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NO. COA08-1225

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

IN THE MATTER OF:
A.S., B.L.S., J.B.

Brunswick County
Nos. 07 J 127A-28A,
08 J 70A

Appeal by Respondents from orders entered 16 July 2008, *nunc pro tunc* 1 July 2008, by Judge Thomas V. Aldredge, Jr. in District Court, Brunswick County. Heard in the Court of Appeals 26 January 2009.

Jess, Isenberg, & Thompson, by Elva T. Jess for Petitioner-Appellee Brunswick County Department of Social Services.

Susan J. Hall for Respondent-Appellant Mother.

Rebekah W. Davis for Respondent-Appellant Father.

Pamela Newell Williams for Guardian ad Litem.

McGEE, Judge.

Respondent-Mother appeals from an order adjudicating A.S. an abused, neglected and dependent juvenile, and adjudicating B.L.S. and J.B. neglected and dependent juveniles. Respondent-Mother additionally appeals from a dispositional order ceasing reunification efforts and changing the permanent plan for the juveniles to adoption. Respondent-Father appeals from a dispositional order ceasing reunification efforts between him and

A.S., changing the permanent plan for A.S. to adoption, and failing to provide for visitation. We affirm in part, and reverse and remand in part.

The Brunswick County Department of Social Services (DSS) filed juvenile petitions on 5 May 2008, alleging that A.S. was an abused and dependent juvenile, and that B.L.S. and J.B. were neglected and dependent juveniles. DSS alleged that on 3 May 2008, A.S. had "sustained a complete spiral fracture of the left femur which medical personnel contend could not have occurred in the manner that the [Respondent-Mother] has described." DSS further claimed that the "unexplained injury" placed B.L.S. and J.B. in an injurious environment. DSS alleged that Respondent-Mother was unable to provide for the Juveniles' care or supervision and lacked an appropriate alternative child care arrangement. A non-secure custody order was entered and the Juveniles were removed from Respondent-Mother's care. DSS filed amended petitions additionally on 9 May 2009, alleging that A.S. was a neglected juvenile and providing further facts concerning the alleged abuse, neglect and dependency of the Juveniles.

Adjudicatory and dispositional hearings were held on 1 and 7 July 2008. The trial court entered the written adjudicatory and dispositional orders on 16 July 2008, *nunc pro tunc* 1 July 2008. The trial court found that A.S. was an abused, neglected and dependent juvenile, and that B.L.S. and J.B. were neglected and dependent juveniles. The trial court awarded custody to DSS, concluded that reunification was not in the best interest of the

Juveniles, and ordered that DSS should pursue a permanent plan of adoption for the Juveniles. Respondents appeal.

I. Respondent-Mother's Appeal

A. Abuse

Respondent-Mother first contends that the trial court erred when it concluded that A.S. was an abused juvenile. Respondent-Mother asserts that the evidence was not clear and convincing that the spiral fracture suffered by A.S. was inflicted by other than accidental means. Respondent-Mother cites the testimony of Dr. Austin Yeargan, who testified that it was "impossible to say" when asked whether A.S.'s injury was intentionally inflicted. Thus, Respondent-Mother contends that the trial court's findings of fact numbers 30 and 34, in which the trial court found that the fracture "could not have resulted from accidental means" and that Respondent-Mother "allowed [the] injury to be inflicted by other than accidental means[,]" were not supported by the evidence.

The role of this Court in reviewing a trial court's adjudication of neglect and abuse is 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[.]" *If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.*

In Re T.H.T., 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (emphasis added), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (citations omitted). An abused juvenile is defined as a juvenile whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious

physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a) (2007). "[S]erious physical injury" is defined as an injury that causes "great pain and suffering." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303 (1991).

Respondent-Mother challenges the findings by the trial court that the injuries suffered by A.S. were intentional and could not have been inflicted by non-accidental means. However, Dr. Yeargan, who testified as an expert in the fields of orthopedics and orthopedic surgery, unequivocally testified that it was not possible for A.S. to have suffered her injury in the manner suggested by Respondent-Mother, either falling from a standing position or falling off a couch. Instead, Dr. Yeargan testified that the type of injury suffered by A.S. "typically" occurs when "the limb is grasped and twisted." Dr. Yeargan asserted that it was his opinion that A.S. was abused, and that the injury did not result from accidental means. In addition to Dr. Yeargan's unequivocal testimony regarding the cause of A.S.'s leg injury, Dr. Yeargan additionally testified, and the trial court found as fact, that A.S. had "multiple bruises and abrasions in various stages of healing. The bruises on the face were of a hand print where it appeared the child's head had been grasped."

