

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-18

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

In the Matters of:

A.H., L.L. and B.L.

Transylvania County
No. 01 JA 46, 47
07 JA 44

Appeal by respondents from order entered 7 November 2007 by Judge David K. Fox in District Court, Transylvania County. Heard in the Court of Appeals 14 April 2008.

Janna D. Allison, for respondent-appellant mother.
Carol Ann Bauer, for respondent-appellant father.
Sarah B. Kemble, for guardian ad litem.

WYNN, Judge.

If a trial court's findings of fact are supported by competent evidence, the findings are binding on appeal.¹ Here, Respondent-father and Respondent-mother contend that the trial court erred by making various findings of fact in its adjudication and disposition order. Because the findings of fact are supported by competent evidence and the findings of fact support the trial court's conclusion that the minor children were neglected, we affirm.

¹ *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003).

According to the record, the Transylvania County Department of Social Services (DSS) has been involved with this family since 2001 because of incidents of domestic violence between Respondent-mother and Respondent-father. DSS first filed a juvenile petition alleging neglect of A.H. and L.L. on 23 July 2001,² but DSS voluntarily dismissed the petition on 29 April 2002. DSS filed another juvenile petition on 25 February 2003, alleging neglect and dependency as to A.H. and L.L., due to an incident in which the parents were involved in a fight and Respondent-father took the children in his car and led the police on a high-speed car chase. Both parents were arrested, and the trial court issued an order granting DSS non-secure custody of the children. The two children were adjudicated neglected, and on 17 August 2004, the trial court entered an order ceasing reunification efforts by DSS and allowing DSS to move forward with termination of parental rights as to both Respondents. The father appealed to this Court.

After this Court reversed the trial court's order and remanded for further findings of fact, *In re A.L. a/k/a A.H. & L.L. a/k/a L.H.*, 174 N.C. App. 625, 621 S.E.2d 343 (2005), the trial court determined that it was in the best interests of the children to be returned to their mother and the father should have visitation. Physical custody was granted to Respondent-father in May 2007, after an incident in which Respondent-mother was arrested for hitting Respondent-father while she was holding B.L.

² B.L., the youngest sibling, was born in November 2005.

On 27 June 2007, two police officers responded to a call at Respondent-father's residence regarding gunshots fired. The minor children were living with Respondent-father at that time. The officers observed the youngest child, B.L., sucking on the barrel of a loaded pistol. DSS was granted non-secure custody of all three children on that day and filed a juvenile petition on 28 June 2007 alleging neglect and dependency. DSS alleged that the children were living in an environment injurious to their welfare, and that no parent, guardian, or custodian was responsible for the children's care or supervision. The children were placed first in foster care, then briefly with their maternal grandparents, and then were returned to foster care.

The adjudication and disposition hearing was held on 15 October 2007. The following evidence was presented at the adjudication phase regarding the 27 June 2007 incident. Shannon Stamey, a deputy with the Transylvania County Sheriff's department, testified that on 27 June 2007, he responded to a 911 call from Respondent-father reporting that Respondent-mother had driven by and fired shots toward his residence. Deputy Stamey and another officer, Lieutenant Kevin Holden, stopped Respondent-mother's car within a few minutes of the call, but a search yielded no firearms. Deputy Stamey testified that he and Lieutenant Holden returned to the Sheriff's office, where the magistrate informed them that Respondent-mother had a Chapter 50B restraining order against Respondent-father; thus, Respondent-father was not allowed to have any firearms in his possession. Because a police officer who had

responded to the 911 call had seen Respondent-father with a 12-gauge shotgun, the officers returned to Respondent-father's residence to question him about whether he was in possession of any firearms.

As Deputy Stamey and Lieutenant Holden questioned Respondent-father outside of his residence, Deputy Stamey noticed a young child walk by the front door holding a gun with his finger on the trigger and the barrel in his mouth. Deputy Stamey thought the gun was a toy even though it looked real. Deputy Stamey then saw Respondent-father's wife, Tina L., take the gun from the child and place it on a table near the front door. A moment later, the officers saw the child holding the gun again with the barrel in his mouth. Lieutenant Holden immediately asked if it was a real gun, at which point Respondent-father turned around and said, "Oh, s-, yeah it's real," went into the house, grabbed the gun from the child, ran into the kitchen with it and was about to put it on top of the refrigerator. The officers followed Respondent-father into the house and took the gun from him. The weapon was a loaded .25-caliber gun. Respondent-father revealed that he also had a shotgun in the house as well as shotgun shells. Respondent-father was arrested for violating the 50B restraining order, and was later charged with misdemeanor child abuse along with his wife Tina L.

