C. App. 239,240-41,328 S.E.2d 33,34-35

(1985). .

Pursuant to N.C. Gen. Stat. § 7B-1111(a)(2) (2005), a parent's rights to a child may be terminated if [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

"A finding of willfulness does not require a showing of fault by the parent." Oghenekevebe, 123 N.C. App. at 439, 473 S.E.2d at 398. "Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." In re McMillon, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175, disc. review denied, 354 N.C. 218, 554 S.E.2d 341 (2001). "A finding of willfulness is not precluded even if the respondent has made some efforts to regain custody of the children." In re Nolen, 117 N.C. App. 693, 699, 453 S.E.2d 220, 224 (1995).

In the instant case, the trial court's termination orders indicate that respondent-mother's substance abuse problem played a significant role in the removal of S.L.G. and T.R.G. from her custody, and the orders are replete with allusions to respondent-mother's failure to address this problem during the children's sixteen-month stay in foster care. On these facts, we discern no

error in the trial court's conclusion that respondent-mother left her children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made to correct the conditions which led to the removal of the children.

Our holding with respect to this ground for tennination makes it unnecessary for us to consider respondent-mother's arguments concerning the other grounds upon which her parental rights were tenninated. See Swisher, 74 N.C. App. at 240-41, 328 S.E.2d at 34-35.

## II.

Respondent-mother also contends that the trial court erred by detennining that it was in the best interests of the children that her parental rights be tenninated. This contention also lacks merit.

If a trial court detennines that grounds to terminate parental rights exist, "the court shall issue an order terminating the parental rights of such parent with respect to the juvenile unless the court. shall further determine that the best interests of the juvenile require that the parental rights of the par t not be terminated." N.C. Gen. Stat. § 7B-1110(a) (2003), amended by 2005 N.C. Session Laws ch. 398, § 7. "The trial court's decision to terminate parental rights, if based upon a finding of one or more of the statutory grounds

supported by evidence in the record, is reviewed on an abuse of discretion standard." McMillon, 143 N.C. App. at 408,546 S.E.2d at 174.

Given the facts and circumstances of the instant case, we discern no abuse of discretion in the trial court's determination that the best interest of S.L.G. and T.R.G. would be served by terminating respondent-mother's parental rights.

### III.

The foregoing analysis makes it unnecessary to address respondent-mother's remaining arguments.

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The trial court's termination orders are affirmed with respect to respondent-mother's appeal.

Respondent - father's A

### I.

On appeal, respondent-father first argues that the trial court erred by

considering prior orders entered  
in the instant case. We disagree.

Resp09-dent-father's argument is subdivided into three contentions concerning the previously entered orders. His first qualm with the trial court's consideration of these orders is that they "were entered at different times, in different hearings, some with different standards of proof." This Court has held that determinations made by a court in prior orders, such as findings of neglect, are not determinative of the issues before the court at a subsequent termination hearing. See *In re Byrd*, 72 N.C. App. 277,280,324 S.E.2d 273, 276 (1985). However, such prior determinations may be considered by the court at the termination hearing as evidence of whether there are grounds to terminate parental rights. *Id.* Regardless of the burden of proof required at any other stage of the proceedings, adjudicatory findings made in an order terminating parental rights must" be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-11 09(f) (2005).

The order at issue in the instant case reflects that the trial court appropriately considered its prior orders as well as the evidence presented at the termination hearing to determine whether respondentfather's parental rights as to T.R.G. should be terminated. Further, the order clearly reflects

that the trial court correctly applied the "clear, cogent and convincing evidence" standard in making its adjudicatory findings.

Respondent-father also challenges consideration of the previous orders based on his assertion that "the reports referenced in the prior orders contain considerable hearsay. . . . One social worker testified. . . to confirm the reports[, such that h]earsay was stacked upon hearsay." The record is bereft of any indication that respondent-father raised hearsay concerns at the termination hearing; therefore, this

particular argument has been waived. See N.C. R. App. P. 10(b)(1) (2006) ("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. . . . It is also necessary for the complaining party to obtain a ruling. . . .").

