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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1021

Filed 15 August 2023

Vance County, Nos. 18 JT 15-17

IN THE MATTER OF: I.J.M., M.G.R., O.S.R.

Appeal by respondent-mother from orders entered 5 August 2022 by Judge Adam S. Keith in Vance County District Court. Heard in the Court of Appeals 17 July 2023.

Batten Law Firm, P.C., by Holly W. Batten, for petitioner-appellee.

Anné C. Wright for respondent-mother appellant.

ARROWOOD, Judge.

Respondent-mother ("respondent") appeals from the trial court's orders terminating her parental rights to I.J.M. ("Ivy"), M.G.R. ("May"), and O.S.R. ("Opal").[1] On appeal, respondent argues the trial court erred by: (1) treating the prior custody order as a prior adjudication and making no competent findings of fact to support a conclusion of prior neglect or probability of repetition of neglect; and (2) failing to find the necessary findings of fact to terminate respondent's parental rights based on dependency. For the following reasons, we reverse.

[1] Pseudonyms are used to protect the juveniles' identities and for ease of reading.

I. Background

Petitioner and respondent (collectively "the parties") were married in January 2006. At the time of their union, respondent had one child, Ivy, who was born to respondent and respondent-father[2] in November 2003. Two children were born to the marriage of the parties; May was born in September 2006 and Opal was born in April 2009.

The parties separated on 6 September 2011, after respondent filed a domestic violence protective order against petitioner. Respondent alleged petitioner "punched [her] in the leg" during an argument while Opal and May were "asleep in the bed beside" her, and left the residence. The order was granted, requiring petitioner to leave the residence, but the case was later dropped.

On 6 September 2012, the parties entered into a consent order where they agreed to share "joint legal" and "joint physical custody of" May and Opal and created a visitation schedule. In July 2014, there was an altercation outside of respondent's residence between her then-boyfriend and ex-boyfriend while the children were there. During the altercation respondent went inside her residence and locked the door, then instructed one of her children from her first marriage, a 15-year-old at the time, to go outside to her car and retrieve a gun. Respondent testified the teenager was trained how to handle a firearm. The Department of Social Services ("DSS") opened

[2] Respondent-father is not a party to this action. His parental rights to Ivy were terminated, and he does not appeal.

an investigation on 15 July 2014, after respondent's mother filed a complaint. On 8 August 2014, petitioner filed an emergency *ex parte* order requesting custody of May and Opal.

In the emergency order, petitioner claimed that one of the children told DSS that respondent did not feed them, she was living with a boyfriend who was a convicted felon and whom the children feared, and there were "multiple unlocked guns in [respondent's] home" which the children had access to. The emergency order was granted, giving petitioner "temporary primary physical custody" of May and Opal and ordering respondent not to have any visitation with the children.

In response to the order, respondent had her boyfriend leave, obtained a mental health assessment, and removed the firearms from the residence. Respondent's evaluation resulted in "no recommendations" by the provider. DSS investigated, and found respondent's home safe, she no longer had firearms in the residence, and no further action was taken. However, DSS did note in their report that the children expressed concern to the social worker that respondent chose her boyfriend over them, said that visiting respondent would make them "sad[,]" and stated Ivy had to do "the cooking for the children because [respondent] [wa]s too preoccupied with [her boyfriend]."

On 4 September 2014, the parties entered into a consent order where the emergency *ex parte* order was dissolved, and respondent was granted supervised visitation with the children. In January 2015, respondent relocated to Florida. The

parties entered into a temporary custody agreement on 23 July 2015, where respondent was granted unsupervised visitation. As part of the agreement, respondent took a drug test the next day, where a sample of her hair was negative for any drugs.

In August 2015, during an unsupervised visit, respondent took the children to the courthouse and filed paperwork to get restraining orders against petitioner. The petitions alleged petitioner improperly disciplined the children and requested petitioner's current wife, Mrs. R, never be near or left alone with the children. The requests were denied.

