NO. COA05-1504

NORTH CAROLINA COURT OF APPEALS

Filed: 20 June 2006

IN THE MATTER OF:
J.W.B.

Buncombe County
No. 04 J 339

Appeal by respondent mother from order entered 11 August 2005 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 18 May 2006.

Matthew J. Middleton, for petitioner-appellee Buncombe County Department of Social Services.

Michael N. Tousey, for petitioner-appellee Guardian ad Litem.

Rebekah W. Davis, for respondent-appellant.

TYSON, Judge.

A.R. ("respondent") appeals from order entered adjudicating her minor child, J.W.B., neglected. We affirm.

I. Background

J.W.B. was born prematurely in July 2003 at thirty-four weeks. At age nine or ten months, he was diagnosed as having Hydrocephalus, or water on his brain. J.W.B. is developmentally delayed and receives speech and physical therapy in Asheville and medical care from Duke University Medical Center in Durham.

Respondent is forty-one years old and was previously twice married. Respondent and J.W.B.'s biological father met in 2002,

but never married. They resided together for approximately one year and separated in April 2004. The relationship between respondent and J.W.B.'s father became violent while the couple lived together. The parties threw cups and plates at each other. On several occasions, respondent threw items in the direction of J.W.B.'s father when J.W.B. was located within a few feet of him.

Respondent would become angry two or three times per month and would shake for no apparent reason. On several occasions, respondent threatened to kill herself with a knife and locked herself in the bathroom for several hours. J.W.B.'s father hid all knives located in the house.

This behavior began when respondent was pregnant with J.W.B. and continued after his birth. On other occasions, respondent threatened to kill herself and walked into the public roadway as if she might throw herself into oncoming traffic. Before J.W.B. was born, respondent pushed the child's father into an entertainment center. Approximately two months after J.W.B. was born, respondent stated she was going to kill herself and was going to take J.W.B. and "set him out and walk away." On another occasion, respondent pushed J.W.B.'s father down and slammed a door in his face. Respondent told J.W.B.'s father that she was bipolar and had previously been committed to a hospital.

J.W.B.'s father primarily cared for him on weekends while respondent worked. On some weekends, J.W.B.'s father drank a twelve pack of beer during the day while caring for J.W.B. Respondent left J.W.B. with his father knowing he was drinking

these amounts, but testified she did not know his drinking was "getting out of hand." J.W.B.'s father was drinking on the several occasions when he was violent toward respondent.

The Buncombe County Department of Social Services ("DSS") received a complaint regarding an altercation between respondent, J.W.B.'s father, and J.W.B.'s paternal grandmother in April 2004. DSS conducted an investigation and observed respondent, J.W.B.'s father, J.W.B.'s maternal and paternal grandparents, and eight other persons. Based on its investigation, DSS substantiated J.W.B. was neglected. DSS observed J.W.B., who appeared to be in good health and dressed appropriately. J.W.B. could not pull himself up, as appropriate for his age.

Respondent and J.W.B. lived with respondent's parents from 27 April 2004 until June 2004. From June 2004 until August 2004, they lived in a domestic violence shelter until respondent and J.W.B. moved back into her parents' residence.

In June 2004, respondent refused DSS's request for authorization to obtain respondent's medical records. DSS was concerned about: (1) the safety of J.W.B. due to the prior suicide threats made by respondent; (2) respondent's history of domestic violence; (3) the excessive alcohol consumption of J.W.B.'s father; (4) acts of domestic violence; and (5) respondent's failure to complete a prior case plan involving another child.

DSS located respondent at the local Helpmate Domestic Violence Shelter in July 2004. Respondent agreed to a family services case plan on 21 July 2004 in which she would: (1) obtain a mental

health evaluation; (2) obtain a substance abuse assessment and comply with all recommendations; (3) obtain an assessment to determine her need for domestic violence counseling; and, (4) attend parenting classes. Respondent informed the social worker of a scheduled appointment at Duke University Medical Center to have J.W.B. evaluated. Respondent indicated she had no desire to continue residing with her parents and intended to apply for government subsidized housing. Respondent admitted she was angry and tore the telephone out of the wall during the April 2004 altercation with J.W.B.'s father.

DSS referred respondent for government subsidized housing, provided contact information for mental health providers, and gave respondent a bus pass. In early August 2004, respondent told the social worker she had been approved for government subsidized housing, food stamps, and Medicaid.