It is the trial court's "duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted); see also

In Re T.H.T., 185 N.C. App. at 343, 648 S.E.2d at 523 ("The trial [court] determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject."). Accordingly, in the case before us, we conclude there was sufficient evidence to support the trial court's findings of fact and conclusions of law that A.S. was an abused juvenile.

B. Neglect

Respondent-Mother next argues that the trial court erred by adjudicating A.S., B.L.S. and J.B. neglected juveniles.

(1) A.S.

Respondent-Mother contends that the initial petition solely alleged abuse and dependency, and not neglect as to A.S. Although an amended petition was filed on 9 May 2008, Respondent-Mother notes that no summons was issued, and she was never personally served with the amended petition.

"The pleading in an abuse, neglect, or dependency action is the petition." N.C. Gen. Stat. § 7B-401 (2007). "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re S.E.P.*, 184 N.C. App. 481, 486, 646 S.E.2d 617, 621 (2007) (citation omitted). In this case, the initial petition was properly verified, summons was issued to Respondent-Mother, and thus the trial court acquired jurisdiction over the subject matter of the action.

The initial petition alleged abuse and dependency on the basis that A.S. had suffered a serious injury that could not have occurred in the manner described by Respondent-Mother. The amended petition added a claim of neglect and additional factual allegations, including an allegation that Respondent-Mother "continues to demonstrate the same drug seeking behavior that caused DSS involvement in the past." The record does not show that a summons issued or that the amended petition was served on Respondent-Mother.

"The court may permit a petition to be amended when the amendment does not change the nature of the conditions upon which the petition is based." N.C. Gen. Stat. § 7B-800 (2007). In this case, we conclude that the amended petition changed the nature of the condition upon which the petition was based so as to deprive Respondent-Mother of sufficient notice. The amended petition did not merely correct clerical or procedural errors, but added new factual allegations to support its additional claim that A.S. was neglected. See *In re M.G.*, 187 N.C. App. 536, 547-48, 653 S.E.2d 581, 588 (2007) ("Because the new allegations gave rise to a different status for [the juvenile] than alleged in the original petition, they violated N.C. Gen. Stat. § 7B-800[.]"); *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007) (Court reversed adjudication of neglect where DSS alleged dependency in the petition but proceeded on a theory of neglect at adjudication). Furthermore, even assuming *arguendo* that the amendment was proper, there is no indication in the record that Respondent-Mother was

given notice of the additional allegations. Therefore, we reverse that portion of the order of the trial court which adjudicates A.S. to be a neglected juvenile.

(2) B.L.S. and J.B.

Respondent-Mother next argues that the trial court erred by concluding that B.L.S. and J.B. were neglected juveniles. Respondent-Mother contends that while J.B. did reside in the home, the injuries to A.S. occurred outside of J.B.'s presence. Respondent-Mother further argues that B.L.S. had always resided outside of the home, having resided in pediatric care at the hospital since the child's premature birth. Thus, Respondent-Mother asserts that all of the instances of abuse of A.S. occurred outside of the presence of B.L.S. and J.B., and therefore the Juveniles were not neglected. We are not persuaded.

In an abuse, neglect and dependency case, review is limited to the issue of whether the conclusion is supported by adequate findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). "Neglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) as:

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

N.C. Gen. Stat. § 7B-101(15) (2007). N.C. Gen. Stat § 7B-101(15) affords "the trial court some discretion in determining whether

children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). "In cases of this sort [involving an infant], 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 396, 521 S.E.2d at 127.

