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NO. COA13-503  
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

IN THE MATTER OF:

Brunswick County  
Nos. 12 JA 160-61

R.B., E.O.

Appeal by Respondent-Mother and Respondent-Father from amended adjudication order entered 14 February 2013 and disposition order entered 28 January 2013 by Judge Sherry Dew Prince in District Court, Brunswick County. Heard in the Court of Appeals 17 September 2013.

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

*Parker Poe Adams & Bernstein LLP, by Deborah L. Edney, for Guardian ad Litem.*

*Rebekah W. Davis for Respondent-Appellant Mother.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam, for Respondent-Appellant Father.*

McGEE, Judge.

Brunswick County Department of Social Services ("DSS") filed petitions on 9 November 2012 alleging that R.B., then ten

months old, and E.O., then eight years old, were neglected and dependent. After a hearing, the trial court filed adjudication and disposition orders on 28 January 2013. The trial court filed an amended adjudication order on 14 February 2013. The trial court adjudicated the children neglected and dependent and ordered them to remain in the custody of DSS. Respondent-Mother ("Mother") is the mother of both children, but the children have different fathers. E.O.'s father is Respondent-Father ("Father"). R.B.'s father is not a party to this appeal. Mother and Father (together, "Respondents") appeal.

I. Mother's Petition for Writ of Certiorari

Father filed notice of appeal from the amended adjudication order on 22 February 2013 and Mother filed notice of appeal from the amended adjudication order on 12 March 2013. Mother also filed a petition for writ of certiorari with this Court, seeking review of the original adjudication order "if the amended adjudication order was improperly entered[.]" No party argues that the amended adjudication order was improperly entered, and we discern no jurisdictional defect in the amended order. We thus deny Mother's petition.

II. Standard of Review

We review an adjudication order to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re A.R.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 742 S.E.2d 629, 631 (2013). "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." *Id.* "Findings of fact are also binding if they are not challenged on appeal." *Id.* "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010).

III. Neglect

A juvenile is neglected if the juvenile does not receive proper care, supervision, or discipline from a parent or guardian, is not provided necessary medical or remedial care, or resides in an environment injurious to the juvenile's welfare. N.C. Gen. Stat. § 7B-101(15) (2011). This Court requires that "there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of" a parent's neglect. *In re S.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 719 S.E.2d 157, 158-59 (2011). The "trial court need

not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re S.H.*, \_\_\_ N.C. App. at \_\_\_, 719 S.E.2d at 159.

The trial court in this case made the following relevant findings:

10. [Social workers] went to the home where [Mother] was living on November 8, 2012. Present in the home was [Mother], [E.O.] and [R.B.]. The home in which the children were residing was not appropriate for them. The home was messy and cluttered. There were dirty dishes piled in the sink. There were toys and clothes all over the floors and there was no clear pathway. [R.B.], who was active and mobile, presented with a soggy diaper that was hanging to the floor; it did not appear to have been changed in some time. [Mother] seemed confused. It was difficult for her to focus on questions that were being asked. She was unsteady on her feet and her pupils were dilated. [Mother] represented that she had been prescribed drugs for a toothache, those being xanax, soma and vicodin. However, she could only produce one bottle and the number of pills in that bottle were insufficient based upon the date of prescription and the date examined.

. . . .

14. [Father] has made it clear that he does not have confidence in the mental health system. He did not address a plan to meet the child's mental health concerns. He did not want to go through an agency, but when an alternative was suggested of meeting with someone who could provide guidance such as a minister, no alternative was sought to the

knowledge of [DSS].

. . . .

17. School officials asked for a meeting with [E.O.'s] father to address his depression and the statements that he was making. The first meeting he did not attend. At the second meeting, staff noticed the smell of alcohol about his person.

18. [E.O.] was not coming in to school on time. On one occasion, it was at one o'clock in the afternoon. When he was late, he was not escorted into the office as is school policy and was often dropped off at the road.

19. [E.O.] was academically regressing as well and was academically at risk for repeating his grade. He has already been retained once.

20. School personnel consistently expressed to the child's parents that [E.O.]'s emotional needs had to be addressed. There was no evidence that any therapeutic assistance was provided for him.

21. Despite the execution of a safety assessment and recommendations from school personnel, [Father] did nothing to address his son's mental health issues.

22. [DSS] recommended that the parents secure a mental health evaluation of [E.O.]. The parents did not want the child to receive any medication. [Mother] acknowledged that she knew that [E.O.] had mental health needs, however she said she couldn't take him for services because she did not have legal custody and did not have a medicaid card for his use.

23. [Mother] went to the emergency room . . . on November 7, 2012 with both of the children. This was the first medical appointment that she made for the children in the recent past. [E.O.] was seen for a tooth infection and [R.B.] was seen with bronchitis.

