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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-468

Filed: 6 December 2016

Rutherford County, Nos. 13 JA 93-94

IN THE MATTER OF: D.L.P. and H.L.P., Minor children.

Appeal by Respondent-mother from orders entered 11 February 2016 by Judge C. Randy Pool in Rutherford County District Court. Heard in the Court of Appeals 7 November 2016.

Merri Burwell Oxley for petitioner-appellee Rutherford County Department of Social Services.

Robert W. Ewing for respondent-appellant mother.

Cranfill Sumner & Hartzog LLP, by Jennifer A. Welch, for guardian ad litem.

DAVIS, Judge.

R.P. ("Respondent-mother") appeals from orders adjudicating her minor children "David" and "Henry"[1] to be neglected and dependent juveniles. On appeal, Respondent-mother argues that the trial court erred in finding that the children were dependent juveniles.[2] After careful review, we affirm.

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[1] Pseudonyms and initials are used throughout this opinion to protect the identities of the juveniles and for ease of reading. N.C. R. App. P. 3.1(b).

[2] The children's father is not a party to this appeal.

Factual Background

On 7 May 2014, the Rutherford County Department of Social Services ("DSS") filed petitions alleging that fifteen-year-old David and four-year-old Henry were neglected and dependent juveniles. The petitions alleged that on 6 May 2014, the children's father threatened to beat Henry "until he was bruised all over with blood running all over him." Respondent-mother sought assistance from DSS, but she repeatedly told DSS staff that she was unable or unwilling to leave the children's father in order to move her children to a safe place. Moreover, Respondent-mother objected to the children staying with a relative of their father, fearing that the relative would allow the father to visit the children. DSS obtained non-secure custody of David and Henry and placed them in foster care.

Beginning on 12 August 2014, the trial court conducted a hearing upon the petitions. On 18 November 2014, the trial court entered orders adjudicating David and Henry as neglected and dependent juveniles. Respondent-mother appealed to this Court, and we vacated and remanded the trial court's orders after determining the court had erred by failing to determine whether Respondent-mother needed a guardian *ad litem* during the adjudication and disposition hearings. *In re D.L.P.*, __ N.C. App. __, __, 776 S.E.2d 241, 244 (2015).

While Respondent-mother's appeal was pending, the trial court entered orders that granted Respondent-mother and the children's father joint legal custody of

Henry. In addition, the parties were ordered to share physical custody of Henry with each parent having custody of him every other week. The exchange of custody was required to occur at the Rutherford County Sheriff's Office since the parents were not permitted to have contact with each other. David — who was almost seventeen years old — was placed in the custody of his father, and the court allowed him to determine for himself whether he would have visitation with Respondent-mother.

On 16 June 2015, DSS filed new petitions alleging that David and Henry were neglected and dependent. The petitions alleged that (1) David had been involved in a physical altercation with his father; (2) Respondent-mother and the children's father were continuing to have contact with one another in violation of the court's prior order; and (3) the parents had physical and verbal altercations in front of their children. DSS regained non-secure custody of the children.

On 31 August 2015, DSS voluntarily dismissed the 16 June 2015 petition regarding David. A hearing was conducted on the remaining portions of the petitions on 14, 21, and 25 January 2016. On 11 February 2016, the trial court entered two orders — one for each minor child.[3]

With respect to David, the trial court made the following pertinent findings of fact:

[3] Although the trial court entered two separate adjudication orders, the substantive findings of fact in each order were identical.

12. That DSS became involved with the family due to domestic violence in the home and the mental health issues of the respondent mother.

13. That on or about May 6, 2014 DSS was working a treatment case with the family. The parties were to get mental health assessments and intensive in-home treatment had started working with the family. The respondent parents were living together at this time.

14. That on May 6, 2014 DSS received a report alleging the respondent father threatened to beat [Henry] who was four years old at the time "until he was bruised all over with blood running all over him" after [Henry] accidently hit the respondent father with a toy. In addition [David] who was 15 years of age at the time confirmed this happened and said that he would harm the respondent father if he returned to the home.

