IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-598

Filed: 6 November 2018

Avery County, No. 18 JA 12

IN THE MATTER OF: K.K.L-H.

Appeal by respondent-mother from order entered 12 April 2018 by Judge Rebecca Eggers-Gryder in Avery County District Court. Heard in the Court of Appeals 2 October 2018.

Stephen M. Schoeberle for petitioner-appellee Avery County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Thomas N. Griffin III and Laura D. Goode, for guardian ad litem.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

INMAN, Judge.

Respondent-mother ("Mother") appeals from an order of the trial court adjudicating her newborn son, "Kevin,"[1] a neglected juvenile; keeping him in the custody of petitioner Avery County Department of Social Services ("DSS"); ceasing

[1] We use pseudonyms to refer to each of Mother's minor children.

reunification efforts; and prohibiting Mother from having contact with Kevin. We affirm the adjudication of neglect but reverse the dispositional provisions that cease reunification efforts and deny visitation to Mother. We remand for further proceedings.

Factual and Procedural Background

Mother is a resident of Elk Park, North Carolina, in Avery County. In February 2018, she gave birth to Kevin at Johnson City Medical Center in Johnson City, Tennessee. The Tennessee Department of Children's Services assumed custody of Kevin and contacted DSS after receiving a report that Mother tested positive for multiple controlled substances at the time of Kevin's birth. Mother's two older children were already in DSS custody pursuant to adjudications of neglect entered in 2017.

On 28 February 2018, the Juvenile Court of Johnson City, Tennessee transferred jurisdiction over Kevin's case to North Carolina pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. The Tennessee court found that Kevin had no connection to Tennessee other than the location of his birth; that Mother is a North Carolina resident; and "that Tennessee is a *forum non conveniens* for this cause."

On the same day that the Tennessee court transferred jurisdiction to North Carolina, DSS filed a juvenile petition in Avery County District Court alleging that

Kevin was neglected and dependent. The petition cited Mother's positive drug test at the time of Kevin's birth and the results of Kevin's umbilical cord blood test, which also reflected the presence of illicit drugs. The petition further reported that DSS "already has custody of [Mother's] two older children for drugs" and "has worked with her for several months trying to get her to cooperate with needed substance abuse treatment," to no avail. In light of Mother's ongoing substance abuse and refusal of treatment, DSS alleged that "the safety of [Kevin could not] be assured in the home with his mother."

After a hearing on 15 March 2018, the court entered an "Adjudication and Dispositional Order" on 12 April 2018 adjudicating Kevin as neglected and ordered that he remain in DSS custody. The court found that Mother "committed chronic or toxic exposure to controlled substances . . . upon [Kevin], that cause[d] impairment of or addiction in the juvenile," an aggravating circumstance pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e.). The trial court also found that, after a year of services by DSS, Mother "has not changed one thing about choosing controlled substances over her children," and that further efforts toward reunification would be futile. The trial court relieved DSS of efforts toward reunification that set a permanency planning hearing for 12 April 2018, and ordered that Mother have no contact with Kevin. Mother timely filed a notice of appeal from the order.[2]

[2] Although the notice of appeal and accompanying certificate of service are dated 12 April 2018, the trial court's file-stamp is illegible on the copy included in the record on appeal.

Analysis

I. Neglected Juvenile

Mother first claims the trial court erred in adjudicating Kevin a neglected juvenile "solely based on [her] drug use during pregnancy." The trial court's findings and the underlying evidence support the adjudication of Kevin as a neglected juvenile.

A trial court's finding of fact must be based on "clear and convincing competent evidence" such that it supports its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Findings uncontested on appeal are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Erroneous findings unnecessary to the adjudication may be disregarded as non-prejudicial. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006). The trial court's legal conclusions, including the conclusion that a child qualifies as "neglected" under N.C. Gen. Stat. § 7B-101(15), are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

A neglected juvenile is one "who does not receive proper care, supervision, or discipline from [his] parent, guardian, custodian, or caretaker," or "who lives in an environment injurious to [his] welfare." N.C. Gen. Stat. § 7B-101(15) (2017). We have held that:

> Although the statute is silent on whether the juvenile to be adjudicated as neglected must sustain some injury as a result of neglect, "this Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.' " Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.

