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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-540

No. COA21-227

Filed 5 October 2021

Robeson County, No. 20 JA 166

IN THE MATTER OF: A.L.

Appeal by Respondent-Mother from orders entered on 2 October 2020 and 29 December 2020 by Judge Angelica C. McIntyre in Robeson County District Court.

Heard in the Court of Appeals 8 September 2021.

*J. Edward Yeager, Jr., for the Petitioner-Appellee Robeson County Department of Social Services.*

*Robert W. Ewing for the Respondent-Appellant Mother.*

*Administrative Office of the Courts, by Michelle FormyDuval Lynch, for the Appellee-Guardian ad Litem.*

JACKSON, Judge.

¶ 1

Mother appeals from the trial court's orders adjudicating her daughter, Amy,<sup>1</sup> neglected, ceasing reunification efforts, and establishing a permanent plan of guardianship with a court approved caretaker. We vacate the trial court's adjudication of neglect and remand the matter for further proceedings.

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<sup>1</sup> The parties have stipulated to the use of pseudonyms to refer to the juveniles and we use them to protect the juveniles' privacy and for ease of reading. See N.C. R. App. P. 42(b).

## **I. Background**

¶ 2 On 23 June 2016, the Robeson County Department of Social Services (“DSS”) received a referral alleging that Amy’s older sister, Susan, had been physically abused. The report alleged that Susan had sustained bruising on her left cheek and abrasions on her left shoulder and back and that she did not have the mobility to inflict these injuries herself. She was a one-year-old at the time. DSS sought nonsecure custody of Susan on 16 July 2016, but the trial court dismissed the action on 20 July 2016. Several months later, DSS learned that Susan had died.

¶ 3 On 24 October 2019, DSS received a Child Protective Services (“CPS”) report alleging physical abuse of Jennifer, the younger of Amy’s two older sisters. Jennifer suffered a fractured skull, bleeding on the brain, brain swelling, and two fractured ribs—injuries that medical staff were confident resulted from at least two significant incidents of physical abuse. She was also a one-year-old at the time. Jennifer was subsequently adjudicated abused and neglected. Mother and Zane<sup>2</sup> were the only people living in the home at the time.

¶ 4 Amy was born on 15 June 2020. Mother and Zane still lived together at the time of Amy’s birth.

¶ 5 On 22 June 2020, DSS filed a petition alleging that Amy was neglected. DSS

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<sup>2</sup> The parties have stipulated to the use of this pseudonym to refer to Amy’s father.

obtained nonsecure custody of Amy that day.

¶ 6 The matter came on for adjudication on 20 August 2020 before the Honorable Angelica C. McIntyre in Robeson County District Court. At the conclusion of the hearing, the trial court adjudicated Amy neglected.<sup>3</sup>

¶ 7 The matter proceeded to disposition on 21 October 2020. At the conclusion of the hearing, the trial court relieved DSS of reunification efforts and established a permanent plan of guardianship with a court approved caretaker.<sup>4</sup>

¶ 8 Mother entered timely written notice of appeal from the trial court's adjudicatory and dispositional orders on 20 January 2021.

## II. Analysis

¶ 9 Mother argues that the trial court's findings of fact do not support the adjudication of neglect because they related only to prior abuse and neglect of Amy's sister Jennifer and did not address whether a substantial risk of future neglect of Amy existed because of this prior abuse and neglect of Jennifer. We agree.<sup>5</sup>

### A. Standard of Review

We review an adjudication under N.C. Gen. Stat. § 7B-807 to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence"

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<sup>3</sup> The court entered an order to that effect on 2 October 2020.

<sup>4</sup> The court entered its order on disposition on 29 December 2020.

<sup>5</sup> Because we vacate the trial court's adjudication of neglect, we do not reach the issue of whether the trial court abused its discretion at the dispositional stage by relieving DSS of reunification efforts and establishing a permanent plan of guardianship with a court approved caretaker.

and whether the court's findings support its conclusions of law. The "clear and convincing" standard is greater than the preponderance of the evidence standard required in most civil cases. Clear and convincing evidence is evidence which should fully convince. Findings of fact unchallenged by the appellant are binding on appeal.

*In re K.L.*, 272 N.C. App. 30, 36, 845 S.E.2d 182, 188-89 (2020) (internal marks and citation omitted).