15. That DSS met with the respondent mother on May 6, 2014 about the incident which she confirmed and DSS offered to pay for a night in a hotel for the respondent mother and the children and then discuss a safety plan the next day. The respondent mother and the children stayed at a local hotel the night of May 6, 2014.

16. That on May 7, 2014 DSS met with the respondent mother again to discuss a safety plan. DSS discussed that housing could be provided at least temporarily for the respondent mother and the children and that there was space at the local women's shelter for the respondent mother and her children. However, the respondent mother advised that she could not leave the respondent father and move herself and her children to a safe location. DSS explained that if the respondent mother would not cooperate to keep the respondent father away from the children then DSS would have to take custody of the children. The respondent mother advised DSS that DSS would have to take custody of the children because she could not leave the respondent father and would not

enforce an order to keep the respondent father away from the children.

17. That the respondent mother objected to the children staying with a relative of the respondent father. The respondent mother felt that the relative would allow respondent father to see the children.

18. That there is a history of domestic violence between the respondent parents that has occurred on a regular basis and on one occasion the respondent father hit [David] in the face and choked him when [David] stepped into to [sic] protect the respondent mother.

. . . .

22. That [David] confirmed that the respondent father tried to choke him[,] partially blocking his breathing[,] and afterwards his neck was red and he was hoarse. [David] also reported that the respondent mother slapped him and he in turn pushed the respondent mother.

23. That [Henry] reported that the respondent father told him he would whip [Henry] until there was blood coming down him. [Henry] also said that the respondent father whips him with a paddle on the butt. [Henry] also reported seeing the choking incident with [David].

24. That both [David] and [Henry] have been exposed to domestic violence and threats of abuse.

. . . .

31. That [David] did not have any family members who were available and appropriate to care for [David] that are known to DSS.

32. That on or about May 6, 2014 the respondent parents did not have any other appropriate child care arrangements for [David].

With respect to Henry, the trial court restated the majority of its findings from its order regarding David and made additional findings of fact detailing domestic violence incidents in the home during June 2015, including the following:

> 32. That on June 5, 2015 DSS received another report alleging continued altercations between the respondent parents in front of the children and a verbal and physical argument between the respondent father and [David]. Rutherford County Department of Social Services requested that Polk County Department of Social Services investigate this report.
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> . . . .
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> 34. That based on [the investigating social worker]'s investigation, the respondent parents continued to have contact with each other despite a court order that they have no contact. The respondent father let the air out of the tires on the respondent mother's vehicle. The respondent father came to the respondent mother's place of work with the children creating a scene resulting in him being trespassed from the Golden Corral restaurant.
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> 35. That Brian Smith was the respondent mother's supervisor at Golden Corral restaurant in June 2015. Mr. Smith was helping the respondent mother move furniture in June 2015 when the respondent father came over to the apartment with the children. (The respondent mother had gotten the apartment in December 2014.) The respondent father refused to leave when requested and called the respondent mother vulgar names in front of the children.
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> 36. That [David] reported that the respondent mother was subject to outbursts of anger[,] throwing things[,] and yelling and on one occasion in the past the respondent mother brandished a knife and stabbed a trash can.

> 37. That the respondent parents had been court ordered not to have contact with each other in the presence of the children; however, both the respondent mother and the respondent father admitted to disregarding the court's orders on a number of occasions when they continued to have contact with each other in the presence of the children.
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> 38. That [Henry] does not have any family members who are available and appropriate to care for [him] that are known to DSS.
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> . . . .
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> 40. That on or about June 16, 2015, the respondent parents did not have any other appropriate child care arrangements for [Henry].

Based on these findings of fact, the trial court concluded that both children were neglected and dependent. At the disposition phase, the trial court ordered that Henry remain in DSS custody and awarded both of his parents unsupervised overnight visitation. The court concluded that because David was seventeen years old, he was "of sufficient age and discretion to determine how much time he will spend with each of his parents." As such, the trial court dismissed the matter with respect to him. Respondent-mother entered timely written notices of appeal as to each order.[4]

Analysis

[4] Although David has turned eighteen during the pendency of this appeal, Respondent-mother's appeal as to David is not moot because the trial court's adjudication may have collateral legal consequences. *See In re A.K.*, 360 N.C. 449, 459, 628 S.E.2d 753, 759 (2006).

