

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-875

Filed: 7 July 2020

Greene County, No. 19 JA 8-9

IN THE MATTER OF: J.J. & K.J.

Appeal by Respondent from orders entered 13 May 2019 and 1 July 2019 by Judge Elizabeth A. Heath in Greene County District Court. Heard in the Court of Appeals 27 May 2020.

*Wendy C. Sotolongo, Parent Defender, by Jacky Brammer, Assistant Parent Defender, for Respondent-Father.*

*Delaina Davis Boyd and E.B. Borden Parker for Respondent-Mother and Greene County Department of Social Services.*

*No brief filed for guardian ad litem.*

DILLON, Judge.

I. Background

J.J. (“Jerry”) and K.J. (“Karen”)<sup>1</sup> are the minor children of Respondent-Father Jason (“Father”) and Respondent-Mother Kim (“Mother”). Jerry and Karen lived

---

<sup>1</sup> A pseudonym has been used throughout the opinion to protect the identity of the juveniles and for ease of reading. See N.C. R. App. P. 42(b)(1).

primarily with Father and stayed with Mother on alternate weekends. In March 2019, Karen's school learned that she had been self-harming by cutting herself. Karen said that she had been cutting herself in response to the arguments between herself and Father. Father was called in to a meeting at Karen's school to address her self-harm. Father walked out of the meeting, took his children home from school, and kept them out of school the next day.

The day after the meeting at Karen's school, Father talked to Karen at home about her self-harm. They argued and Father admitted that "[i]t got a little heated at a couple of times." Karen did not want to show Father the cuts on her arms despite his insistence. Karen testified that Father told her, "I'll show you what real pain feels like," and burned her on her arm with his cigarette. Father disputes this and claims the burning was an accident, and that he treated her burn with ointment. Jerry was in the family's small home when the burning incident was happening.

Karen testified that Father had also been violent on other occasions, including striking Karen in the face with a closed fist. Father also broke a glass table and a door in anger. Father testified that he believes "[y]our children are supposed to be afraid of you. A man is God's representation in the home." Greene County Department of Social Services ("DSS") conducted a home visit while Father was keeping his children out of school. DSS took photographs of Karen's burn mark on her arm. Father would not allow DSS to interview the children alone, so DSS

eventually conducted their interviews at school. DSS subsequently removed Jerry and Karen from their home and filed petitions alleging abuse and neglect.

On 13 May 2019, the trial court adjudicated Karen an abused and neglected juvenile and Jerry a neglected juvenile. The court continued custody with DSS and placed the children with Mother. In disposition orders entered 1 July 2019, Father was awarded visitation with Jerry according to the court's schedule, but was not awarded visitation with Karen unless she desired to have visitation with Father. Father appealed from the adjudication and disposition orders.

## II. Analysis

Father makes several arguments on appeal. We address each in turn.

### A. Jerry's Neglect Adjudication

Father argues that the trial court erred in adjudicating Jerry neglected. We disagree.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse 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) (internal quotation and citation omitted). "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.* at 343, 648 S.E.2d at 523. We review the trial court's conclusions of

law *de novo* on appeal. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). The determination of whether a child is abused or neglected is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999).

In relevant part, our General Statutes define a neglected juvenile as:

**(15) Neglected juvenile.** -- Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; 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* . . . In determining whether a juvenile is a neglected juvenile, *it is relevant whether that juvenile . . . lives in a home whether 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) (2019) (emphasis added).

In its adjudication order, the trial court made the following findings of fact in support of its conclusion that Jerry was a neglected juvenile:

13. That [Father] grabbed [Karen's] arm with a lit cigarette in his hand and burned her on the arm. He stated to [Karen] that he would show her what real pain was like.

14. That [Jerry] was in the home, which [Father] describes as a small house, during the events set out above.

...

16. That [Father] told [Jerry and Karen] not to tell the truth to the social worker about what happened with the burn.

17. That [Father] kept [Jerry and Karen] out of school the next day. They returned to school on the following day.

...

*Opinion of the Court*

19. That [Father] believes that the man is God's representative in the home, that the children should be fearful of their father and that he wants [Jerry] to have a healthy fear of him.

...

22. That the Court has found that [Jerry] lives in the home of a sibling who has been both abused and neglected.

23. That [Jerry] is a neglected juvenile in that [Jerry] lives in an environment injurious to his welfare in that [Father] has allowed so much discord to exist in the home with arguing and anger that has caused the sister of [Jerry] to have multiple cuttings and [Father] burned [Jerry's] sister with a cigarette on the arm because school personnel found out about the cuttings. [Father] calls [Karen] derogatory names and that he works to make both of his children fear him, believing that fear is healthy for the children.