Respondent-father testified that on 27 June 2007, he heard what he thought were gunshots outside his residence, saw Respondent-mother in a vehicle with two males, and he heard her yell out the window. Respondent-father called 911 and waited for

the authorities for approximately twenty to thirty minutes before deciding to call Jesse Eubanks, a friend who was holding his guns on his behalf due to the 50B restrictions on firearm possession. Mr. Eubanks's testimony was consistent with Respondent-father's; they both stated that Mr. Eubanks arrived within a few minutes of being called and brought Respondent-father his shotgun and a pistol. Respondent-father testified that he already had ammunition, and he loaded the pistol and put it on top of the refrigerator inside the house. The shotgun was left unloaded and put in the cab of Respondent-father's truck. Deputy Stamey and Lieutenant Holden arrived approximately fifteen to twenty minutes after Respondent-father received the guns from Mr. Eubanks, who left after dropping the weapons off.

Respondent-father testified that the weapons could not be reached by the children, that B.L. only played with toy guns, and that he had been playing with a toy gun on the day in question. He stated that when the officers came to talk to him, they asked him if he had any weapons at the house. He told them he did, and stepped inside to ask Tina L. to retrieve the pistol, which she got from the top of the refrigerator. Respondent-father stated that he handed the pistol to Lieutenant Holden, and that's when he was arrested for violating the 50B order. Respondent-father denied that one of the officers asked if the child was holding a real gun, or that he replied, "Oh, s-, yes it is." He stated he did not run into the house to get the gun from the child, and that he never saw the child with a real gun, only with a toy gun.

Regarding the relationship between Respondents, Respondent-father testified that Respondent-mother had threatened to kill both him and his wife Tina L., and that she continued to threaten him, including in the courthouse on the day of the adjudication hearing. He stated Respondent-mother had taken out thirty four warrants against him and that he had to go to jail each time she took out a warrant against him. At the end of the adjudication phase, the trial court agreed to take judicial notice of the underlying domestic violence files.

Respondent-father's wife, Tina L., also testified regarding the events of 27 June 2007. She stated she and her husband heard what sounded like gunshots outside their house, saw Respondent-mother drive by with two males in the car, and heard her yelling curses out the window. Tina L. stated that she was aware of a shotgun under a mattress and a pistol on top of the refrigerator, but never saw B.L. with a weapon, as the only things he had access to were "toy guns, squirt guns, and . . . cyber shooters" which were on the floor in the house. She testified she did not recall removing anything from B.L.'s hand, and that B.L. would not have been able to reach the gun that was on top of the refrigerator. She also stated there is no table near the front door that would be visible from the outside. When Respondent-father came into the house and asked her where the pistol was, she replied that it was on the refrigerator, and she got the gun and handed it to him. She stated the officers were outside during this exchange and they came into the trailer as she was handing the gun to Respondent-father.

During the disposition phase of the hearing, DSS social worker Dottie Harris testified regarding the children's placements. She requested that the children remain in DSS custody due to the extensive history of the case, the ineffective placements with each of Respondents, and Respondents' inability to break the cycle of domestic violence. DSS worked with Respondents from 2003 through 2006, but even after that, Respondents continued to take out 50B restraining orders against each other and to fight with one another. Ms. Harris stated that visitation with Respondent-mother was problematic because she spends a lot of her time on her cell phone rather than engaging with the children. Prior visitation between the children and Respondent-father had generally gone well. However, there were problems with both parents' behavior with regard to attempting to see the children or otherwise interfering with the other parent's visitation, such that the children needed to be placed in a different county. Ms. Harris did note that both parents had completed their case plans, including anger management classes by Respondent-father.

Brenda Morgan, another DSS worker who supervised visits for Respondent-father, briefly testified that the visits went well, that she did not observe anything inappropriate, and that the children and Respondent-father appear to be bonded with each other. She stated that the children are bonded with their mother as well. Renee Crocker, also a DSS social worker, testified in the disposition phase that she had supervised a couple of visits at Respondent-father's home, and that the visits had gone well.

Upon conclusion of the hearing, the trial court adjudicated the minor children neglected and relieved DSS of its obligation to continue reunification efforts. The order further allowed DSS to pursue termination of parental rights as to both Respondents. Respondents appeal from the trial court's order.

On appeal, Respondent-father first argues that the trial court erred by making adjudicatory findings of fact 5, 6, and 7, and disposition finding of fact 11, as they were not supported by the evidence. Additionally, both Respondents argue that the trial court erred by making disposition findings of fact 12, 13, and 14, as they were contrary to the evidence. Finally, Respondent-father contends that the trial court erred in concluding that the children are neglected.

