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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1056

Filed 5 December 2023

Mecklenburg County, No. 20 JA 330

IN THE MATTER OF: G.E.

Appeal by respondent-appellant from orders entered 8 April 2022 and 19 July 2022 by Judge Faith Fickling-Alvarez in District Court, Mecklenburg County. Heard in the Court of Appeals 9 October 2023.

*Mecklenburg County Attorney's Office, by Senior Associate Attorney Kristina A. Graham, for petitioner-appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.*

*Womble Bond Dickinson (US) LLP, by Reid C. Adams, Jr. and Nicholas D. Acevedo, for guardian ad litem.*

*Hooks Law, P.C., by Laura G. Hooks, for respondent-appellant-father.*

STROUD, Chief Judge.

Respondent-appellant-father appeals from the trial court's order adjudicating his minor child to be a neglected and dependent juvenile and from a disposition order continuing custody of the child with the Mecklenburg County Department of Social Services, Division of Youth and Family Services. Respondent-appellant-father only challenges the denial of his motion to dismiss. Because Youth and Family Services

presented sufficient evidence to withstand the motion to dismiss, we affirm.

### **I. Background**

Gina<sup>1</sup> was born in January 2020. On 6 August 2020, Mecklenburg County Department of Social Services, Division of Youth and Family Services (“YFS”) filed a juvenile petition alleging Gina to be neglected and dependent due to a referral regarding a domestic violence incident that occurred between Gina’s parents when she was present. On 6 May 2020, YFS received another referral about a domestic violence incident between Gina’s mother and respondent-appellant-father (“Father”), which resulted in Father being charged with assault by strangulation.

The juvenile petition was heard on 12 January and 31 January 2022. Father made a motion to dismiss at the close of YFS’s evidence based on his argument Gina was neither dependent nor neglected. Father’s motion to dismiss was denied. On 8 April 2022, the trial court entered an order adjudicating Gina to be a dependent and neglected juvenile. On 19 July 2022, the trial court entered a disposition order concluding that it was in Gina’s best interest to remain with YFS placement in foster care. Father appeals.

### **II. Motion to Dismiss**

The *only* challenge Father makes on appeal is to the trial court’s denial of his motion to dismiss under North Carolina Rule of Civil Procedure 41(b) because YFS

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<sup>1</sup> A pseudonym is used.

did not present “clear and convincing evidence” of dependency and neglect.

**A. Rule 41(b)**

North Carolina General Statute Section 1A-1, Rule 41(b) of the Rules of Civil Procedure provides in pertinent part,

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2021).

**B. Standard of Review**

We review the trial court’s denial of Father’s motion to dismiss under Rule 41(b) for abuse of discretion. *See Walsh v. Jones*, 263 N.C. App. 582, 586, 824 S.E.2d 129, 132 (2019). Because the trial court is the trier of fact in an adjudication of dependency or neglect, and dismissal under Rule 41(b) is left to the discretion of the trial court, dismissal at the close of the petitioner’s evidence is generally disfavored “except in the clearest of cases”:

Dismissal under Rule 41(b) is left to the sound discretion of the trial court. *In a Rule 41(b) context, the trial judge may decline to render any judgment until the close of all the evidence, and except in the clearest cases, he should defer judgment until the close of all the evidence.*

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On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. Instead, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them.

A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits.

*Id.* at 586–87, 824 S.E.2d at 132–33 (emphasis added) (citations omitted).

### **C. Evidence at Motion to Dismiss**

A dependent juvenile is one “in need of assistance or placement because . . . 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) (2021). A neglected juvenile is defined as one “whose parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline” or “[c]reates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15) (2021).

The YFS social worker testified regarding the referrals about Gina due to

domestic violence, including that Father had strangled Gina's mother in Gina's presence. The social worker also testified that she met with Father on 15 June 2020 to create a Family Service Agreement which required him to engage in services to address domestic violence concerns and to complete parenting education. Ultimately, Father stated he could not complete the case plan and did not engage in any services. Father also refused to provide YFS information regarding his location or place of residence. Father identified his parents as possible placement providers, but they were not immediately available because they lived in South Carolina and YFS could not facilitate a placement with them without conducting an Interstate Compact for the Placement of Children home study. Father did not identify any other alternative placement providers.

We conclude YFS "made out a colorable claim" for neglect and dependency. *Walsh*, 263 N.C. App. at 586–87, 824 S.E.2d at 133; *see also* N.C. Gen. Stat. § 7B-101(9), (15); *see generally In re A.W.*, 377 N.C. 238, 251, 856 S.E.2d 841, 852 (2021) (affirming adjudication of dependency where the respondents were unable to properly care for and supervise the minor child and the potential caregivers offered by respondents were inappropriate); *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 781 (2009) ("Other conduct that supports a conclusion that a child is neglected includes exposing the child to acts of domestic violence . . ."). Accordingly, the trial court did not err in denying Father's motion to dismiss.

As to the trial court's orders, Father did not challenge any of the trial court's

findings of fact or conclusions of law. Thus, Father's

appeal suffers from a fatal defect: [he] has not challenged on appeal the court's conclusions of law.

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Respondent's omission eviscerates respondent's appeal since an appellant must assign error to [or in some way challenge] . . . each conclusion it believes is not supported by the evidence. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts.

*In re T.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006) (affirming a trial court order adjudicating respondent's child to be neglected); *see also In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) (noting that in a termination of parental rights case, "The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts.").

### **III. Conclusion**

Accordingly, we affirm.

**AFFIRMED.**

Judges GORE and STADING concur.

Report per Rule 30(e).