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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-546

Filed: 15 November 2016

New Hanover County, No. 15 JA 260

IN THE MATTER OF: K.D.

Appeal by respondent from order entered 29 March 2016 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 18 October 2016.

*Dean W. Hollandsworth for New Hanover County Department of Social Services, for petitioner-appellee.*

*Doughton Rich Blancato PLLC, by William A. Blancato, for guardian ad litem.*

*Rebekah W. Davis for respondent-appellant.*

BRYANT, Judge.

Where the evidence supports the trial court's findings of fact, which in turn support the conclusion of neglect, we affirm. Where the law does not require that evidence be presented of an alternative *family* placement and where the trial court's finding regarding the second prong of the dependency analysis is inadequate, it cannot support the trial court's conclusion of dependency, and we reverse that portion of the order.

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When Kobe<sup>1</sup> was born on 3 September 2015, he was approximately ten weeks premature. Kobe has two older brothers, Kevin and Keith<sup>2</sup>, who were in the legal custody of the New Hanover County Department of Social Services (“petitioner DSS”)<sup>3</sup> due to findings of neglect in an order entered 22 May 2014. During the course of Keith and Kevin’s cases, respondent-mother failed to submit to requested court-ordered drug screens, failed to participate in treatment by missing meetings, tested positive for unprescribed opiates, was diagnosed with Schizoaffective disorder, stopped taking her psychiatric medications, was dropped from her community support team due to lack of participation, and was prone to behavioral outbursts. Respondent-mother was so resistant to court-ordered services and out of compliance with her family services case plan that efforts at reunification with Kevin and Keith were ultimately ceased by the court. Kevin and Keith were eventually placed with paternal relatives in Raleigh and New Jersey<sup>4</sup> on a permanent basis.

On 3 September 2015, social worker Robin Johnson met with respondent-mother following a report that respondent-mother had given birth, tested positive for drugs, and exhibited conduct raising mental health concerns. Because Kobe would be in the hospital for four to five weeks due to his premature birth, Johnson used this

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<sup>1</sup> A pseudonym is used to protect the juvenile’s identity. Kobe has two brothers, K.M.T. and K.A.D. K.M.T. will be referred to as “Kevin,” and K.A.D. will be referred to as “Keith.”

<sup>2</sup> See *supra* note 1.

<sup>3</sup> Petitioner DSS assumed custody of Kevin and Keith on 27 December 2013, when Keith was four years old and Kevin was four months old.

<sup>4</sup> Kevin and Keith have different fathers.

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time to give respondent-mother the opportunity to demonstrate she could be successful with this infant. While at first respondent-mother was “very motivated,” she ultimately was unable to obtain a stable residence, failed to engage in mental health treatment, and had an outstanding warrant for her arrest which she did not address.

Petitioner DSS obtained custody of Kobe on 6 October 2015. The same day, petitioner DSS filed a neglect and dependency petition concerning Kobe and an order for nonsecure custody was entered. Upon learning that petitioner DSS had secured custody of Kobe, respondent-mother reacted so extremely she landed in jail.

Kobe’s neglect and dependency petition was heard on 4 February 2016 by the Honorable J. H. Corpening, II. The trial court heard testimony from respondent-mother, called as an adverse witness by petitioner DSS, as well as the testimony of social workers Johnson and Crystal Le Duc, who had been assigned to all three of respondent-mother’s children’s cases. Both Keith and Kevin were in the legal custody of petitioner DSS at that time, and the court took judicial notice of the orders in their files. After consideration of the evidence, the court adjudicated Kobe as neglected and dependent by order entered 29 March 2016. Respondent-mother appeals.

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On appeal, respondent-mother argues that (I) the findings of fact were conclusory and not supported by the evidence, which findings were insufficient to

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support a conclusion that Kobe was neglected, and (II) the evidence did not support the findings of fact, which in turn failed to support the trial court's conclusion that Kobe was dependent.

*I*

Respondent-mother first argues the evidence did not support the trial court's findings of fact, which in turn did not support the trial court's conclusion that Kobe was neglected. We disagree.