I.

In an appeal from an adjudication order, this Court reviews the evidence to determine whether clear, cogent, and convincing evidence exists to support the findings of fact. *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003); see also N.C. Gen. Stat. § 7B-805 (2007) ("The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence."). If competent evidence exists, the findings are binding on appeal, even if evidence contrary to the findings was presented. *McCabe*, 157 N.C. App. at 679, 580 S.E.2d at 73. Finally, "[t]he trial judge 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, he alone

determines which inferences to draw and which to reject." *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985); *see also In re A.K.*, 360 N.C. 449, 456, 628 S.E.2d 753, 757 (2006) (stating that the trial court has "broad discretion as to which facts to consider and how much weight to accord them").

Here, the petition alleged neglect of the minor children as a result of the incidents which occurred on 27 June 2007. A neglected juvenile is one "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) (2007).

Respondent-father challenges the following findings of fact made by the trial court in the adjudication stage:

5. Mr. [L.] met Deputy Stamey and Lt. Holden at the door of his residence. While speaking with Mr. [L.], Deputy Stamey saw the juvenile [B.L.], 19 months old at the time, walking by the door holding what appeared to the Deputy to be a small caliber automatic pistol with the barrel in his mouth. Deputy Stamey initially thought the juvenile was holding a plastic toy pistol. He saw Tina [L.] take the pistol from the juvenile and place it on a small table near the door. When Deputy Stamey saw [B.L.] again, holding the pistol in his mouth with his finger on the trigger, he became alarmed and asked Mr. [L.] if it was a real pistol. Mr. [L.] looked at the juvenile, made a statement to the effect of "Oh, s[-];" and turned back to take the gun away from [B.L.].

6. Mr. [L.] took the pistol from [B.L.] and placed it on the refrigerator inside the residence.

7. Deputy Stamey and Lt. Holden entered the residence and retrieved the [gun] from the top of the refrigerator, a small .25 caliber

automatic pistol. One round was in the chamber. It was the same pistol [B.L.] was holding earlier with his finger on the trigger and the barrel in his mouth. The Court received the pistol, marked as Petitioner's "Exhibit A," into evidence.

Respondent-father also challenges the following finding of fact from the disposition phase of the hearing:

11. That on or about June 27, 2007, while the juveniles were in the residence of the father, the mother with two men drove by the residence and either fired a gun or threw a firecracker and uttered profanity which could be heard at the residence. The father thereafter called for and received his shotgun and automatic pistol, believing the safety of his family to be in jeopardy. When the officers arrived at the father's residence, the youngest child, [B.L.], had a loaded .25 caliber automatic pistol in his hand, with the barrel in his mouth and his finger on the trigger.

Respondent-father states that Deputy Stamey's evidence was ambiguous regarding whether the gun held by the child was a toy or real, versus Respondent-father's and Tina L.'s testimony that the gun was a toy. Therefore, according to Respondent-father, the trial court erred in believing the officer's testimony and adopting his version of the facts. We do not agree.

After reviewing the record, we conclude that there was clear and convincing evidence to support these findings of fact. Deputy Stamey testified that he saw the youngest child holding a pistol while sucking on the barrel and that although he at first thought it was a toy, he became alarmed after Tina L. took the gun away and then the toddler picked it back up again. He was about to ask about the gun when Lieutenant Holden exclaimed, "My God, please tell me that's not a real gun." In response, Respondent-father

responded, "Oh, s-, yeah it's real," ran into the house to take the gun from B.L. and then attempted to put it atop the refrigerator. The officers retrieved the gun from Respondent-father, and the gun was a loaded .25-caliber pistol. Deputy Stamey stated he was able to see Respondent-father from the time he stepped into the house, to when the officers retrieved the gun from him.

Although the testimony by Respondent-father and Tina L. contradicts the testimony given by Deputy Stamey, the trial judge is the ultimate arbiter of the facts and may choose to accept certain evidence as credible and other evidence as incredible. *Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Deputy Stamey's testimony was clear that the item taken from the minor child B.L. was in fact a loaded pistol and not a toy gun. The trial court was well within its province to determine Deputy Stamey's testimony to be more credible than Respondent-father's or Tina L.'s. Since the evidence clearly supports the trial court's findings of fact, Respondent-father's assignments of error are overruled.

II.