On 7 January 2016, there was a hearing for custody, which respondent did not attend but was represented by counsel. Following the hearing, the trial court entered an order granting petitioner "permanent sole legal custody and permanent sole physical custody" of the children. The order also required respondent "not have any visitation with the children until she [could] show to the [c]ourt that she ha[d] a willingness to put the minor children first in her life" and she could "prove that she ha[d] stable living arrangements[.]" The order specified that "stable living arrangements" required respondent to show she had "independent stable housing for at least six months without a man living with her" and "maintained stable employment for six months prior to her petitioning the [c]ourt for visitation[.]" Furthermore, the order stated that respondent had exposed the "children to an injurious environment by allowing [them] to be in the presence of convicted felons,

allowing [them] to be exposed to several unlocked handguns in her home, and failing to properly feed and care for the" children.

On 19 December 2017, respondent filed a petition to modify the custody agreement in Franklin County, requesting visitation with the children and joint custody. Thereafter, on 19 March 2018, petitioner filed the petitions that led to this case, requesting the court terminate respondent's parental rights to the children pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (a)(6), and (a)(7).

According to the petitions, respondent had not spoken to or seen the children from January 2016 until the filing of the petition, thereby abandoning them. The petition further alleged respondent neglected the children by exposing them to an injurious environment because she "allow[ed] the [children] to be in the presence of convicted felons, allow[ed] the [children] to be exposed to several unlocked guns in her home, and fail[ed] to properly feed and care for the [children.]"

Finally, the petition alleged respondent was "incapable of providing for the proper care and supervision of the [children], such that the [children] [are] dependent juvenile[s], and there is a reasonable probability that such incapability w[ould] continue" considering respondent's "long history of unstable housing, dating convicted felons with drug problems, not maintaining stable employment, and exposing the . . . children to inappropriate influences." Respondent timely answered, denying the allegations and requesting the petitions be denied or dismissed.

The matter came on for hearings in Vance County District Court on

6 June 2018, 17 October 2018, 23 January 2019, 6 March 2019, 26 April 2019, 24 May 2019, 5 July 2019, 23 August 2019, 23 October 2019, 12 December 2019, 6 February 2020, and 1 July 2021, Judge Keith presiding. Although respondent's request to modify custody was filed earlier than the termination petition, the modification matter was pending until an outcome in this case.

During the adjudication portion of the hearings, petitioner testified that after the order granting him custody was entered, contact from respondent was "very, very seldom" and she made "[v]ery little effort[.]" Petitioner further testified that respondent rarely asked to speak with or see the children and only once asked if she could send them gifts. However, petitioner acknowledged that he would not allow respondent to speak with or see the children, but still expected her to text and ask so he "would at least know she was trying[.]"

Mrs. R also testified that respondent's contact was rare and she had asked to see the children "three to five times" since January 2016. Furthermore, Mrs. R testified that respondent drove by her and petitioner's residence twice with her mother, yelling out the window at the children, causing them to duck and hide.

Deborah Holtzman ("Ms. Holtzman"), the appointed guardian ad litem, also testified about her conversations with the children. Ms. Holtzman testified that when she spoke with the children on 16 October 2018, without a parent present, the children stated they "did not want to have to be forced to go see [respondent]." Ivy told Ms. Holtzman that she felt like "the mom" when she was with respondent

because she had to cook and respondent "would lay in the bed and shake a tea glass, and [Ivy] would be expected to fill it."

The children also told Ms. Holtzman that they did not like respondent's previous boyfriends and did not feel safe with firearms being shot at respondent's house, and on one occasion one of the children found a shell casing in their hair. Ms. Holtzman also testified that when she spoke with respondent, she was "desperately begging to be a part of her children's life" but the information she provided did not match with what the children told her.

Mr. D, respondent's ex-husband with whom she shared two daughters, testified on behalf of respondent. Mr. D testified that respondent falsely accused him of sexually abusing their children, but the charges were dropped and DSS found respondent's claims "unsubstantiated[.]" Thereafter, respondent agreed to give Mr. D full custody of their children. One of respondent's children from her first marriage also testified. She testified that petitioner no longer allowed her to have contact with the children and although petitioner "was a little over the top" with his method of discipline, he was otherwise "a good dad." She also testified that the children were not in danger during the altercation at respondent's residence in 2014, there was no time respondent did not feed the children, and the children cooked because they "wanted to."

Respondent also testified. Respondent testified she did not choose her boyfriend over the children, the children's statements to DSS were "exaggerated[,]"

and explained that she dropped the domestic violence case against petitioner because she was "advised" to do so, otherwise petitioner would lose his job. Respondent also testified that although the children were "shaken up" by the fight that occurred at her house in 2014, they were unharmed and never at risk.