These findings of fact were supported by clear and convincing evidence. Karen's testimony supported the findings that her father burned her with a cigarette, told her to lie to the social worker about what happened, and kept her and Jerry out of school. Father's testimony supported the findings that he burned Karen's arm with a cigarette (though Father maintains it was an accident), that he believed his children should fear him, and that Jerry was in the home when Father burned Karen's arm with a cigarette. Finally, the testimony of the DSS social worker who took photos of Karen's cigarette burn and cuttings supported the finding that Karen's arm was burned.

Because these findings are supported by clear and convincing evidence, they are binding on appeal. Further, these findings support the trial court's legal

conclusion that Jerry was a neglected juvenile. The trial court explicitly found that Jerry “lives in the home of a sibling who has been both abused and neglected[,]” a relevant statutory factor of the neglect definition. N.C. Gen. Stat § 7B-101(15). Additionally, the trial court’s findings support the legal conclusion that Jerry is a neglected juvenile in that he “lives in an environment injurious to the juvenile’s welfare.” *See* N.C. Gen. Stat § 7B-101(15). Specifically, the trial court found that Father attempted to thwart DSS’s investigation by not allowing the children to be interviewed alone, Father instructed Jerry and Karen to lie to the social worker, Father had violent episodes in the home during arguments, and Father kept the children out of school.

In our *de novo* review of the conclusion that Jerry is a neglected child, we come to the same determination as the trial court. We conclude that the trial court did not err in adjudicating Jerry neglected.

#### B. Karen’s Abuse Adjudication

Father also argues that the trial court erred in adjudicating Karen abused. We disagree.

We review Karen’s abuse adjudication under the same standard of review set out above in Subsection A. In relevant part, our General Statutes define an abused juvenile as:

**(1) Abused juveniles.** – Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or

caretaker:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
- b. *Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;*
- c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;  
...
- e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others . . .

N.C. Gen. Stat § 7B-101(1) (emphasis added).

In its adjudication order, the trial court made the following findings of fact in support of its conclusion that Karen was an abused juvenile:

6. That when [Karen] was in the 6<sup>th</sup> grade, she cut herself on multiple occasions, cutting her arms and right leg. The reason she did this was because of all the arguing she and [Father] did.

...

8. That when [Karen] was in the 7<sup>th</sup> grade, [Father] struck her in the face with his fist. Also, sometime during that year, [Father] broke the glass on the kitchen table and at sometime a glass door out of anger.

9. That on March 6, 2019, someone at school told the school counselor that [Karen] had been cutting herself. School personnel called [Father] in to discuss the allegations with him. [Father] was furious about being called into school and removed [Karen and Jerry] from the school and took them home.

...

11. That [Father] grabbed [Karen's] arm to see the scratches. He minimalized the cuts as just "scratches" and chastised [Karen] for jeopardizing their family.

...

13. That [Father] grabbed [Karen's] arm with a lit cigarette in his hand and burned her on the arm. He stated that to [Karen] that he would show her what real pain was like.

...

18. That [Father] believes that the man is God's representative in the home, that the children should be fearful of their father and that he wants the juvenile to have a healthy fear of him.

...

21. That [Karen] is an abused and neglected juvenile in that the parent has *created or allowed to be created a substantial risk of serious physical injury by other than accidental means* and [Karen] is neglected in that she lives in an environment injurious to her welfare in that [Father] has allowed so much discord to exist in the home with arguing and anger that [Karen] has engaged in multiple cuttings, that [Father] burned [Karen] with a cigarette on the arm because school personnel found out about the cuttings. [Father] calls her derogatory names and that he works to make both of his children fear him, believing that fear is healthy for the children.

(Emphasis added.)

Again, these findings of fact were supported by clear and convincing evidence. Karen's testimony supported the findings that she cut herself in response to arguments with Father, that Father burned her with a cigarette, that Father struck her in the face, and that Father broke a table and door. Father's testimony supported the findings that he burned Karen's arm with a cigarette (though Father maintains it was an accident) and that he believed his children should fear him. Finally, the

testimony of the DSS social worker who took photos of Karen's cigarette burn and cuttings supported the finding that Karen's arm was burned and that she had engaged in self-harm.

However, Father argues that the findings and evidence did not show any *commission* of serious physical injury, one possible form of abuse under N.C. Gen. Stat § 7B-101(1). Father alleges that Karen's burn did not require further medical attention beyond ointment and a bandage applied at home, and there is no proof in the record that any further medical attention was sought. Further, Father claims that Karen's report to a counselor that she had not cut herself since being removed from her father's care indicates that her self-harm was also not a serious physical injury.

