

NO. COA14-697

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

IN THE MATTER OF:

J.D.R.

Rutherford County
No. 13 JA 109

Appeal by Respondent-Mother from order entered 18 March 2014 by Judge Laura Powell in District Court, Rutherford County. Heard in the Court of Appeals 22 December 2014.

No brief for Petitioner-Appellee Rutherford County Department of Social Services.

Leslie Rawls for Respondent-Appellant Mother.

Callahan Law Office, PLLC, by J. Christopher Callahan, for Respondent-Appellee Father.

Smith Moore Leatherwood LLP, by Kip D. Nelson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Appellant Mother ("Mother") appeals from an adjudication and disposition order ("the disposition order") adjudicating J.D.R. ("the Child") a neglected and dependent juvenile, awarding custody of the Child to Respondent-Appellee Father ("Father"), granting Mother visitation, and transferring

the case to a Chapter 50 civil action. For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

At the time the following events occurred, the Child had a diagnosis of mild oppositional defiant disorder, although his "symptoms [were] confined to only one setting, [the] home." The Child was eight-years-old and primarily had lived with Mother for most of his life.

The Rutherford County Department of Social Services ("DSS") filed a petition on 30 October 2013, based upon reports concerning the Child's safety, alleging that the Child was a neglected and dependent juvenile. DSS alleged that when the Child went to school on 29 October 2013, he had scratches near his eye. The Child told school personnel that Mother had hit and kicked him. Mother took the Child to the hospital later that day and the Child told the doctor Mother had kicked him and had pulled him from under the bed. Mother would not allow a DSS social worker to interview the Child at the hospital and would not allow Father to assist her. DSS took non-secure custody of the Child and subsequently placed the Child with Father. By orders entered 6 and 11 November 2013, the trial court continued its non-secure custody order.

The trial court held an adjudication and disposition hearing in January and February of 2014. During the February hearing, the trial court suspected that Mother was intoxicated. At the conclusion of the hearing, the trial court ordered Mother to submit to a drug test, which was administered approximately twenty minutes later. Mother tested positive for opiates, amphetamines, and methamphetamines. By order entered 18 March 2014, the trial court adjudicated the Child neglected and dependent. The trial court further ordered that the court's jurisdiction be terminated, initiated a Chapter 50 civil custody case, awarded custody of the Child to Father, and granted Mother visitation. Mother appeals.

Mother's first notice of appeal, filed 18 March 2014, does not have a certificate of service attached and states only that Mother was "appealing the adjudication in these matters." Mother's second notice of appeal, filed 19 March 2014, states that Mother was appealing from both the disposition order as well as the trial court's 26 November 2013 order continuing the non-secure custody order of the Child. This second notice was served only on counsel for the Guardian ad Litem. Mother's third, and final, notice of appeal, filed 28 March 2014, states only that Mother is appealing from the disposition order, and

this notice was served on counsel for the Guardian ad Litem, as well as counsel for Father.

II. Scope of Review

As a preliminary matter, we note that Mother filed three separate notices of appeal in this action. Notwithstanding possible issues with Mother's first two notices of appeal, the arguments in Mother's brief focus exclusively on the disposition order. As such, our review of Mother's appeal will be limited accordingly. N.C.R. App. P. Rule 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

III. Standard of Review

On appeal from the trial court's disposition order, we must determine (1) whether the trial court's findings of fact are supported by clear and convincing evidence, and (2) whether its conclusions of law are supported by the findings. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Unchallenged findings are binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007). The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*. *In re N.G.*, 186 N.C. App. 1, 13, 650 S.E.2d 45, 53 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

IV. Adjudication of Neglect

Mother first challenges the trial court's adjudication of the Child as neglected. A neglected juvenile is defined as

[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.

N.C. Gen. Stat. § 7B-101(15) (2013). We have consistently held that an adjudication of neglect requires "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, 901-02 (1993) (internal quotation marks omitted).

In support of its neglect adjudication, the trial court made the following findings of fact:

3. On October 29, 2013, the minor child went to school with scratches and bruises on his face.
4. On the 29th[,] the minor child met with the school counselor and told her that his mother had hit and kicked him that morning.

5. The hitting and kicking occurred when the minor child would not get ready for school.
6. Later in the day, the minor child hid under the bed and while trying to get him out the child hit his back on the bed causing an abrasion.
7. The mother called the police that morning in order to aid her in getting him to school.
8. The mother came to pick the minor child up at school on the 29th after school had been released. The Minor Child was in the school office, waiting for his mother [to] arrive, but was not there for disciplinary reasons.
9. The minor child left with his mother but came back into the school and said his mother had locked him out of the car and would not let him in until he apologized.
10. The mother was not in the car at this time but was sitting outside the school and would not let the minor child in the car until he apologized.
11. The mother was very agitated and at that point called Kevin Blackwell with juvenile services.
12. After describing behaviors to Mr. Blackwell, which only the mother observed and which were not occurring at the school, Mr. Blackwell told her she may want to take the child to the hospital for an evaluation.