In re Padgett, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

The trial court found the following facts supporting its adjudication of neglect "by clear, cogent and convincing evidence":

> 1. The Mother stipulated under oath that as of the date of the filing of the Petition, this juvenile was a neglected juvenile as alleged in the Petition, to wit: because the child was born to her [in February] 2018 at Johnson City Medical Center and tested positive for Amphetamine, Methamphetamine, Oxycodone, and Hydrocodone. The cord blood test . . . was received into evidence without objection . . . . The Court took judicial notice of that test result in accepting the mother's stipulation today to these facts;
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> . . . .
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> 5. This mother also has two Termination of Parental Rights actions pending against her in this court as to her two older children, [B.G.] (17 JT 12) and [Z.H.] (17 JT 13). These underlying petitions as to these juveniles were filed on March 9, 2017 and these juveniles were adjudicated neglected juveniles on April 25, 2017 based upon abuse of controlled substances, especially methamphetamine, by the mother;

> 6. The permanent plan for these juveniles was changed to adoption on October 24, 2017 after the mother made no progress in her case plans for those juveniles;
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> 7. That the mother, despite all the efforts expended to try to reunify her with these older juveniles, has now given birth to a child[—the child that is the subject of this action—][3]addicted not just to methamphetamine but three other controlled substances[.]

The court separately concluded that Kevin "is a neglected juvenile as defined in [Section 7B-101(15)]."

On appeal, Mother does not contest any of the trial court's findings of fact, but argues that her stipulation before the trial court was not sufficient to support the trial court's conclusion that Kevin was neglected. We agree.

"Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979). Accordingly, Mother's stipulation that Kevin is neglected "was ineffective to support the trial court's adjudication of neglect." *In re R.L.G.*, __ N.C. App. __, __, 816 S.E.2d 914, 919 (2018). Nevertheless, the cord blood test indicating that Kevin was exposed to amphetamine, methamphetamine, Oxycodone, and Hydrocodone, and other uncontested evidence and facts found by the trial court support its conclusion that Kevin was neglected.

[3] The bracketed portion represents Judge Eggers-Gryder's handwritten annotation.

The trial court did not solely rely on Mother's stipulation of neglect, or solely on Mother's drug use and its effect on Kevin, to determine that Kevin was a neglected juvenile. When "determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile 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). This provision "allows the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect," and further "allows 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." *See In re McLean*, 135 N.C. App. 387, 394-95, 521 S.E.2d 121, 126 (1999) (applying similar language in the predecessor statute to Section 7B-101(15)). The court's findings reflect the presence of harmful opioids and other toxic controlled substances in Kevin's umbilical cord as well as Mother's prior neglect of two older children due to her substance abuse.[4]

In cases involving a newborn child who has yet to reside in the respondent-parent's home, "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

[4] Mother does not object to the trial court's taking judicial notice of its files in the adjudication of her two older children, nor does she contest the accuracy of its findings with regard to those proceedings. *See generally In re L.T.R.*, 181 N.C. App. 376, 385 n.3, 639 S.E.2d 122, 128 n.3 (2007) (noting that the "trial court took judicial notice of the separate juvenile case regarding L.R.P.," another child of the respondent-parents). Contrary to Mother's argument on appeal, the transcript reflects that the court made its findings regarding the two children as part of its adjudication in this case.

of future . . . neglect of a child based on the historical facts of the case." *Id.* at 396, 521 S.E.2d at 127; *see also In re A.B.*, 179 N.C. App. 605, 611, 635 S.E.2d 11, 16 (2006) ("To hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of the statute."). Given the multiple controlled substances found in Kevin's umbilical cord, the neglect experienced by his two older siblings due to Mother's substance abuse, and the lack of progress shown by Mother in those pending cases, the trial court did not err in concluding that Kevin was at substantial risk of neglect if released to Mother's care. *McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127; *see also In re G.T.*, __ N.C. App. __, __, 791 S.E.2d 274, 277 (2016) (concluding that G.T. "suffered an actual impairment" where the trial court's "findings of fact sufficiently establish that [he] suffered actual exposure to controlled substances while in utero"), *aff'd per curiam*, 370 N.C. 387, 808 S.E.2d 142 (2017).

Mother argues that the trial court made no explicit finding that Kevin suffered any "physical, mental, or emotional impairment or a substantial risk of such impairment" as is required to establish a juvenile's neglected status. *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007). We disagree. The trial court found, based upon its review of the evidence independent of Mother's stipulation, that Mother "committed chronic or toxic exposure to controlled substances . . . upon [Kevin], that cause[d] impairment of or addiction in the juvenile." Further, "[w]here

there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340; *see also Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902 ("Although the trial court failed to make any findings of fact . . . all the evidence supports such a finding."). We thus affirm the court's adjudication of Kevin as a neglected juvenile.

II. Reunification Efforts

Mother next claims that the trial court erred by relieving DSS of reunification efforts based on findings under Section 7B-901(c)(1)(e.). We agree.

Section 7B-901(c) governs the trial court's authority to forgo reunification efforts as part of its initial disposition following an adjudication of abuse, neglect, or dependency. Section 7B-901(c) provides, in pertinent part, as follows:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
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> (1) A court of competent jurisdiction *has determined* that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
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> . . . .

> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
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> . . . .
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> (2) A court of competent jurisdiction *has terminated* involuntarily the parental rights of the parent to another child of the parent.
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> (3) A court of competent jurisdiction *has determined* that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; . . . (iii) has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c)(1)(e.) (2017) (emphasis added). In *In re G.T.*, we held that the legislature's use of "the present perfect tense in subsections (c)(1) through (c)(3) . . . . indicate[d] that the determination must have already been made by a trial court" in "a prior court order." *In re G.T.*, __ N.C. App. at __, 791 S.E.2d at 279. Notwithstanding the guardian *ad litem*'s view that this interpretation of Section 7B-901(c) "strains credulity," we are bound by *In re G.T.* and the plain meaning of the statute, as affirmed by our Supreme Court. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The General Assembly amended Section 7B-901(c), effective since 25 June 2018, to allow the trial court to make the necessary determination contemporaneous with its decision to forgo reunification efforts. *See* Act of June 25, 2018, sec. 2, 2018 N.C. Sess. Laws 1-2 (supplementing the applicable statutory language to include the word "determines"). Because the court's order at issue in this case was entered prior to 25 June 2018, the amended language does not apply.

The trial court found, pursuant to Section 7B-901(c)(1)(e.), that Mother "committed chronic or toxic exposure to controlled substances . . . upon [Kevin], that cause[d] impairment of or addiction in [him]." Because this finding is included in the same order that adjudicates Kevin as neglected, the trial court erred in relieving DSS of reunification efforts on this basis. *In re G.T.*, __ N.C. App. at __, 791 S.E.2d at 279.

We note that the trial court made an additional finding that "[a]ny attempt at pursuing reunification with this child and the mother would clearly be futile and not in the best interests of the juvenile." This language tracks the standard provided by N.C. Gen. Stat. § 7B-906.2(b) for ceasing reunification efforts at a permanency planning hearing. But this was not a permanency planning hearing. A finding of futility does not suffice to cease reunification efforts as part of an initial disposition. *In re J.M.*, __ N.C. App. __, __, 804 S.E.2d 830, 840-41 (2017), *disc. review improvidently allowed*, __ N.C. __, 813 S.E.2d 847 (2018) (*per curiam*). As the court did not purport to engage in permanency planning at the hearing on 15 March 2018,

this finding is superfluous. "Because the trial court erroneously concluded that reasonable reunification efforts must cease pursuant to [Section 7B-901(c)(1)(e.)], we reverse that portion of the trial court's disposition order." *In re G.T.*, __ N.C. App. at __, 791 S.E.2d at 279.

III. No Visitation Order

Mother also claims the trial court erred in ordering that she have no contact with Kevin. We review this dispositional provision for abuse of discretion. *In re C.M.*, 183 N.C. App. at 215, 644 S.E.2d at 595. To establish abuse of discretion, the appellant must show that the "trial court's ruling [was] so 'arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation omitted).

"An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2017). A parent is entitled to visitation "in the absence of findings that a parent has forfeited her right to visitation or that it is in the child's best interest to deny visitation." *In re C.P.*, 181 N.C. App. 698, 706, 641 S.E.2d 13, 18 (2007) (citing *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). To cease a parent's presumptive right to visitation, the trial court must "specifically determine that such a plan would be

inappropriate in light of the specific facts under consideration." *In re K.C.*, 199 N.C. App 557, 562, 681 S.E.2d 559, 563 (2009).

In this case, the trial court made no explicit finding that Mother had forfeited her right to visit Kevin or that such visitation would be contrary to his best interest. The court simply found that "[t]he mother shall have no contact with this juvenile." The court also entered the following generalized "conclusions of law":

> 1. This Order is in the best interest of the named juvenile;
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> 2. This Order is the least restrictive order available to preserve the health, safety, and welfare of the named juvenile;
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> 3. The purpose of this Order is to preserve the health, safety, and welfare of the named juvenile[.]

The trial court received no evidence and made no explicit findings to support a conclusion that properly supervised visitation between Mother and Kevin would be contrary to his best interest, or harmful to his health or safety. The court based its no-contact order on Mother's ongoing substance abuse issues and its decision to forgo reunification efforts in this case. As we have reversed the ceasing of reunification efforts, the trial court's limited findings are insufficient to demonstrate a reasoned basis for denying visitation. Accordingly, we reverse this portion of the order and remand for entry of additional findings to support the denial of visitation to Mother or entry of an appropriate visitation schedule consistent with Section 7B-905.1(b). *In re M.H.B.*, 192 N.C. App. 258, 267, 664 S.E.2d 583, 588-89 (2008).

We leave to the trial court's discretion whether to receive additional evidence on remand to consider facts not addressed by previously admitted evidence, including facts regarding circumstances that have occurred while this appeal has been pending.

AFFIRMED IN PART; REVERSED IN PART; REVERSED AND REMANDED IN PART.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).