“The role of this Court in reviewing a trial court's adjudication of neglect . . . 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[.]’ ” *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2008)). “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.* (citation omitted)

Allegations in a neglect petition must be proved by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2015). “Clear and convincing evidence ‘is greater than the preponderance of the evidence standard required in most civil cases.’ ” *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (quoting *In re Montgomery*, 311 N.C. 101, 109–10, 316 S.E.2d 246, 252 (1984)).

A “neglected juvenile” is defined as

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[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. *In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (2015) (emphasis added). “In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a *substantial risk of such impairment.*” *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (emphasis added) (citing *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1998)).

“An adjudication of neglect may be based on conduct occurring before a child's birth.” *Id.* at 210–11, 644 S.E.2d at 592 (citation omitted); see *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007) (holding that where a parent has failed to participate in court-ordered therapy and continued to refuse to accept responsibility, together with a previous adjudication of neglect, such evidence will be sufficient to support a finding that a newborn would likely be neglected). Thus, a newborn child, like Kobe, may be adjudicated as neglected by a parent even if the child has never

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resided in the parent's home. *See In re K.J.D.*, 203 N.C. App. 653, 661, 692 S.E.2d 437, 444 (2010). As such, determining neglect in cases where DSS takes custody of a newborn "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future . . . neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court made the following findings of fact regarding neglect:

3. After hearing the testimony of all witnesses and the evidence as presented, the Court finds as fact that the Juvenile is a neglected Juvenile, in that the Juvenile does not receive proper care, supervision, or discipline from the Juvenile's parents and lives in an environment injurious to the Juvenile's welfare. Specifically, on or about October 6, 2015 and preceding: The Juvenile was born at approximately 30 weeks gestation and was in the hospital at the date of filing of the Juvenile Petition. Also that this is the mother's third child, with the first two being in the legal custody of the Petitioner and placed with paternal relatives. The mother has a history of mental illness, low cognitive functioning and substance abuse, she tested positive for unprescribed opiates during the pregnancy in July of 2015 and has been diagnosed with Schizoaffective Disorder and Post Traumatic Stress Disorder in a psychological evaluation previously performed by Dr. Len Lecci.

...

5. The Court found as fact that [respondent-mother] has serious, profound longstanding mental health issues unmet to this point; specifically schizoaffective disorder; tested positive on November 6, 2015 for cocaine by hair test and did not disclose her pregnancy and all of these factors

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combined to form a nexus of harm to this child. With the mother's past history and lack of compliance with mental health and substance abuse treatment along with past inappropriate behaviors during the Petitioner's involvement with her older children, this infant would be at risk if discharged to the mother's care.

6. Crystal Le Duc, social worker with the New Hanover County Department of Social Services testified as to the accuracy and authenticity of the Court Report dated February 4, 2016 that was accepted into evidence and considered by the Court along with a random drug screen result from MEDAC dated November 9, 2015 with a positive result for cocaine from the mother's hair test; positive paternity testing of Antwarn Rogers; medical records from Dawson Street Family Practice for [respondent-mother]; Comprehensive Clinical Assessment for [respondent-mother] performed at A Helping Hand of Wilmington and a letter from that program showing a record of her compliance and non-compliance. Social Worker Le Duc testified that [respondent-mother] is aware of what it takes to address her severe mental health and instability issues, however, she continues to be resistant to addressing her needs and remains in denial of her mental health issues. The Department will be looking for [respondent-mother] to fully engage in her treatment and has already been in contact with her provider about the possibility of an ACT Team or another round of Community Support Team involvement. [Respondent-mother] will need to maintain her housing, obtain and maintain employment, and demonstrate sobriety through negative drug screens.

...

1. [Kobe] is a . . . neglected Juvenile as defined by N.C.G.S. § 7B-101(9) and (15) and as detailed in the Findings of Fact.