Respondent further testified that after moving to Florida in January 2015, she drove up every other week for her supervised visits with the children. Regarding the attempt to obtain restraining orders, respondent testified that she initiated the petitions because the children did not want to return to petitioner and the information regarding petitioner's discipline came directly from the children.

Respondent stated she missed the January 2016 court date because she did not know about the court date until "two days before court and [she] could not take off with such short notice[,]" and she never received the letter sent to her by her attorney regarding the court date because it was sent to an address she no longer lived at. Respondent denied receiving a text from her mother on 4 January 2016 reminding her of the 7 January 2016 court date, despite being presented with a text message to which she responded. When presented with the text message exchange, respondent stated she did not "believe that was for court" and she was "talking about something else."

Respondent further testified that after the permanent custody order was entered, she made arrangements for her then-boyfriend to move out, since the order required her to live without a man. Respondent testified that she did not have contact

with the children because petitioner would not allow it and he refused to allow her to send things for the children. Respondent presented a series of text messages between her and petitioner going back to October 2015 where she asked multiple times to see or speak to the children and asked for pictures of them.

Respondent also admitted that when she found out petitioner moved without informing her, she "panicked" and posted to Facebook that petitioner and Mrs. R "had kidnapped [the children]" and asked "if anyone had seen them, to let [her] know." However, she deleted the post once she learned petitioner's new address. Respondent testified she had two jobs and rented a house from her brother, who was currently incarcerated for sexual exploitation of minors. However, respondent stated that if her brother returned, he would not be around the children, and she would seek other housing.

Respondent's family friend, Ms. S, testified that the children from respondent's previous marriage disclosed something concerning to her, which led to respondent accusing Mr. D of sexually abusing their children. Ms. S also testified at Mr. D's trial to contradict Mr. D's claim that respondent had made up the allegations. On rebuttal, Mrs. R was recalled to the stand by petitioner.

Mrs. R testified about a series of text messages between her and respondent's mother, contradicting claims that respondent did not know about her ex-boyfriend's criminal history and insinuating respondent moved to Florida to pursue a relationship and not a job opportunity. Mrs. R also testified respondent's mother

showed the presiding judge the text messages between them three days before the 7 January 2016 hearing to show the judge that respondent knew about the court date but did not appear.

When called to the stand, respondent's mother said she initiated the DSS investigation in 2014 because petitioner told her "it would be more believable" for her to call DSS because "they would think he was just being jealous or spiteful if he called." She also testified that it was unclear whether respondent ever received or read her message about the court date, stated all of the information from the DSS report she provided were things she had heard but did not witness, and stated that she was friendly with Mrs. R "because [she] wanted to make sure [she] saw [her] grandkids."

Thereafter, the trial court found grounds existed to terminate respondent's parental rights for neglect and dependency. At the dispositional phase, Ms. Holtzman testified about her phone conversation with the children on 30 June 2021. Each child expressed to Ms. Holtzman that they did not want contact with respondent or her family, and wished to be adopted by Mrs. R. Ms. Holtzman did state that whether the children were rehearsed "crossed [her] mind," since they all made identical statements, but she thought the children were genuine because they "never wavered in how they felt" or "what they told [her,]" and had "gotten emotional[.]"

Respondent testified she did not want her rights to be terminated, would "like to know what [the children were] being told . . . for them to think that [she] do[esn't]

care" or that she abandoned them, and expressed surprise about the statements they provided to Ms. Holtzman. Respondent also testified she was employed, had been living alone since November 2019, and was currently single. Respondent also provided a lease for her new residence. When asked what she would do differently with the children, respondent testified she would "have to work less so that [she'd] be able to spend more time with them."

Petitioner testified that he stopped all contact between respondent and the children after the 2016 custody order. Petitioner claimed that respondent rarely contacted the children, even now, but admitted that he did not tell the children when respondent attempted to contact them because he did not want to "upset" or "bother" them.

Following the hearing and in orders filed 5 August 2022, the trial court found it was in the best interest of the children to terminate respondent's parental rights. The trial court found there was "clear, cogent, and convincing evidence that" respondent had "neglected the [children] by exposing [them] to an injurious environment" and that respondent was "incapable of providing for the proper care and supervision of the [children], such that the" children were dependent juveniles.