In this case, the trial court made findings of fact that: (1) Respondent-Mother used crack cocaine in February 2008, and used controlled substances and prescription medication while pregnant with B.L.S.; (2) there were pending charges of possession of drug paraphernalia against Respondent-Mother; (3) there were assault charges and incidents of domestic abuse between Respondent-Mother and her boyfriend; (4) Respondent-Mother's parental rights to an older sibling of the Juveniles had been terminated; (5) after the injury to C.S., Respondent-Mother was arrested in Myrtle Beach, South Carolina, spent two days in jail and was convicted of drunken and disruptive behavior; and (6) B.L.S. received no pre-natal care and was born premature. Respondent-Mother does not contest these findings on appeal. Therefore, the findings of fact are deemed to be supported by sufficient evidence, and are binding on appeal. N.C.R. App. P. 28(b)(6); see also *In re P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404-05 (2005) (concluding the respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by

evidence"). Accordingly, based on these findings, we find the trial court did not err by adjudicating B.L.S. and J.B. neglected juveniles.

C. Dependency

Respondent-Mother next argues that the trial court erred when it concluded that the Juveniles were dependent. Respondent-Mother argues that although she was incarcerated at the time of the hearing, she was not incarcerated when the petition was filed. Moreover, Respondent-Mother further contends that her mother and sister were available to care for the Juveniles.

As stated previously herein, our review in abuse, neglect and dependency cases is limited to the issue of whether the conclusion is supported by adequate findings of fact. *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. "Dependent juvenile" is defined in N.C. Gen. Stat. § 7B-101(9) as:

A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2007). "In determining whether a juvenile is dependent, '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 B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007) (citation omitted). "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." *Id.* (citation omitted).

In the case before us, Respondent-Mother used illegal and prescription drugs, there was domestic violence in the home, and at the time of the hearing, Respondent-Mother was incarcerated. Thus, the trial court could properly conclude that Respondent-Mother could not provide proper care or supervision for the Juveniles. Additionally, there is no evidence that Respondent-Mother ever suggested appropriate alternate placement for the Juveniles. See *In re D.J.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005). Therefore, the trial court could properly find that the Juveniles lacked an appropriate alternative caregiver. Accordingly, we hold that the trial court did not err in concluding that A.S., B.L.S. and J.B. were dependent juveniles. Even assuming *arguendo* that the trial court erred in adjudicating the Juveniles dependent we hold that the cases of all three Juveniles properly proceeded to the disposition stage. We have upheld the trial court's adjudication of A.S. as abused, and the trial court's adjudication of B.L.S. and J.B. as neglected. Because the trial court properly found at least one ground to proceed to the disposition phase for each child, Respondent-Mother's argument is without merit. See *In re A.D.L.*, 169 N.C. App. 701, 710, 612 S.E.2d 639, 645 (2005).

D. Disposition

Respondent-Mother next argues that the evidence and findings of fact do not support the trial court's conclusion of law that reunification efforts should cease and adoption should be the

permanent plan for the Juveniles.

N.C. Gen. Stat. § 7B-507(b) states that:

In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

N.C. Gen. Stat. § 7B-507(b) (2007). The trial court may "order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In Re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition. *Id.* at 477-78, 581 S.E.2d at 137; N.C. Gen. Stat. § 7B-507 (2005).

In this case, the trial court made the following dispositional findings of fact:

5. That [Respondent-Mother] gave birth to B.L.S. on [] and was discharged from the hospital on []. She went home while her daughter remained in the neo-natal intensive care unit. [Respondent-Mother] went to see

B.L.S. on four occasions.

6. [Respondent-Mother] went to Myrtle Beach, South Carolina with her sister and her roommate the week of May 14, 2008. She was arrested during bike week, for drunk and disruptive behavior, stayed in jail for two days and pled guilty so that she could be released.

. . . .

12. [DSS] provided assistance to [Respondent-Mother] during the past year and continued efforts would not be beneficial in improving her ability to provide care for her children.

. . . .

16. That the children cannot be returned to their mother's care today, nor is it likely they will be returned within the next six months, as [Respondent-Mother] is currently incarcerated and she has been unable to show that she can make appropriate choices with regard to individuals who are asked to provide care for her children. Efforts to reunify would be inconsistent with the juveniles' health, safety, and need for a safe permanent home within a reasonable period of time.

Additionally, the trial court incorporated the findings from its adjudicatory order regarding the abuse, neglect and dependency of the Juveniles. Respondent-Mother does not specifically argue that these findings of fact are erroneous. Therefore, the findings of fact are deemed to be supported by sufficient evidence, and are binding on appeal. N.C.R. App. P. 28(b)(6); see also *In re P.M.*, 169 N.C. App. at 424, 610 S.E.2d at 404-05.