On 21 August 2004, a DSS social worker contacted the Helpmate Shelter and was told that respondent had left J.W.B.'s toys and clothes at the shelter with no forwarding address. The social worker attempted to locate respondent at her parents' house. The social worker heard a child crying in the house, but respondent's father refused to let her and accompanying law enforcement agents enter without a warrant. DSS was not able to contact respondent until 19 October 2004, when DSS learned of J.W.B.'s medical appointment at Graham Medical Center. The social worker met respondent at Graham Medical Center and asked if respondent would allow her to see J.W.B. Respondent informed the social worker that

she could not come into her house and respondent would not meet the social worker elsewhere with J.W.B. As of the date of the hearing, respondent has not sought a mental health evaluation or a domestic violence assessment and did not complete any parenting classes.

DSS filed a juvenile petition on 13 December 2004 alleging the child to be neglected because the child "lives in an environment injurious to the [child's] welfare." On 5 January 2005, DSS obtained a court order allowing DSS to visit with the child. Thereafter, an order was entered allowing DSS to make a home visit. The trial court adjudicated J.W.B. neglected by both parents on 11 August 2005. The court ordered that respondent mother and J.W.B.'s father share joint legal custody of the child "contingent upon the respondent parents cooperating with the Department and following the Orders of this Court." Respondent appeals.

II. Issues

Respondent argues: (1) the trial court's findings of fact numbered 4, 5, 6, and 7 in the adjudication judgment are not supported by clear and convincing evidence; (2) the trial court's findings of fact numbered 5, 6, 7, 8, 9, 12, and 17 in the dispositional order are not supported by the evidence or are not proper findings of fact; (3) the trial court's conclusion that the child lived in an environment injurious to his welfare is neither supported by the findings of fact nor evidence; (4) the trial court exceeded its authority in giving custody of the child equally to each parent while conditioning custody on the parents cooperating with DSS and following court orders; and (5) the trial court abused

its discretion in modifying the custodial arrangement so that each parent has an equal amount of physical custody of the child.

III. Standard of Review

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005).

> "A proper review of a trial court's finding of . . . neglect entails a determination of (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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury . . . neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). "Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *Id.*

In re Pittman, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566, *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). We review conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

Once the trial court adjudicates a child neglected, the court moves to the dispositional stage and solely considers the best interests of the child. *In re Pittman*, 149 N.C. App. at 766, 561 S.E.2d at 567. We review the trial court's disposition under an abuse of discretion standard. *Id.*

IV. Findings of Fact

A. Adjudication Judgment

Respondent argues the trial court's findings of fact numbered 4, 5, 6, and 7 in the adjudication judgment are not supported by clear and convincing evidence.

The trial court's finding of fact Number 4 states:

> 4. The respondent mother is 41 years of age and has been married on two prior occasions. Both of her prior husbands committed acts of domestic violence toward her. In 1999, one of her husbands, [name omitted], beat her in front of his friends, which resulted, in part, to her not being able to speak and being admitted into the Copestone Unit of Mission Hospital, in Asheville, North Carolina where she remained for four days. Following her release from the Copestone Unit, she received brief mental health services at Blue Ridge Center.

Respondent argues the evidence only showed one of prior husband, not both, committed acts of domestic violence against her. Although the transcript reveals only one of respondent's prior husbands committed acts of domestic violence against her, this finding did not prejudice respondent. The import of this finding of fact is, and it is not disputed, that respondent has suffered domestic violence in the past.

> "Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and that a different result likely would have ensued, with the burden being on appellant to show this."

Parks v. Washington, 255 N.C. 478, 483, 122 S.E.2d 70, 73-74 (1961) (quoting *Perkins v. Langdon*, 237 N.C. 159, 178, 74 S.E.2d 634, 649 (1953)). "The deviations were slight and not of sufficient moment

to upset the result reached below." *Perkins*, 237 N.C. at 178, 74 S.E.2d at 649.