The court further found that respondent had "not taken steps to change any of the conditions that existed at the prior adjudication" so "there [wa]s a high probability of a repetition of neglect" and "there [wa]s a reasonable probability that" respondent would continue to be incapable of providing proper care and supervision to the

children. However, the court found that petitioner could not prove his allegations of abandonment, since "respondent was under court order . . . not to have contact with the [children] for a six month period." Respondent filed a notice of appeal on 19 August 2022.

II. Discussion

On appeal, respondent argues the trial court erred by: (1) treating the prior custody order as a prior adjudication and making no findings of fact to support a conclusion of prior neglect or probability of repetition of neglect; and (2) failing to find the necessary findings of fact to terminate respondent's parental rights based on dependency. We address each argument in turn.

A. Standard of Review

Our Supreme Court has "previously explained the standard of review for termination of parental rights appeals [is] as follows:"

> Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes. We review a trial court's adjudication under N.C.G.S. § 7B-1109 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal.

In re Q.P.W., 376 N.C. 738, 741, 855 S.E.2d 214, 217 (2021) (citation omitted). "Whether a child is abused or neglected is a conclusion of law[.]" *In re K.L.*, 272 N.C.

App. 30, 36, 845 S.E.2d 181, 189 (2020) (citation omitted). "Under a de novo review, this Court 'considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Id.* (citation omitted). "Findings of fact unchallenged by the appellant are 'binding on appeal.' " *Id.* (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

B. Neglect

In her first argument on appeal, respondent contends "the trial court erroneously treated a prior civil custody order as a prior adjudication and made no competent findings of fact to support a conclusion of past neglect or probability of repetition of neglect." We agree.

A neglected juvenile is one whose parent "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(e) (2022). "Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, *if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent*." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (emphasis added) (citation omitted), *reh'g denied*, 369 N.C. 43, 789 S.E.2d 5 (Mem) (2016). " 'When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.' " *In re C.L.H.*, 376 N.C. 614, 617, 853 S.E.2d 434, 437 (2021) (citations

omitted). However, when the "case does not arise from involvement" with DSS, and "no petition alleging neglect was ever filed," the juveniles have never been adjudicated neglected. *Id.* at 618, 853 S.E.2d at 438.

Here, the trial court found there was "clear, cogent, and convincing evidence" respondent "neglected the minor children by exposing [them] to an injurious environment." The trial court treated the 2016 permanent custody order as a prior adjudication of neglect, and found that respondent did not have stable housing, since she moved six times between 7 January 2016 and 19 March 2018 and three times between 20 March 2018 and 12 December 2019, did not live alone or have "suitable" housing for the children, and did not have stable employment. Therefore, the trial court determined the "conditions that existed at the time of the prior adjudication of neglect are the same conditions that exist now[,]" and since respondent did not take "steps to change any of the conditions" there was "a high probability of a repetition of neglect."

In order to prove neglect in this case, since the children have been out of respondent's care for a significant amount of time, petitioner would have to prove "past neglect *and* a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (emphasis added) (citation omitted). However, the petitioner did not show past neglect since a prior civil custody order is not a prior adjudication of neglect. *In re C.L.H.*, 376 N.C. at 618, 853 S.E.2d at 438.

Even, *arguendo*, had there been a showing of past neglect, the trial court's

findings do not support its conclusion that there is "a high probability of a repetition of neglect." The custody order, which the trial court incorrectly equated to an adjudication of neglect, and the petition to terminate respondent's rights raised three factors that exposed the children to an injurious environment: (1) respondent "allow[ed] the [children] to be in the presence of convicted felons"; (2) "allow[ed] the [children] to be exposed to several unlocked guns"; and (3) "fail[ed] to properly feed and care for the [children.]"

However, all of these matters had been resolved. In their report, DSS noted that there were no longer firearms inside the house and respondent had shown proof that the firearms were either sold or reported missing. Furthermore, DSS investigated and found that respondent's home was safe, stocked with food, and concluded there were no concerns with respondent's home. DSS took no further action.

Additionally, the last person respondent dated with a criminal record, that she was aware of, was from 2015-2016. Although petitioner did not mention employment or housing regarding neglect, respondent had maintained a residence and employment, although admittedly it changed frequently. Since the trial court's findings do not support its conclusion that the children were previously neglected and there was a likelihood of future neglect, we reverse.