. . . .
15. During the month of September, the mother had taken the minor child to the

Department of Juvenile Justice because of his defiant behavior.

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17. The Department [of Juvenile Justice] did tell the mother that if the child committed a crime and she felt it necessary then she should call the police. The Department never told her to call the police if the child would not go to school.

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20. [The mother] has provided financially for the child with the help of child support from the father. She has provided [for] all necessary medical care and all the child's educational needs. She testified that [t]he minor child treats her like a friend and at times she testified that [t]he minor child was her "buddy".

21. This relationship seems to contribute to [t]he minor child's defiance.

22. The mother had a drug problem in the past and had involvement with the Department of Social Services because she slapped the child in the face, leaving a handprint bruise on his face.

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25. The mother takes pain medication for different injuries she received [in] at least one and possibly two car wrecks. She no longer has a prescription but she still continues to use the medication. She testified that she last used the pain medication approximately one week prior to this hearing, but that she was unsure what the medication was.

26. The mother testified that she purchases or is given painkillers by different individuals.
27. The mother testified [at the hearing] and was very erratic. She would talk around the question and would talk of grandiose ideas and reasons for her and [t]he minor child's behavior.
28. On October 29th, 2013[,] the mother took the minor child to the hospital for an evaluation. During the evaluation the child disclosed that he had been hit and kicked by the mother.
29. The hospital called [DSS].
30. [DSS] had received a report earlier that day regarding the bruising, hitting[,] and kicking and also regarding the mother's erratic behavior at school.
31. The school was concerned about her emotional state when she came to pick the minor child up that day.
32. The school secretary, counselor, principal[,] and assistant principal all testified and the Court finds that the mother was so upset and irrational that she posed a threat to the minor child's safety in light of what had happened earlier that day.
33. The DSS worker arrived at the hospital and spoke with the mother. She let the worker know that her attorney was on the way.
34. The DSS worker was not allowed to meet with the minor child although her attorney [] said that he would make the child available the next day at [DSS].

. . . .

37. Reasonable efforts were made in that DSS attempted to [substantiate] the allegations by interviewing the minor child and observing the marks that were alleged to have been made by the minor's parent by other than accidental means. Due to [respondent's] failure to comply with the request and her own refusal to speak about the allegations and give any explanation, [the] safety [of the Child] could not [be] assessed.

Mother does not challenge the trial court's findings of fact and, therefore, they are binding on appeal. See *C.B.*, 180 N.C. App. at 223, 636 S.E.2d at 337. Instead, Mother contends the trial court's findings are insufficient to support its conclusion that the Child was neglected.

The trial court found that Mother had previous problems with drugs and that she had previously injured the Child while abusing drugs. It also found that Mother had continued to use drugs illegally, that Mother had hit and kicked the Child on or around 29 October 2013, and that she had refused to cooperate with DSS to assess the Child's safety. Moreover, even though the Child had been diagnosed with oppositional defiant disorder, the trial court found that the Child "treats [Mother] like a friend" and that "[t]his relationship seems to contribute" to the Child's defiant behavior. These findings support the trial

court's conclusion that the Child was not receiving proper care and supervision under the care of Mother, and that he was living in an environment injurious to his welfare. Therefore, the trial court's determination that the Child was a neglected juvenile, as defined under N.C.G.S. § 7B-101(15), is supported by the evidence.

V. Adjudication of Dependency

Mother next challenges the trial court's adjudication of the Child as dependent. A dependent juvenile is defined, in pertinent part, as 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) (2013). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

In the present case, DSS failed to present any evidence on child care at the hearing and the trial court made no finding of fact that Mother lacked an alternative child care arrangement. Without the necessary findings in support of the trial court's

conclusion that the Child was a dependent juvenile, this conclusion was in error. See *id.* (trial court's order reversed when it failed to make any findings regarding the availability of alternative child care arrangements). Because we reverse, based on the lack of findings pertaining to the second prong of dependency, we need not address Mother's challenge to the first prong.

VI. Civil Child Custody Order

Mother further contends the trial court failed to comply with N.C. Gen. Stat. § 7B-911 when it awarded custody to Father and terminated its jurisdiction. N.C. Gen. Stat. § 7B-911 (2013) provides, in part:

- (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.
- (b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

. . . .

(c) When entering an order under this section, the court shall satisfy the following:

(1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7.

(2) Make the following findings:

a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Mother first argues the trial court's findings of fact and conclusions of law were insufficient to satisfy the requirements of a custody order under Chapter 50 and, therefore, the trial court's order awarding custody to Father did not comply with

N.C. Gen. Stat. § 7B-911(a). We disagree. N.C. Gen. Stat. § 50-13.2(a) (2013) provides, in part:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child[.]