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Both the historical facts and the evidence regarding respondent-mother's most recent behavior support the trial court's above findings of fact. The court took judicial notice of Kevin and Keith's DSS case files, which included the order ceasing reunification efforts between respondent-mother and Kevin and Keith and includes the following relevant findings of fact which support those in the instant case:

2. The Respondent-Mother visits with the Juveniles consistently however the Department is requesting to cease reasonable efforts at reunification due to the mother's mental health issues of Schizoaffective Disorder and PTSD along with low to borderline intelligence, lack of income and housing, unknown substance abuse concerns, lack of positive support and lack of parenting skills. Dr. Len Lecci's psychological evaluation disclosed an IQ of 79; the mother is prone to violent outbursts and has a strong temper. The mother struggles with mood regulation and exhibits unstable behavior. She was resistant to appropriate mental health services until approximately six months from the onset of this case. Her uncontrolled behavior has prevented unsupervised visitation from progressing, also has prevented shared parenting and visitations outside the Department. Her compliance with medications has been inconsistent despite the recommendation that such medication is a requirement to stabilize her functioning. She suffers from auditory hallucinations and delusional ideations. Her visitation was temporarily suspended since the last review due to an explosive encounter at daycare with the foster parent over an unfounded allegation of inappropriate discipline and resumed when she became more mentally stable. The mother struggles with chronic medical issues that result in monthly trips to the emergency department for hypertension and migraine headaches. The mother has complied with the parenting classes and had one negative drug screen but has failed to submit to all other requests for monthly drug screens.

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Social worker Le Duc also testified to respondent-mother's mental health history during the hearing in the instant case as Le Duc had been involved with respondent-mother since December 2013 regarding Kevin and Keith. Le Duc testified as follows regarding what she would foresee as a risk to Kobe:

My concern is that her mental health is so in control of her that the care of the child would be compromised in the form of neglect, in the form of, as he gets older and has more needs than just being fed and changed, I know that in the previous case with the older children that we had trouble with her and the way she is parenting [Keith]. [Keith] had bigger issues, and there was times that she was incredibly harsh with him and that he would shut down. He would go underneath the bench, stuff like that.

...

But if she had housing, and she had a job, and she stopped using drugs, or was not using any substances, I would still have concerns if she was not compliant with her mental health.

The trial court, which "determine[s] the credibility of the witnesses and the weight to be given their testimony[.]" *In re Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365 (citation omitted), also had the opportunity to hear from respondent-mother and evaluate her credibility, particularly her evasiveness regarding substance abuse:

Q. . . . So you tested positive for -- in a hair screen for cocaine in November of 2015.

A. Yes, sir.

Q. Okay, how did you test positive? What caused that, to

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your knowledge?

...

A. I don't know.

...

A. Not by me doing it. Ask Ms. Le Duc.

Q. Well, did you tell somebody you were around someone who was smoking?

A. That's what she said. She said.

Q. That's what she said?

A. That's he say, she say.

Q. He say, she say?

A. Yeah.

Q. Okay. All right, what did you tell her could have caused that ----

A. I don't recall.

Q. -- cocaine positive screen?

A. I don't recall.

Q. You don't recall? You don't recall saying you were around somebody smoking crack?

...

A. No, sir.

...

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A. I don't recall none of them things that Crystal's saying.

Q. Okay. Now you tested positive for some things when you did your comprehensive clinical assessment in January, didn't you?

...

A. Yes, sir.

Q. Was that -- Was that marijuana.

A. I don't do marijuana.

Q. Well, how did marijuana get in your system on that test?

A. I'm not sure.

Q. Were you around people smoking marijuana?

A. Hey, I stay in the projects. People smoke marijuana all the time. You could be walking down the street, people smoking marijuana. I'm around it.

...

Q. Back in July of 2015, did you test positive for an unprescribed opiate?

A. I guess so. If it's in the paperwork, I guess so.

...

Q. How did that get in your system?

A. I don't know.

Q. You think all these things are lies?

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A. Yeah.

Q. Every one of them?

A. Yeah.

Q. Okay.

A. I really do.

Q. Do you have a substance abuse problem?

A. No, sir, I don't.

...

Q. Do you have a mental health problem?

A. I have anxiety.

Q. Do you know what your diagnosis is?

A. I don't know. They lie about so many things, like schizo, which even that's a lie. When you have so many doctors telling you so many things, you don't know. They don't even know my diagnosis.