. . . .

25. On October 11, 2012, the agency completed an In Home Services Agreement that provided that [Mother] enter into and complete an intensive Out-Patient Substance Abuse Program through Coastal Horizons. [Mother] attended two class meetings regarding the minor child, [E.O.]. However, she did not participate or complete in a substance abuse program.

A. Challenges to Findings of Fact

Mother argues that findings 10, 23, and 25 are not supported by clear and convincing evidence. Mother does not specify which portions of finding 10 she challenges. She concedes that her house was cluttered on 8 November 2012. Findings of fact that are not challenged on appeal are binding. *In re A.R.*, \_\_\_ N.C. App. at \_\_\_, 742 S.E.2d at 631.

As to finding 23, Mother argues that she took R.B. to the doctor. A social worker testified as follows:

[Mother's Attorney]. And she got [R.B.] caught up on doctor's appointments and different things that you had asked?

[Social Worker]. She did.

Getting "caught up" on doctor's appointments implies that Mother had not taken R.B. to appointments in the past. The finding is supported by clear and convincing evidence in the record.

As to finding 25, Mother contends that the "evidence provided no detail regarding [Mother's] drug treatment other than intake visits at the drug treatment center . . . and some general references to drug treatment participation and drug tests[.]" The record indicates Mother began treatment for substance abuse. Mother testified that she had not yet completed the program. The finding that Mother did not participate is unsupported by the evidence and is therefore error. To the extent that the finding implies that Mother simply quit the program, there is no evidence to support such an inference.

Father challenges finding 10 as unsupported. Relevant portions of the transcript are quoted below:

[Social Worker]. She advised me that she was currently taking Soma, Vicodin, and Xanax. She stated to me that she was prescribed Vicodin yesterday at the ER for a toothache.

[DSS Attorney]. And did you ask her to show you the bottles?

A. I did. . . . The only bottle that she produced to me was the Soma bottle which was filled on 10/29/12 and had very few pills

remaining. . . . I do not have in my notes how many there were, but I can say that when we counted them, there should have been more in the bottle.

This finding is supported by clear and convincing evidence.

Father also argues there is no evidence supporting portions of findings 5, 7, 12, 13, and 16. The findings are quoted below:

5. [DSS] became involved with the family on August 2, 2012 after receiving a child protective services referral alleging that [Mother] has serious substance abuse issues. [DSS] contacted [Mother] and it was determined that she was in need of case management services. She was referred for intake with Coastal Horizons and was to engage in a treatment program, secure stable housing separate and apart from [Father] and provide proof of her ability to provide for the care of the children.

7. The plan was reviewed on October 25, 2012 and [Father] was, again, to schedule a mental health assessment for [E.O.] and follow all recommendations of the mental health professionals and to provide [E.O.] with safe, sober supervision at all times. [Mother] attempted to take [E.O.] to a mental health assessment. She took him to the first scheduled appointment on or about October 8, 2012, but was turned away due to the fact she did not have [E.O.'s] social security card with her. [Father] was in possession of the card and did not provide it to her. The second appointment scheduled for late October had to be rescheduled by N.C. Solutions due to a scheduling conflict.

12. [E.O.] has been enrolled in [elementary



school] since kindergarten. He presents with some behavior issues in the classroom that have resulted in referrals for services. Debra Stapperfenne, the school social worker, has developed a rapport and relationship with [E.O.] and has often addressed his agitation and "melt-downs" in the classroom. Ms. Stapperfenne has recommended that the parents secure mental health services for the child.

13. [E.O.] has become emotionally distraught in the classroom, will have breakdowns and cry, has been unable to concentrate in class. He has made statements about injury to himself - suggested jumping off the bed and breaking his neck. He has also made deprecating statements such as "I may fade away" or "I am unimportant" or "I may starve myself." On one occasion he stated that he would "run in front of the bus."

16. On occasion [E.O.] would not independently get on the bus. He would bawl and sob. On one occasion he began to hyperventilate and when directed to "breathe easy and think about something happy" he replied "I have nothing to be happy about."

As to finding 5, Father argues that the allegation of serious substance abuse issues is unsupported. However, the trial court did not find that Mother had serious substance abuse issues. Rather, the trial court found that DSS became involved after receiving a "referral *alleging* that [Mother] has serious substance abuse issues." The trial court did not err in making this finding.

Father next argues that there was no evidence to support finding 7 that Father had the social security card in his possession and did not give it to Mother. The transcript reveals no evidence to this effect. The trial court erred in this portion of finding 7.