On appeal, Respondent-mother argues that the trial court erred by adjudicating her children to be dependent juveniles. Specifically, she contends that the court's findings did not support its determination that she and the children's father were unable to adequately provide for the children's care.[5] We disagree.

This Court's review of an order adjudicating a juvenile as dependent is limited to determining "(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 Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citation and quotation marks omitted). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007).

A dependent juvenile is defined, in relevant part, as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care and lacks an appropriate alternative childcare arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). Respondent-mother concedes that the trial court's findings show that the parents violated the court's orders by "continu[ing] to contact each other and engage[ ] in domestic violence." However, she argues the findings "did not show that [Respondent-mother] had an

[5] Respondent-mother does not challenge the trial court's adjudication of the children as neglected.

inability to supervise David or Henry[,]" and that, therefore, the findings could not support an adjudication of dependency.[6]

This Court has previously upheld an adjudication of dependency based upon a parent's failure to prevent the child's other parent from being in contact with the child. For example, in *In re K.W.*, 192 N.C. App. 646, 666 S.E.2d 490 (2008), a juvenile notified her school counselor that her father had been raping her. *Id.* at 647, 666 S.E.2d at 492. The juvenile was unsure if her mother was aware of the rape. *Id.* When Mecklenburg Youth and Family Services ("YFS") became involved with the case, the father signed a Safety Assessment Plan, agreeing to cease contact with his daughter. *Id.* However, one week later the father moved back into the family home in contravention of the established plan. *Id.*

On appeal of the trial court's order adjudicating the juvenile as abused, neglected, and dependent, this Court held that "K.W. was in an injurious environment where her father continued to be present despite his agreement to stay away[,]" and it was necessary for YFS to obtain the custody order for K.W.'s protection. *Id.* at 656, 666 S.E.2d at 497. Since K.W.'s mother had refused to prevent the father from having contact with K.W., we affirmed the trial court's adjudication of her as a dependent juvenile. *Id.*

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[6] Respondent-mother does not contest the trial court's determination that the children lacked an alternative childcare arrangement.

Here, the trial court's findings demonstrate that the parents had a history of domestic violence. DSS determined that the adverse impact of this violence on the children prevented the parents from providing proper care and supervision of them. For this reason, the court ordered the parents to cease contact with one another in the presence of the children. Despite this order, the findings — which are not contested by Respondent-mother — establish that Respondent-mother and the children's father continued to have contact with one another in the presence of the children. Thus, the trial court's findings supported its determination that Respondent-mother and the children's father were unable to properly care for and supervise Henry.

Respondent-mother also contends that the trial court's adjudication orders, which were entered on 11 February 2016, cannot be reconciled with the trial court's decision to grant the parents unsupervised visitation in a separate order in December 2015, arguing that "a trial court would not grant a parent unsupervised visitation with a child if they were in fact unable to provide for that child's care." She also notes that the trial court's disposition order dismissed David's case and argues that "[t]hese parents cannot possibly be found to [be] unable to provide care with this result."

However, N.C. Gen. Stat. § 7B-802 makes clear that "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in a petition*." N.C. Gen. Stat. § 7B-802

(2015) (emphasis added). As a result, "post-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect, or dependency." *In re V.B.*, __ N.C. App. __, __, 768 S.E.2d 867, 869 (2015).

Although Respondent-mother correctly notes that "this rule is not absolute[,]" this Court has only allowed exceptions to the rule for evidence of "a fixed and ongoing circumstance," such as paternity. *Id.* at __, 768 S.E.2d at 870. In this case, the children were determined to be dependent based on specific events that took place prior to the filing of DSS's petitions rather than on any fixed and ongoing circumstance. Therefore, evidence that Respondent-mother and the children's father were granted unsupervised visitation shortly before the adjudication hearing and that David's case was dismissed at disposition would not be relevant or admissible as to whether the parents were able to properly care for the children at the time the petitions were filed. Thus, the trial court did not err by not considering this post-petition evidence.

Conclusion

For the reasons stated above, we affirm the trial court's orders.

AFFIRMED.

Chief Judge MCGEE and Judge ELMORE concur.

Report per Rule 30(e).