A copy of a comprehensive clinical assessment performed by A Helping Hand of Wilmington was also presented to the trial court which also documents in great detail respondent-mother's mental health and substance abuse history, as well as her failed urine drug screens and continued denial of a substance abuse problem or using certain substances at all.

Based on all of the foregoing, the evidence is clear and convincing and supports the trial court's findings of fact. Respondent-mother, however, argues that the trial

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court should not have relied on post-petition evidence such as the November 2015 drug test because post-petition evidence is not competent for the adjudication phase.

However, this rule is not absolute. For instance, in *In re A.S.R.*, 216 N.C. App. 182, 716 S.E.2d 440, slip op. at 11 (2011) (unpublished), this Court allowed a post-petition psychological evaluation to be considered during a neglect adjudication hearing because, “[d]ue to the fact that mental illness is generally not a discrete event or a one-time occurrence, . . . the psychological assessment was relevant to respondent’s ability to care for her child, regardless of when it occurred.”

*In re V.B.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 768 S.E.2d 867, 870 (2015). Respondent-mother’s mental health and substance abuse problems are not “discrete event[s] or . . . one-time occurrence[s.]” *See id.* As such, the post-petition November 2015 drug test is relevant to predicting the likelihood of neglect.

Here, as the trial court found, the historical facts establish that after Kevin and Keith were removed from her custody, she has continued to fail to submit to drug tests and those she does submit to she has failed, she has routinely missed appointments for mental health services, she has neglected to take her medications, she denies having a substance abuse problem and even denies taking the drugs she has tested positive for, and she remains prone to outbursts. Accordingly, the trial court’s findings of fact, taken in their entirety, are sufficient to support the conclusion that Kobe is a neglected child based on the substantial risk of neglect if Kobe were to be released to respondent-mother’s care. *See In re E.N.S.*, 164 N.C. App. 146, 150–51,

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595 S.E.2d 167, 170 (2004) (affirming conclusion of neglect “based primarily on events that took place before [the child’s] birth, in particular, the circumstances regarding respondent’s oldest child being adjudicated neglected and dependent” and a subsequent failure to demonstrate stability). Respondent-mother’s argument is overruled, and we affirm the trial court’s conclusion that Kobe is a neglected child.

*II*

Respondent-mother also argues that the evidence did not support the trial court’s findings of fact, which in turn failed to support the trial court’s conclusion that Kobe was dependent. We agree.

A “dependent juvenile” is defined as

[a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or (ii) the juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision *and lacks an appropriate alternative child care arrangement.*

N.C. Gen. Stat. § 7B-101(9) (2015) (emphasis added). “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) (quoting *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005)) (reversing and remanding for entry of findings which address both prongs of dependency adjudication). “Findings of fact addressing both prongs must be made before a

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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).

The trial court made the following relevant findings of fact and conclusion of law regarding dependency:

4. This Court also finds as fact that the Juvenile is a dependent juvenile, in that the Juvenile’s parents . . . lack an appropriate alternative child care arrangement. Specifically, . . . [t]he mother has a history of mental health issues, including being diagnosed with low cognitive functioning and Schizoaffective Disorder along with Post Traumatic Stress Disorder. The father remains incarcerated with a projected release date of 2028. *No viable alternative family placements were advanced by the parents.*

The trial court’s only finding regarding the second prong of a dependency determination—the availability to the parent of an alternative child care arrangement—is that “[n]o viable alternative family placements were advanced by the parents.” However, the law does not limit appropriate alternative child care arrangements to placements with a *relative*, but rather, to establish dependency, the law requires evidence of a lack of *any* appropriate alternative child care arrangement. *See* N.C.G.S. § 7B-101(9). As such, the law does not require that evidence be presented of an alternative *family* placement, and therefore, the trial court’s finding regarding the second prong of the dependency analysis is inadequate. As an inadequate finding of fact, it cannot support the trial court’s conclusion that Kobe is a dependent juvenile.

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Because the record reflects there were insufficient findings to support an adjudication of dependency, and such is conceded by petitioner DSS and the guardian ad litem in their joint brief on appeal, we reverse the trial court's order on adjudication as to dependency and remand for additional findings, and a new order if appropriate on adjudication.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).