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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-255

Filed: 5 September 2017

New Hanover County, No. 16 JA 232

IN THE MATTER OF: M.H.

Appeal by respondent from order entered 22 November 2016 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 8 August 2017.

*Dean W. Hollandsworth for petitioner-appellee New Hanover County Department of Social Services.*

*Robert W. Ewing for respondent-appellant mother.*

*Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.*

DAVIS, Judge.

B.H. (“Respondent”) appeals from an order adjudicating her son, M.H. (“Mark”),<sup>1</sup> to be a neglected juvenile. After careful review, we vacate and remand.

**Factual and Procedural Background**

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<sup>1</sup> Pseudonyms and initials are used throughout this opinion to protect the identity of the minor child and for ease of reading. N.C. R. App. P. 3.1(b).

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On 22 August 2016, the New Hanover County Department of Social Services (“DSS”) filed a petition alleging that Mark was a neglected juvenile pursuant to N.C. Gen. Stat. § 7B-101(15). The allegations in the petition stated as follows:

The child was born to the mother two days ago. She does not have legal custody of any of her other five children, who were removed from her care in August of 2015. She has not been compliant with mental health treatment, has not submitted to a psychological evaluation, has not established a stable residence or employment, has not participated in parenting classes or been generally successful in her Family Services Case Plan to the degree required to regain legal custody of her children during the past year that they have been in the legal custody of the New Hanover County Department of Social Services. Her behaviors are such that this infant would not be safe in her care. The father of the child has an extensive criminal history including felony drug convictions and has recently completed probation. He has no concerns about the care that the mother would provide this child despite having knowledge of her history and present involvement with child protective services. This infant would be in a dangerous situation if discharged to the care of the mother and father.

DSS subsequently obtained non-secure custody of Mark.

An adjudicatory hearing was held on 22 September 2016 before the Honorable J.H. Corpening, II. At the beginning of the hearing, the parties presented to the trial court a stipulation concerning certain facts relevant to the adjudication. All of the parties, including Mark’s father,<sup>2</sup> agreed to the stipulation, which stated as follows:

This child was born to the mother two days ago. She does

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<sup>2</sup> The father is not a party to this appeal.

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not have legal custody of any of her other five children, who were removed from her care in August of 2015. She has not been generally successful in her Family Services Case Plan to the degree required to regain legal custody of her children during the past year, requiring them to be in the custody of New Hanover County Department of Social Services. The father of the child has a criminal history including felony drug convictions and has recently completed probation. He has no concerns about the care that the mother would provide this child.

Upon receiving this stipulation, the trial court adjudicated Mark to be a neglected juvenile and proceeded to the dispositional stage of the hearing.

On the same day, the trial court entered its order on adjudication and disposition. The order contained the following pertinent finding of fact with respect to adjudication:

2. All parties stipulated to the neglect allegations as contained in the Juvenile Petition and as follows: The Juvenile is a neglected Juvenile, in that the Juvenile[ ] does not receive proper care, supervision, or discipline from the Juvenile's parents and lives in an environment injurious to the Juvenile's welfare. Specifically, on or about August 19, 2016 and preceding: This child was born to the mother two days ago. She does not have legal custody of any of her other five children, who were removed from her care in August of 2015. She has not been generally successful in her Family Services Case Plan to the degree required to regain legal custody of her children during the past year, requiring them to be in the custody of the New Hanover County Department of Social Services. *Her behaviors are such that this infant would not be safe in her care.* The father of the child has a criminal history including felony drug convictions and has recently completed probation. He has no concerns about the care that the mother would provide this child. All parties agreed to such stipulation to

neglect and the Court found the Juvenile to be neglected.

(Emphasis added.)

Based upon this finding, the trial court adjudicated Mark to be a neglected juvenile. In the dispositional portion of the order, the court determined that it would be in Mark's best interests to remain in DSS's custody pending the next hearing in the case. Respondent filed a timely notice of appeal.

### **Analysis**

Respondent argues that the trial court erred by adjudicating Mark to be a neglected juvenile. We review the trial court's order of adjudication to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Q.A.*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 862, 864 (2016) (citation, quotation marks, and brackets omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, \_\_ N.C. App. \_\_, \_\_, 781 S.E.2d 685, 689, *disc. review denied*, 369 N.C. 182, 793 S.E.2d 695 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

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As an initial matter, we note that this is a case in which the parties purported to consent to the adjudication pursuant to N.C. Gen Stat. § 7B-801(b1). That provision authorizes the court to enter “a consent adjudication order” if

- (1) All parties are present or represented by counsel, who is present and authorized to consent.
- (2) The juvenile is represented by counsel.
- (3) The court makes sufficient findings of fact.

N.C. Gen. Stat. § 7B-801(b1) (2015). Here, Respondent argues that the consent adjudication was improper because — despite the parties’ stipulation — the trial court failed to meet the requirement under N.C. Gen. Stat. § 7B-801(b1)(3) of “mak[ing] sufficient findings of fact” to support such an adjudication of neglect.