C. Dependency

A dependent juvenile is one who is "in need of assistance or placement because

. . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2022). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

Here, the trial court found there was "clear, cogent, and convincing evidence" respondent was "incapable of providing for the proper care and supervision of the [children]" and there was "a reasonable probability that such incapability [would] continue[.]" Specifically, the trial court found respondent had "a long history of unstable housing, dating convicted felons with drug problems, not maintaining stable employment, and exposing the children to inappropriate influences." The trial court also mentioned respondent agreed to give custody of her children from her first marriage to Mr. D, after accusing him of sexual abuse and found respondent "refused to provide evidence that she ha[d] changed her living situation in any way but persist[ed] in posting derogatory and false comments about [p]etitioner and [Mrs. R] on social media, including but not limited to accusing [them] of kidnapping the [children]."

As an initial matter, we note that the trial court did not address whether respondent "lacks an appropriate alternative child care arrangement" as required by our statutes. N.C. Gen. Stat. § 7B-101(9). "Findings of fact addressing both prongs

must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation omitted). Accordingly, we reverse the trial court's conclusion that the children were dependent.

Additionally, we note that the trial court's findings of fact related to respondent's "unstable" employment and housing cannot support a conclusion of dependency, since such findings do not indicate respondent was unable to provide the children care or supervision. *In re M.H.*, 272 N.C. App. 283, 291, 845 S.E.2d 908, 914 (2020) (citation omitted) (reversing the trial court because its conclusion of dependency was not supported by its finding of fact related to the respondent's "lack of employment and unstable housing" since such factors did not establish the respondent could not care for or supervise her child). Furthermore, the trial court's additional findings of fact regarding respondent's dating preferences, older children's custody, and "derogatory" social media postings "pertain more to . . . historic facts . . . that occurred at least a year prior to the hearing" and do not address respondent's ability to care for and supervise the children at the time of the hearing. *In re Z.D.*, 258 N.C. App. 441, 452, 812 S.E.2d 668, 676 (2018).

For example, the custody issue with Mr. D was handled from 2003-2005. Following the party's separation, respondent had a handful of relationships she testified to. The last person respondent dated with a criminal record, that she was aware of, was from 2015-2016. This person had been to jail when he was 18 and

smoked marijuana, but respondent testified he never smoked in front of the children. He moved out of the residence they shared when the permanent custody order requiring respondent to live "without a man" was entered in 2016. Respondent testified she had a fiancé at the August 2019 hearing who she had been living with since early 2018. She testified he was not a convicted felon and did not use drugs or drink. However, at the dispositional hearing in July 2019, respondent testified she was single.

As far as the statements respondent made on Facebook in 2017, respondent acknowledged posting petitioner and Mrs. R were kidnappers demonstrated poor judgment, but testified she was "frantic to find out where [her] children were" since petitioner had not told her he had moved. Additionally, respondent denied negatively talking about the way the children were dressed on social media in December 2017. Although petitioner testified to the sexually explicit content shared by respondent on her Facebook page and comments she made regarding Mrs. R from 2016, he did not testify that the children relevant to the petition had access to or saw the Facebook content, just that he would be concerned *if the children were friends* with respondent on Facebook and saw the posts.

We cannot see how respondent's dating history going back years to 2006 and incidents that happened in 2005 are relevant to her current ability to care for and supervise her children. Although respondent may have posted about petitioner and Mrs. R on Facebook, this is completely irrelevant to her ability to care for the children

and the trial court's finding of dependency. These findings, based on historical and irrelevant facts, do not support a finding that the children were dependent and there was a probability that such incapability would continue for the foreseeable future.

Accordingly, because the trial court failed to address respondent's "ability to provide care or supervision" *and* "the availability . . . of alternative child care arrangements[,]" and its findings were otherwise insufficient, we reverse. *See In re B.M.*, 183 N.C. App. at 90, 643 S.E.2d at 648 (emphasis added) (citation and internal quotation marks omitted).

III. Conclusion

For the foregoing reasons, we reverse the trial court's orders terminating respondent's parental rights.

REVERSED.

Chief Judge STROUD and Judge FLOOD concur.

Report per Rule 30(e).