¶ 10 "Whether a child is neglected is a conclusion of law which must be supported by adequate findings of fact." *In re R.L.G.*, 260 N.C. App. 70, 75, 816 S.E.2d 914, 918 (2018) (citation omitted). "[W]e review a trial court's conclusions of law de novo." *In re K.L.*, 272 N.C. App. at 36, 845 S.E.2d at 189 (citation omitted). "Under a de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (internal marks and citation omitted).

### **B. Neglect of a Newborn**

¶ 11 "In North Carolina, juvenile abuse, neglect, and dependency actions are governed by Chapter 7B of the General Statutes, commonly known as the Juvenile Code." *In re A.K.*, 360 N.C. 449, 454, 628 S.E.2d 753, 756 (2006). Under the Juvenile Code, "neglected juvenile" is defined to include a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline[,] . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2019) (emphasis added). Even though

[t]he statute is silent on whether the juvenile, to be neglected, must sustain some injury as a consequence of the failure to provide “proper care, supervision, or discipline[.]” . . . 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.”

*In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901 (1993) (internal marks and citation omitted) (emphasis added).

¶ 12 The statutory definition of neglect in the Juvenile Code also provides that

[i]n 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) (2019). As applied to newborns, this provision

does not require a finding that the child lives in the home in the most literal meaning of that term, that is physically resides in the home at the time of the filing of the petition, when the child is a newborn who has not yet left the hospital but remains in parental care.

*In re A.B.*, 179 N.C. App. 605, 611, 635 S.E.2d 11, 15 (2006). Our Supreme Court has held that “[i]n neglect cases involving newborns, 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 of future abuse or neglect of a child based on the historical facts of the case.” *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698-99 (2019) (internal marks

and citation omitted).

¶ 13 For example, when a child has died in the same home in which parents plan for a newborn to live after being released from the hospital, the parents' plan for the newborn child to live in the same environment where the prior child died is "a relevant factor which the trial court c[an] consider in making a determination of whether there [is] a substantial risk of impairment to [the newborn]." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). However, "the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007), *aff'd*, 362 N.C. 229, 657 S.E.2d 355 (2008). Findings related to a substantial risk of future abuse or neglect must be based on existing factors at the time of adjudication, *see In re J.A.M.*, 372 N.C. at 10, 822 S.E.2d at 699, and "generally . . . [must] suggest that the neglect or abuse will be repeated[.]" *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014).

### **C. The Adjudication of Amy as Neglected**

¶ 14 The trial court found in relevant part as follows in support of its adjudication of Amy as neglected:

3. The child, [Amy], was born June 15, 2020 and she is two months old.

4. The Court takes Judicial Notice of File 19JA382, where there was an Adjudication of Abuse and Neglect, due to the minor child, [Jennifer], sibling, receiving various physical injuries resulting from abuse.

5. That the Court finds that the minor child, [Amy,] is a neglected juvenile based on an environment injurious to the juvenile's welfare, given that the sibling of the minor child, [Jennifer], who was residing in the same home of this child minor [sic], had she been released to the hospital, suffered significant injuries as a result of child abuse.

6. The only two people in the home when the abuse was alleged to occur on the minor child, [Jennifer], would have been the parents, [Mother] and [Zane], which is the same parents as this minor child, [Amy].

7. The mother, [Mother], indicated that she was working on a case plan that consisted of a Psychiatric Assessment, Mental Health Assessment, Substance Abuse and Parenting. [Mother] indicated she no longer wanted to participate in the Carter Clinic for her treatment and was now at a different facility receiving clinic [sic] with other things that still needed to be addressed within the case plan.

¶ 15 These findings do not specifically address the substantial risk of future neglect of Amy based on the prior adjudication of abuse and neglect of Amy's older sister, nor do they adequately address "the presence of [any] other factors to suggest that the neglect or abuse will be repeated." *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489. Instead, they focus almost entirely on the prior adjudications of abuse and neglect of Amy's older sister Jennifer, briefly touching on Mother's failure to make progress on her case plan with DSS. Because these findings do not specifically address a substantial risk of "physical, mental, or emotional impairment . . . as a consequence of the failure to provide proper care, supervision, or discipline[.]" *In re Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901, we hold that they did not adequately

support the trial court's adjudication of neglect.