Finally, respondent-father insists that consideration of the prior orders constituted a violation of his federal constitutional right of confrontation as enunciated in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). However, this Court has held that *Crawford* is inapplicable to proceedings to terminate parental rights because such proceedings are civil, rather than criminal, in nature. *In re D.R.*, - N.C. App. -' \_\_,616 S.E.2d 300,303 (2005). Accordingly, we reject respondent-father's argument that

the trial court improperly considered its previously entered orders. The corresponding assignment of error is overruled.

## II.

Respondent-father next contends that the order terminating his parental rights as to T.R.G. must be reversed because the trial court failed to make independent findings of fact. This contention lacks merit.

In cases involving the possible termination of parental rights, a trial court is under a duty to "not simply 'recite allegations[;]'" it must instead "[go] through "processes of logical reasoning from the evidentiary facts" [and] find the ultimate facts essential to support the conclusions of law." In re Harton, 156 N.C. App. 655,660,577 S.E.2d 334,337 (2003) (citations omitted). A trial court's findings will be considered sufficient in this regard if they permit an appellate court "to determine that the judgment is adequately supported by competent evidence." In re Anderson, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted).

Respondent-father notes that certain findings in the termination order are practically identical to certain allegations in DSS's motion to terminate his parental rights as to T.R.G. and that the court's findings set forth some of the procedural history of the case. These observations are immaterial to a determination as to whether the trial court made adequate factual

determinations. The court was neither

precluded from finding that the allegations in DSS's motion were correct, nor forbidden to make findings

substantially similar to those allegations; rather, the court was precluded from terminating respondent

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father's parental rights if it did no more than indicate that DSS had alleged certain facts. See, e.g., Harton, 156 N.C. App. at 660, 577 S.E.2d at 337; Anderson, 151 N.C. App. at 97, 564 S.E.2d at 602. Likewise, the court was not precluded from setting forth the procedural history of the case so long as it made findings as to the ultimate facts arising in the case pending before it.

Our review indicates that the trial court made findings which are sufficient to permit this Court to determine whether the challenged termination order is supported by evidence in the record. The corresponding assignment of error is overruled.

### III.

In his final argument on appeal, respondent-father contends that the trial court erred by determining that grounds existed to terminate his parental rights as to T.R.G., and erred by determining that a termination of his parental rights was in T.R.G.'s best interest. This contention also lacks merit.

We reiterate that the trial court's termination order must be affirmed if its findings as to anyone of the statutory grounds for termination is supported by clear, cogent, and convincing evidence and if those findings support a conclusion that parental rights should be terminated. Ante, slip op. at 6-7. Likewise, we again observe that the trial court's decision to terminate parental rights, if based upon a finding of one or more of the statutory grounds supported by evidence in the record, is reviewed on an abuse of discretion standard. Ante, slip op. at 8.

In the instant case, the trial court concluded that, pursuant to section 7B-111(a)(2), a ground for termination of parental rights existed because respondent-father had willfully left T.R.G. in placement outside of the home for more than twelve months without making reasonable progress towards correcting the circumstances which led to the removal of the juvenile. The court's termination order indicates that, like respondent-mother, respondent-

father had a substance abuse problem which contributed to the removal of T.R.G. and that respondent-father failed to sufficiently address this problem during the child's sixteen-month stay in foster care. On these facts, we discern no error in the trial court's conclusion that respondent-father had left T.R.G. in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress had been made to correct the conditions which led to the removal of the child, and we discern no abuse of discretion in the trial court's decision to terminate respondent-father's parental rights as to T.R.G.

The corresponding assignments of error are overruled.

#### . IV.

The foregoing analysis makes it unnecessary to address respondent-father's remaining arguments on appeal. The trial court's order terminating respondent-father's parental rights as to T.R.G. is affirmed.

#### Conclusion

The trial court's order terminating respondent-mother's parental rights as to S.L.G. and T.R.G. is affirmed, and the order terminating respondent-father's parental rights as to T.R.G. is affirmed. Affirmed.

Judges HUNTER and GEER concur.

Report per Rule 30(e).

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