We must first determine which factual findings are binding on appeal. Respondent argues that Finding No. 2 incorrectly stated that the parties stipulated that Respondent’s “behaviors are such that [Mark] would not be safe in her care.” In its appellate brief, DSS concedes that the inclusion of this sentence in the trial court’s finding was error and that this portion of Finding No. 2 should not be considered in evaluating whether there were sufficient findings to support the adjudication. We therefore must consider whether the trial court’s remaining findings supported Mark’s adjudication as a neglected juvenile. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (“When . . . ample other findings of fact support an

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adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error.”)

The uncontested and binding findings of fact pertinent to this issue are as follows:

Specifically, on or about August 19, 2016 and proceeding: This child was born to the mother two days ago. She does not have legal custody of any of her other five children, who were removed from her care in August of 2015. She has not been generally successful in her Family Services Case Plan to the degree required to regain legal custody of her children during the past year, requiring them to be in the custody of the New Hanover County Department of Social Services. . . . The father of the child has a criminal history including felony drug convictions and has recently completed probation. He has no concerns about the care that the mother would provide this child.

N.C. Gen. Stat. § 7B-101(15) includes in the definition of a neglected juvenile a juvenile “who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker . . . or who lives in an environment injurious to the juvenile’s welfare . . . .” N.C. Gen. Stat. § 7B-101(15) (2015). “This Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected.” *In re L.Z.A.*, \_\_ N.C. App. \_\_, \_\_, 792 S.E.2d 160, 168-69 (2016) (citation, quotation marks, and emphasis omitted).

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Additionally, “[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.” N.C. Gen. Stat. § 7B-101(15). The trial court may therefore “consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect.” *In re McLean*, 135 N.C. App. 387, 394, 521 S.E.2d 121, 126 (1999).

Moreover, a newborn “child may be adjudicated as neglected by a parent even if the child has never resided in the parent’s home.” *In re K.J.D.*, 203 N.C. App. 653, 661, 692 S.E.2d 437, 443 (2010). In such cases, “the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” *Id.* at 661, 692 S.E.2d at 443-44 (citation and quotation marks omitted).

Respondent argues on appeal that Finding No. 2 fails to establish the presence of “some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected.” *L.Z.A.*, \_\_ N.C. App. at \_\_, 792 S.E.2d at 168-69 (citation, quotation marks, and emphasis omitted). We agree.

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Although, as noted above, a prior adjudication of neglect of another juvenile in a respondent's household is relevant to whether the juvenile at issue is neglected, there is insufficient information in Finding No. 2 — and in the supporting stipulation — to support an adjudication of neglect based simply upon the prior adjudications of neglect as to other juveniles in Respondent's home. In cases where it has been determined that a respondent's prior history of neglect demonstrates neglect in a subsequent case, the evidence generally provides at least one of the following: (1) specific information regarding the conditions leading to those prior adjudications, *see, e.g., In re Leftwich*, 135 N.C. App. 67, 72-73, 518 S.E.2d 799, 803 (1999) (detailing mother's history of alcoholism and various harms experienced by her other children precipitating their neglect adjudications); (2) information on the ways in which the respondent failed to abide by conditions imposed in connection with the prior adjudication, *see, e.g., In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (“[T]he historical facts of the case included the fact that respondent had twice violated court-ordered protection plans with DSS—once after her four other children had already been removed from her custody—and was failing to take responsibility for harm that befell her children as a result of her conduct.”); *In re E.N.S.*, 164 N.C. App. 146, 150, 595 S.E.2d 167, 170 (2004) (detailing various “behavior[s] that evidenced [respondent] would neglect” the juvenile at issue in the subsequent case based upon specific violations of respondent's earlier case plan); or (3) “additional evidence



bearing on the issue of neglect besides the prior abuse and neglect . . . [.]” *In re S.H.*, 217 N.C. App. 140, 143, 719 S.E.2d 157, 159 (2011).

Here, conversely, none of those elements are present in the trial court’s findings on adjudication. In fact, there is a complete absence of detail from which we can assess whether Respondent’s prior adjudications actually establish “a substantial risk of such impairment” of Mark. *L.Z.A.*, \_\_ N.C. App. at \_\_, 792 S.E.2d at 168-69 (citation and emphasis omitted). There is only the vague statement that Respondent “has not been generally successful in her Family Services Case Plan to the degree required to regain legal custody of her children during the past year[.]”

We have previously explained that “[i]n cases of this sort, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.” *P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406 (citation and quotation marks omitted). Here, the scant facts set forth by the trial court preclude us from reaching a determination that there was a substantial risk of impairment to Mark based simply upon the fact that Respondent’s other children had been adjudicated neglected and she had not regained custody of them. Accordingly, we conclude that the trial court erred in adjudicating Mark to be a neglected juvenile.

### **Conclusion**

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For the reasons stated above, we vacate the trial court's 22 November 2016 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).