As to findings 12 and 13, Father argues that the school counselor "had not had contact with [E.O.] for some time." Father contends that because the testimony "was not current[,] " it "could not provide the basis for clear and convincing evidence." Father cited *In re A.K.*, 178 N.C. App. 727, 637 S.E.2d 227 (2006), for support. That case is distinguishable from the present case. The prior adjudication of neglect of another child in the home was relevant in determining whether a child was neglected in *In re A.K.* The trial court "relied upon all prior orders concerning C.A.K. in entering its adjudication of A.K." as neglected. *In re A.K.*, 178 N.C. App. at 731, 637 S.E.2d at 229. This Court held that the trial court could not rely on the prior orders concerning the other child because the findings "were based on a hearing date nine (9) months before the date A.K. was removed from the home[.]" *Id.* Father cites no case holding that testimony of a neglect adjudication must be within a certain number of months, and our research reveals no

such case. The trial court did not err in admitting the testimony.

As to finding 16, Father argues that the finding must be set aside because the evidence was that "[o]ne day" the child would not get on the bus. The finding states that "[o]n occasion" the child would not get on the bus. To the extent that the finding implies that the child refused on multiple occasions, the trial court erred.

Mother also contends the trial court erred by relying on hearsay in findings 13 and 16. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is admissible as an exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(3) (2011). The challenged statements concerned E.O.'s then existing state of mind and emotions. The trial court did not err in admitting this evidence.

B. Challenges to Conclusion of Neglect

Respondents argue that the findings are insufficient to support the conclusion that the children are neglected. Our Supreme Court's "review of the numerous cases where 'neglect' or a 'neglected juvenile' has been found shows that the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). Our Supreme Court then reviewed examples of neglect which rose to the level required by N.C.G.S. § 7B-101(15).

In *Powers v. Powers*, 130 N.C. App. 37, 502 S.E.2d 398 (1998), "the mother was cited for driving while impaired on at least two occasions while her minor children were passengers." *In re Stumbo*, 357 N.C. at 284, 582 S.E.2d at 258. In *In re Thompson*, 64 N.C. App. 95, 306 S.E.2d 792 (1983), "the mother had struck her child with a belt and, on at least three occasions while bathing the child, inserted her finger or a washcloth into the child's vagina and washed with sufficient force to cause the child to bleed." *In re Stumbo*, 357 N.C. at 284, 582 S.E.2d at 259 (internal quotation marks omitted). In *In re Bell*, 107 N.C. App. 566, 421 S.E.2d 590 (1992), the

"parent did not keep adequate food in the house," "two children were not immunized against childhood diseases," and "the six-month-old baby had never been seen by a doctor." *In re Stumbo*, 357 N.C. at 284, 582 S.E.2d at 259.

In the present case, social workers observed the children in a cluttered house. R.B. wore a soggy diaper that reached to the floor and appeared not to have been changed in some time. Mother seemed confused and had difficulty answering questions. Her pupils were dilated, and the pill bottle she produced had fewer pills than the prescription indicated it should contain. E.O. has had academic and emotional difficulty in school.

However, the trial court made no findings that either R.B. or E.O. was harmed. The findings do not indicate that the children were in danger of being harmed. The clutter consisted of toys and clothes. The trial court found that Mother took both children to the doctor on 7 November 2012. The trial court also found that Mother "attended two class meetings regarding the minor child, [E.O.]." The evidence suggests that Mother intends to complete her treatment for substance abuse. Father does not have confidence in the mental health system and does not wish to medicate his child. However, Mother acknowledged E.O.'s mental health needs. The facts in this case do not rise

to the level of cases discussed in this section. We must conclude that the findings do not support a conclusion that the children were neglected.

#### IV. Conclusion of Dependency

Respondents also argue that the trial court erred in concluding that the children were dependent. We agree.

A juvenile is dependent if the juvenile's "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) (2011). "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).

Findings 26 and 28 in this case are the only findings addressing the availability of an alternative child care arrangement. Finding 26 states that the maternal grandmother "was proposed as a placement option" and that DSS was to place the children in her home if the grandmother passed a home evaluation and criminal background check. The finding does not indicate that an alternative child care arrangement was unavailable. See *In re P.M.*, 169 N.C. App. at 428, 610 S.E.2d

at 406-07 (reversing where the trial court made no finding as to the availability of an alternative child care arrangement and an earlier order stated that a relative was willing).

Finding 28 essentially quotes N.C.G.S. § 7B-101(9) and is effectively a conclusion of law stating the juveniles are dependent pursuant to the statute. The trial court erred in concluding that the children were dependent.

V. Conclusion

We do not address Respondents' remaining arguments because of our holdings above. The trial court erred in its conclusions as to neglect and dependency. The case is reversed and remanded.

Reversed and remanded.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).