The remainder of the trial court's findings of fact in the adjudication order which respondent asserts are insufficient are:

> 5. The respondent mother has a daughter, [name omitted], born of the marriage between her and [omitted]. Prior to the respondent mother' [sic] admission at Copestone, [respondent's daughter] attempted to kill herself because the respondent mother would not let her live with her father. [Respondent's daughter] had threatened to call the Department of Social Services if the respondent mother did not let her live with her father and, as a result of a custody action, the respondent mother no longer sees her said daughter.
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> 6. The respondent mother met the respondent father sometime in 2002. Five or six months after they met, they moved in together and then separated in late April of 2004. During the period of approximately one year when the respondent mother and the respondent father resided together, their relationship went from being a normal one to one where the parties were violent with each other. Instances occurred where each party would throw items at the other or in his or her direction including coffee cups, plates and eating ware. On several occasions, Angela Banks [sic] threw these items in the direction of the respondent father while the minor child, was within a few feet of Mr. B. On one occasion, the respondent father threw a cup of warm coffee at the respondent mother, which hit her and splattered the minor child. On at least one occasion, when in a verbal argument, the respondent father ripped the telephone out of the wall. The respondent father broke the respondent mother's glasses twice while she was pregnant and struck her, resulting in her glasses falling off on one occasion.
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> 7. The respondent mother would have episodes where she would become angry and shake for no apparent reason. These episodes occurred two or three times per month. During the latter

> part of their residing together, she threatened to kill herself two or three times per month and, as a result, the respondent father would hide all of the knives in the house. On several occasions, the respondent mother would threaten to kill herself with a knife and lock herself in the bathroom of their residence for several hours. This suicidal gesturing behavior began while Ms. Roberts was pregnant and extended to after the birth of the minor child. On several occasions when she threatened to kill herself, she would walk out of the parties' home and into the public roadway, where she would walk up and down as if she might throw herself into traffic. On one occasion, approximately two months after the minor child's birth, she stated to the respondent father that she was going to kill herself and leave the parties' child or give the parties' child away, stating that she would take the minor child and "set him out and walk away." On one occasion before the minor child was born, the respondent mother pushed the respondent father into an entertainment center and on another occasion pushed him down and slammed a door in his face. The respondent mother stated to the respondent father on one occasion that she had been committed to a hospital before and was bi-polar.

After thorough review of the record and transcript, these findings of fact are supported by clear and convincing evidence, even though other evidence was presented that would support findings to the contrary. *Pittman*, 149 N.C. App. at 763-64, 561 S.E.2d at 566.

B. Dispositional Order

Respondent also argues that the trial courts findings of fact numbered 5, 6, 7, 8, 9, 12, and 17 in the trial court's dispositional order are neither supported by competent evidence nor proper findings of fact.

The trial court must "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). When reviewing the evidence, the trial court must use "processes of logical reasoning." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quotation omitted). Mere recitation of evidence presented at trial does not constitute an ultimate finding of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000).

Finding of fact Number 17 states:

> 17. A letter was received into evidence as Respondent Mother's Exhibit 2 from Dr. Carl Mumpower, Ph.D., dated July 13, 2005. Dr. Mumpower stated that respondent mother's "primary symptoms centered on an anxiety disorder with dependency features and panic attacks. She has some developmental difficulties. (These would require testing to nail down but I am not sure as to the value of such.) I am aware that she has acted out on occasion and has had what appear to be hysterical meltdowns in years past that have required temporary hospitalization."

The trial court's finding of fact Number 17 is a recitation of evidence presented at the hearing and does not constitute an "ultimate finding of fact." *Id.* However, the trial court made other findings of fact sufficient to support its dispositional order. After careful review of the record and transcript, the remaining findings of fact in the dispositional order are supported by clear and convincing evidence. This assignment of error is overruled.

V. Conclusion of Neglect

Respondent argues the trial court's conclusion that the minor child is neglected is neither supported by the findings of fact nor by clear and convincing evidence. We disagree.

> In a non-jury adjudication of . . . neglect . . . the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. This Court reviews the trial court's conclusions of law to determine whether they are supported by the findings of fact. . . . An appellate court's review of the sufficiency of the evidence is limited to those findings of fact specifically assigned as error.

In re P.M., 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005) (internal quotations omitted).

Here, the trial court concluded:

> That by clear, cogent, and convincing evidence, the minor child is a neglected child pursuant to N.C.G.S. §7B-101(15) in that the juvenile lived in an environment injurious to his welfare when living with the respondent parents due to the domestic violence, that respondent mother could have hit the child when she threw the dishes at respondent father who was near the child at the time; the abuse of alcohol by the respondent father in the presence of the minor child; the respondent mother's prior mental health commitment and her behaviors of acting out her suicide and that after respondent mother left the residence of the respondent parents, she was not able to show that her mental health issues had been addressed.

N.C. Gen. Stat. § 7B-101(15) (2005) defines a neglected juvenile as one "who lives in an environment injurious to the juvenile's welfare."