In *State v. Romero*, our Court considered the meaning of "serious physical injury." 164 N.C. App. 169, 595 S.E.2d 208 (2004). We concluded that "the nature of an injury is depend[e]nt upon the relative facts of each case" and that there was no requirement of evidence of medical attention. *Id.* at 172, 595 S.E.2d at 211. For example, our Court has upheld an abuse adjudication in a case where a three-year-old juvenile suffered from "a dark, six-inch bruise, which lasted well over one week, on his right thigh." *In re L.T.R.*, 181 N.C. App. 376, 382, 639 S.E.2d 122, 126 (2007).

We reject Father's arguments. Not only was evidence of medical attention not required under *Romero*, but Father only cites cases in his brief pertinent to N.C. Gen.

Stat § 7B-101(1)(a), “[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]” Father ignores the fact that the trial court actually referenced N.C. Gen. Stat § 7B-101(1)(b), “[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means” in Karen’s abuse adjudication.

The trial court’s findings support the legal conclusion that Karen is an abused juvenile. The evidence shows that Father burned Karen with a cigarette on her arm after demanding to see the cuts on her arm. The trial court’s additional findings show that Father and Karen’s arguments got heated, that Father called Karen derogatory names, that Father damaged property in the house out of anger, that Father sowed discord in the home, that Father attempted to thwart DSS’s investigation, and that Karen engaged in self-harm as a result of the arguments with Father. These findings support the legal conclusion that Karen is an abused juvenile in that Father “[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]” *See* N.C. Gen. Stat § 7B-101(1)(b).

In our *de novo* review of the conclusion that Karen is an abused child, we come to the same determination as the trial court. We conclude that the trial court did not err in adjudicating Karen abused.

### C. Father’s Visitation with Karen

Father also argues that the trial court erred in denying him visitation with Karen and in leaving visitation in Karen's discretion. We agree.

We review dispositional orders regarding visitation for an abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). Our caselaw has interpreted the demands of N.C. Gen. Stat § 7B-905.1 to require that trial courts provide at least a framework for visitation including the minimum frequency and length of time. *See In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 570 (2015). A court may deny a parent visitation by finding either that "the parent has forfeited his or her right to visitation or that it is in the child's best interest to deny visitation[.]" *In re K.C.*, 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009).

Additionally, the court "may not delegate its judicial function of awarding visitation" to another person. *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017). In *In re C.S.L.B.*, the trial court awarded visitation to the respondent-mother if her children's guardians had no concerns that she was using drugs. *Id.* at 400, 829 S.E.2d at 495. Our Court vacated the visitation award because it left visitation "to the discretion of the guardians" and allowed them to "unilaterally modify" the visitation award. *Id.* at 400, 829 S.E.2d at 495.

Similarly, here, the trial court awarded Father no visitation unless Karen desired to have visitation with Father. This plan is an impermissible delegation of the trial court's judicial function; it allows Karen to unilaterally modify the visitation

plan. The trial court also failed to find either that Father had forfeited his right to visitation with Karen or that it was not in Karen's best interest to have visitation with Father. Therefore, we vacate Karen's visitation order and remand for an order that either finds that (1) Father forfeited his right to visitation with Karen *or* that it was not in Karen's best interest to have visitation with Father, or (2) awards visitation to Father.

#### D. Father's Right to File a Motion for Review of the Visitation Order

Finally, Father argues that the trial court erred in not informing him of his right to file a motion for review of the visitation order. N.C. Gen. Stat § 7B-905.1(d) provides, "[i]f the court retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section."

DSS and Mother concede that Father was not informed of this right; however, they argue that this was harmless error. We note that Father has not indicated how he has been harmed by the trial court's omission and that Father is obviously aware of his right now. Nonetheless, because we are vacating the visitation order based on Father's third argument, we direct the trial court on remand to include in the visitation order a provision that Father has the right to file a motion for review of the order.

### III. Conclusion

IN RE: J.J. & K.J.

*Opinion of the Court*

We affirm Jerry's and Karen's adjudication orders. We vacate Karen's dispositional order as it relates to visitation with Father and remand with instructions that the trial court either make findings that (1) Father forfeited his right to visitation with Karen or that it was not in Karen's best interest to have visitation with Father, or (2) awards visitation to Father. Additionally, the visitation provisions of the dispositional order should comply with N.C. Gen. Stat § 7B-905.1(d).

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges ZACHARY and BROOK concur.

Report per Rule 30(e).