Respondents next challenge other findings of fact from the disposition phase of the hearing. Specifically, they assign error to:

12. The most recent events which have been found as a fact by this Court and resulting from the Petition filed in this matter, demonstrate clearly to the Court that, notwithstanding all prior efforts by this Court and the numerous agencies involved for and on behalf of the parents, the parents remain either unable or unwilling to conduct themselves in a manner which is not injurious to the welfare of the juveniles.

13. The Department of Social Services has made reasonable efforts to prevent placement of the juveniles out of the home including, but not limited to, providing Medicaid assistance, food stamps, housing assistance, counseling assistance, emergency assistance, Work First counseling and assistance, Kinship Placement, and various other Department of Social Services community services, most of which have been futile.

14. Because of the conduct of the parents as set forth above and the history of domestic violence which has occurred repeatedly over the years in this case and the continued inability of both the Department of Social Services and the Court to effect a stable and permanent and safe living situation for the juveniles, the juveniles continue to be put into a high risk of continued neglect. Without an apparent ability by the parents to take the necessary steps to effect reunification, a return of the juveniles to the home of either parent would be contrary to their best interests. Because the Transylvania County Department of Social Services has made numerous and continued reasonable efforts in the past to prevent or eliminate the need for the removal of the juveniles from the home of the parents, all of which have been futile, the Court FINDS that further reasonable efforts to eliminate the need for their placement should not be required and shall cease and that a Permanency Planning Hearing as required by G.S. 7B-907 should be held in 30 calendar days.

Respondents contend these findings are not supported by the evidence received at the hearing. Respondent-mother argues that the court erred in finding that the best interests of the children would not be met by pursuing reunification with her because the evidence showed that her children are bonded to her. Respondent-father contends that he has provided a stable environment for the children, that he did not provoke the incident occurring on 27 June 2007, and that the evidence shows his visitation with his children

went well and that they were bonded to him. We find Respondents' arguments unpersuasive.

The disposition phase is for the trial court and the parties "to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C. Gen. Stat. § 7B-900 (2007). If findings made during the disposition phase are supported by competent evidence, they are binding on appeal. *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001).

Here, sufficient evidence was presented regarding the history of the case and the continual problems between Respondents. First, Respondent-father himself testified regarding the approximately thirty four warrants taken out by Respondent-mother against him, and the threats of violence by her against him and Tina L. Second, social worker Ms. Harris testified about the long involvement of DSS in this case, and that Respondents continued to inflict violence on one another. Specifically, she stated, "[t]he parents don't get along with each other and their criminal records would indicate they don't get along with other people either" and their interactions with each other often deteriorate "into physical violence and this last time there were guns involved." Finally, other disposition findings of fact not challenged by Respondents detail previous violence between them as well as their failure to comply with no-contact orders issued by the trial court in the

past. Therefore, finding 12 is sufficiently supported by the evidence given at the hearing.

With respect to finding 13, the trial court notes at the beginning of the disposition findings of fact that it received and considered the guardian *ad litem's* report as well as the report prepared by DSS. These reports, included in the record, are the basis for finding 13 regarding the reasonable efforts made by DSS to prevent placing the children outside the home. The disposition phase of a hearing is informal and the trial court "may consider written reports or other evidence concerning the needs of the juvenile," as well as any evidence "the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-901 (2007). Since the DSS report considered by the trial court fully supports finding 13, we find no error with this finding.

Finding 14 is similarly supported by the evidence presented. As stated above, sufficient evidence was presented regarding the long history of the case and the lack of progress made by Respondents in their ability to deal with each other in a civil and safe manner. The trial court had sufficient basis to determine that returning the children to either Respondent would not be in their best interests. Accordingly, Respondents' assignments of error challenging these three findings are overruled.

III.

Finally, Respondent-father contends the trial court erred in concluding that the children were neglected. He argues the

evidence presented at the hearing does not support a finding of neglect.

If the findings of fact support the conclusion, the trial court's decision will be affirmed. *In re N.G.*, __ N.C. App. __, __, 650 S.E.2d 45, 50 (2007), *aff'd*, _ N.C. _, 657 S.E.2d 355 (2008). Here, we have determined that the evidence taken at the adjudication and disposition hearing support the trial court's findings of fact. Those findings also support the trial court's conclusion that the children were neglected. The children were neglected as a result of living in an environment injurious to their health, where Respondents continually fought with each other and were unable to stop their cycle of violence and interference with each other. The youngest child had access to a dangerous weapon and indeed had the barrel of the weapon in his mouth, endangering both himself and the other two children. In light of the evidence presented and the trial court's findings of fact based on that evidence, we find that the trial court's conclusion of neglect is well founded. Accordingly, the trial court's adjudication and disposition order is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).