Respondent urges this Court to apply the rules our Supreme Court set forth in *In re Ballard*, 311 N.C. 708, 319 S.E.2d 227

(1984) to the issue at bar. *Ballard* dealt with termination of parental rights. The Court held, "The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence *that such neglect exists at the time of the termination proceeding*." *Id.* at 716, 319 S.E.2d at 232 (emphasis supplied). The Court further held: "The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232. In *In re Ballard*, our Supreme Court did not address adjudications under what is now Article 8 of the Juvenile Code. Proof of neglect in a termination of parental rights proceeding is not the same as proof of neglect in a adjudication of neglect proceeding. "This court has noted that a substantive difference exists between the quantum of proof of neglect and dependency necessary for purposes of termination and for purposes of removal." *In re Krauss*, 102 N.C. App. 112, 115, 401 S.E.2d 123, 125, *aff'd*, 347 N.C. 371, 493 S.E.2d 428 (1991).

Presuming *arguendo In re Ballard* applies to an adjudication of neglect, the trial court's findings of fact support its conclusion that J.W.B. is neglected. Respondent argues that the issues of domestic violence, alcohol abuse of J.W.B.'s father, respondent's prior mental health commitment, and her suicidal gestures did not exist at the time of the adjudication hearing. Respondent and J.W.B.'s father resided together until April 2004. The hearing on the neglect petition was held in July 2005.

On 21 July 2004, respondent agreed to a family services case plan wherein she would obtain a mental health evaluation, obtain a substance abuse assessment to determine if she had mental heath issues to be addressed, obtain an assessment to determine her need for domestic violence counseling, and attend parenting classes. The trial court found:

> 15. . . . *As of the date of the hearing* of this matter, *the respondent mother has not sought an evaluation to determine if there are mental health issues that need to be addressed*, *has not* obtained an assessment to determine the need for domestic violence counseling and *has not* completed any parenting education to learn the development stages, appropriate behavior and age appropriate discipline for the child.

(Emphasis supplied).

We find that the trial court's conclusion of law that J.W.B. is neglected is supported by its findings of fact. This assignment of error is overruled.

VI. Custody of the Child

In respondent's final two assignments of error, she argues: (1) the trial court erred in awarding physical custody of J.W.B. equally to each parent while conditioning custody on the parents' cooperating with DSS; and (2) the trial court abused its discretion in modifying the custodial arrangement so that each parent has physical custody of J.W.B. an equal amount of time.

The trial court ordered:

> 2. That respondent mother and respondent father shall share joint legal custody of the minor child. The minor child shall be placed with the respondent mother and the respondent

> father, with his placement alternating between them on a week-to-week basis . . . .
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> . . . .
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> 3. That this joint custody and placement shall be contingent upon the respondent parents cooperating with the Department and following the Orders of this Court. If the respondent mother does not cooperate with the Department of Social Services and the Guardian Ad Litem, the Court shall consider removal of the minor child from the respondent mother's home.

N.C. Gen. Stat. § 7B-903 (2005) offers the court dispositional alternatives for abused, neglected, or dependent juveniles, and provides:

> (a) The following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:
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> . . . .
>
> (2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court may:
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> a. Require that the juvenile be supervised in the juvenile's own home by the department of social services in the juvenile's county, or by other personnel as may be available to the court, subject to conditions applicable to the parent, guardian, custodian, or caretaker as the court may specify[.]

This statute provides explicit authority for the trial court to establish joint custody of J.W.B. with his parents and to require the parents to cooperate with DSS and court orders. *Id.*

Permitting each parent to have custody of the child an equal amount of time rests within the discretion of the trial court and

does not violate the statute. The purposes of the Juvenile Code include "preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(4) (2005). The trial court's decision to alternate custody of J.W.B. between his parents, with each having an equal amount of time with the child, is not "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). These assignments of error are overruled.

VII. Conclusion

The trial court's findings of fact in the adjudication judgment and dispositional order are supported by clear and convincing evidence. The trial court's conclusion that J.W.B. lived in an environment injurious to his welfare is supported by the findings of fact.

The trial court did not exceed its authority in awarding custody of J.W.B. equally to each parent while conditioning custody on their cooperating with DSS and complying with court orders. The trial court did not abuse its discretion in modifying the custodial arrangement so that each parent has an equal amount of physical custody of J.W.B. The trial court's adjudication judgment and dispositional order is affirmed.

Affirmed.

Judges MCCULLOUGH and HUDSON concur.

Report per Rule 30(e).