A trial court's dispositional order must be based on the best interest of the child and the dispositional alternatives are left within the discretion of the trial court, which are not reversible absent an abuse of discretion. See *In re Pittman*, 149 N.C. App.

756, 766, 561 S.E.2d 560, 567 (2002). "'An abuse of discretion occurs when the trial court's ruling "is so arbitrary that it could not have been the result of a reasoned decision.'" *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations omitted). Based on the above findings, the trial court concluded that "it was not in the best interests of the juveniles to compel reunification with their mother." We hold that the trial court did not abuse its discretion in finding it to be in the best interest of the Juvenile to cease reunification efforts.

II. Respondent-Father's Appeal

A. Petition for Writ of Certiorari

Respondent-Father's trial counsel filed notice of appeal from the adjudicatory and dispositional orders on 22 July 2008. However, Respondent-Father failed to sign the notice of appeal. The record on appeal was filed on 30 September 2008. Respondent-Father's appellate counsel filed an amended notice of appeal on 13 October 2008, containing Respondent-Father's signature. Respondent-Father filed a petition for writ of *certiorari* on 24 October 2008. Subsequently, the guardian *ad litem* filed a motion to dismiss the appeal on the ground that Respondent-Father had failed to file a proper notice of appeal in a timely fashion.

We agree that proper notice of appeal was not timely filed in accordance with N.C. Gen. Stat. § 7B-1001(b) and N.C.R. App. P. 3A. "[N]otice of appeal shall be given in writing by a proper party . . . and shall be made within 30 days after entry and service of the order[.]" N.C. Gen. Stat. § 7B-1001(b) (2007). Because proper

and timely notice of appeal is jurisdictional, we must dismiss the appeal. *In re A.L.*, 166 N.C. App. 276, 277, 601 S.E.2d 538, 538 (2004). Nevertheless, we exercise our discretion pursuant to N.C.R. App. P. 21(a)(1) and allow Respondent-Father's petition for writ of *certiorari*. See *In re A.S.*, ___ N.C. App. ___, ___, 661 S.E.2d 313, 316 (2008).

B. Disposition

Respondent-Father argues that the trial court failed to make the findings of fact required by N.C. Gen. Stat. §7B-507(a) and (b). Respondent-Father asserts that the trial court's findings regarding cessation of reunification efforts relate solely to the Respondent-Mother. Thus, Respondent-Father contends that the trial court abused its discretion by ceasing reunification efforts between himself and A.S. We agree.

The sole finding of fact relating to Respondent-Father and his relationship with A.S. was that:

10. [Respondent-Mother] spoke with [Respondent-Father] regarding his child, A.S. He is willing to undergo a drug screen. He indicated to [Respondent-Mother] that he desired to have visitation with his child. [Respondent-Father] and his family are not currently in a position to have custody, but he would like to maintain contact with her.

The trial court made no findings that efforts toward reunification with Respondent-Father would be futile, or that such efforts would be inconsistent with A.S.'s health, safety, and need for a safe, permanent home within a reasonable period of time. *In Re Weiler*, 158 N.C. App. at 478, 581 S.E.2d at 137. Moreover, the trial court made no findings regarding what efforts had been made with

Respondent-Father to prevent A.S.'s placement in DSS's custody. N.C. Gen. Stat. §7B-507(a) (2007). As noted by Respondent-Father, the trial court's findings regarding cessation of reunification efforts related solely to the Respondent-Mother. It appears the trial court did not consider Respondent-Father in its findings. Therefore, we conclude that the trial court erred by ceasing reunification efforts between A.S. and Respondent-Father. The part of the dispositional order ceasing reunification efforts between Respondent-Father and A.S. is reversed and remanded for a new dispositional hearing.

Because of our determination that the dispositional order must be reversed and remanded as to Respondent-Father, we need not address Respondent-Father's remaining arguments.

For the reasons stated above, we reverse the adjudicatory order to the extent that it adjudicates A.S. a neglected juvenile. In all other respects, the adjudicatory order is affirmed. The dispositional order is affirmed as to Respondent-Mother, but is reversed and remanded as to Respondent-Father.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).