¶ 16           However, our review suggests that there is record evidence that could have supported additional findings related to the substantial risk of future neglect of Amy. DSS's involvement with the family did not begin with Jennifer—it began with Jennifer and Amy's older sister, Susan. Susan died before either Amy or Jennifer were born, several months after DSS unsuccessfully sought nonsecure custody of her. Approximately two years after Susan's death, DSS received a CPS report alleging physical abuse of Jennifer. Although Mother claimed Jennifer had fallen out of a toddler bed, Jennifer was treated for a significant head injury that included three areas of the skull with complex bone fractures, bleeding on the brain, and brain swelling, as well as two fractured ribs. The fractured ribs were healing at the time Jennifer was treated for the head and brain injuries. The injuries were not consistent with a child falling off a toddler bed, according to medical staff; skeletal x-rays confirmed the injuries were the result of at least two significant incidents of physical abuse.

¶ 17           By the time DSS learned of Amy's birth on 18 June 2020, it had received five referrals of abuse or neglect in Mother's home. The reports contained allegations of drug use by both parents, abuse of Susan, and Susan not receiving her medications as prescribed. Mother had a case plan for foster care that consisted of psychiatric assessment, mental health counseling, substance abuse treatment, and parenting



classes, but had discontinued her suboxone treatment at the Carter Clinic.

¶ 18 On 17 August 2020, Zane refused to work on his case plan, stating that he could not because of work obligations. When Zane was informed that DSS was required to report to the court that he did not intend to work his case plan, he replied that he understood. On 10 September 2020, after Mother was informed that due to the recommendations from her psychological evaluation and Zane’s refusal to work on his case plan, DSS would be unable to recommend that Amy return to either parent, she stated that she understood.

¶ 19 On 8 December 2020, Social Worker J. McDowell completed a family reunification assessment of Mother and Zane. Social Worker McDowell identified the following risk factors regarding the safety of Mother and Zane’s home for Amy: (1) Mother and Zane were “unwilling, or [] unable to provide supervision or to meet the child’s immediate needs for food, clothing, shelter, and/or medical or mental health care”; (2) “[t]he child’s physical living conditions [were] hazardous and immediately threatening”; and (3) Mother and Zane’s “drug or alcohol use seriously affect[ed] [their] ability to supervise, protect, or care for the child.” Social Worker McDowell additionally noted that Mother “does not have independent housing” and was “testing positive for substance” and that Zane “doesn’t have independent housing”; “refuses to work on a case plan for the child”; and “has substance history.” Social Worker McDowell ultimately concluded that “placement remain[ed] the only protecting

intervention possible” and that “[w]ithout continued placement, [Amy] [would] likely be in danger of immediate or future serious harm.”

¶ 20 Ultimately, our Court “cannot make the findings of fact, as only the trial court has the discretion to make [factual] findings.” *In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 802 (2020). However, based on our review of the record, there is ample evidence which could support additional findings addressing the substantial risk of future abuse or neglect to Amy based on Susan’s suspected abuse and death and Jennifer’s abuse and neglect, such as Zane’s continued presence in the home and outright refusal to work a case plan, Mother’s lack of progress on her own case plan, and the parents’ inability or lack of interest in remediating the issues making the home unsafe for Amy.<sup>6</sup>

¶ 21 On remand, the trial court shall make findings addressing the relevance of the physical abuse and neglect of Jennifer and whether a substantial risk of physical, mental, or emotional impairment resulting from a failure to provide proper care, supervision, or discipline of Amy existed, if the trial court deems the evidence

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<sup>6</sup> Mother argues on appeal that the trial court improperly engaged in an inquiry limited to terminations of parental rights when adjudicating Amy neglected based on Mother’s failure to make progress on her case plan. However, “the definition of neglect is the same, whether for purposes of an adjudication or for termination of parental rights.” *In re S.M.L.*, 272 N.C. App. 499, 514, 846 S.E.2d 790, 800 (2020). Accordingly, Mother’s lack of progress on her case plan and Zane’s refusal to work on his case plan was relevant evidence of neglect.

sufficient to support such findings. In its discretion, the trial court also may also consider the suspected abuse and death of Susan and whether a substantial risk to Amy existed based on the suspected abuse and death of Susan, if the trial court deems the evidence sufficient to support such findings.

### **III. Conclusion**

¶ 22

We vacate the trial court’s adjudication of neglect because the court’s findings do not adequately address the risk of future neglect. We therefore remand the matter to the trial court for additional findings. On remand, in the trial court’s discretion, the court may take additional evidence. If the court adjudicates Amy neglected, the court shall then conduct a properly noticed permanency planning hearing “after providing each party with a reasonable opportunity to prepare and present evidence[.]” N.C. Gen. Stat. § 7B-901(d) (2019), and determine whether a permanent plan of guardianship with a court approved caretaker, or some other permanent plan, is appropriate.

VACATED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).