"The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child." *Green v. Green*, 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

In this case, the trial court's order contains findings of fact relevant to the issue of the Child's interest and welfare. The trial court specifically made findings that establish Mother

tested positive for opiates, amphetamines, and methamphetamines; that Mother showed up late for visits; that Mother's behavior was erratic during visits; that Father tested negative for drugs; that Father's residence was appropriate for the Child; and that Father had sufficient financial resources to support the Child. Further, the trial court made the necessary conclusion that it was in the best interest of the Child to award custody to Father. Therefore, we conclude the trial court made sufficient findings pursuant to N.C.G.S. § 7B-911(a).

Mother also argues the trial court failed to make the necessary finding pursuant to N.C.G.S. § 7B-911(c)(2)(a) that there was no need for continued State intervention on behalf of the Child and, therefore, the trial court erred in terminating its jurisdiction. On this contention, we agree. The trial court's order does not contain the required ultimate finding that there was not a need for continued State intervention on the Child's behalf. Further, the disposition order contains no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary. See *In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403-04 (2007) (upholding order entered under N.C.G.S. § 7B-911(c)(2)(a) where the trial court failed to explicitly find

that further state intervention was not needed, but included findings that: (1) the respondent parents were able to coordinate visitations between themselves; (2) the parents both had "suitable homes for visitation and/or custody of [the] . . . children[;]" (3) the mother was "capable of properly supervising and disciplining the . . . children and keeping them safe while in her care and custody[;]" and (4) DSS "wishes to be relieved of further involvement in this case."). In the present case, because the trial court did not make the required findings in compliance with N.C.G.S. § 7B-911(c)(2)(a), the trial court erred in terminating its jurisdiction over the Child pursuant to Chapter 7B by transferring the issue of the Child's custody to a Chapter 50 case. Accordingly, we reverse the trial court's order and remand this case to the trial court for further proceedings, at which the trial court must make findings of fact and conclusions of law in accordance with N.C. Gen. Stat. § 7B-911(c)(2)(a) (2013).

VII. Visitation Plan

Mother contends the trial court improperly delegated its judicial authority by granting Father discretion in determining the terms of Mother's visitation. We agree. Our General Assembly recently codified a separate section entitled

"Visitation" in N.C. Gen. Stat. § 7B-905.1 (2013), which provides in part:

- (a) 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. The court may specify in the order conditions under which visitation may be suspended.

. . . .

- (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.* The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

(emphasis added).

In the present case, the trial court's disposition order removed custody from Mother and placed custody with a relative, Father. The disposition order further provides that:

- 4. The Respondent Mother will have a full psychological evaluation by a PhD level psychologist and comply with [] treatment.
- 5. The Respondent Mother will have another substance abuse assessment and will comply with the results of the assessment. She will give the results of

all of the assessments and treatment to the Respondent Father.

6. The Respondent Mother shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month. Said visits shall be supervised by her mother, her aunt[,] or anyone else that the Respondent Father deems appropriate. He may supervise the visit but he is not required to supervise.
7. The Respondent Mother will not be impaired during the visits and will not act inappropriately. She will not corporally punish the Minor Child during the visits.
8. If and when the Respondent Mother successfully completes drug treatment, provides to the Respondent Father multiple negative drug tests and completes the above conditions, she may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]

. . . .
10. The Respondent Father may determine whether [Mother] is allowed to eat lunch with the minor child so long as she does not cause a disturbance at the school.
11. The Respondent Mother shall have supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours. The Respondent Father may allow more time in his discretion.

12. Once the Respondent Mother complies with the above conditions[,] the parties will divide all major school holidays according to the school schedule.
13. Once she complies with all conditions above the Respondent Mother shall have two non-consecutive weeks of vacation during the summer.

. . . .
15. The Respondent Mother may have reasonable telephone contact if the child so desires and in the Respondent Father's discretion between the hours of seven o'clock and eight o'clock each night.

The disposition order does specify a certain "minimum frequency and length" for some of Mother's visits and indicates whether those visits must be supervised as required by N.C.G.S. § 7B-905.1. Specifically, the disposition order provides that Mother "shall have supervised visitation with the Minor Child from 9 a.m. until 5 p.m. three (3) Saturday's [sic] a month" as well as "supervised visitation with the Minor Child on either Christmas [D]ay or Christmas Eve, Thanksgiving Day or the day before or after, Easter or the day before or after[,] and Mother's Day for a minimum of four hours." However, the disposition order delegates to Father substantial discretion over other kinds of visitation, such as Mother having lunch with the Child at school. It also provides a number of future,

conditional expansions of Mother's visitation rights that effectively are contingent on Father deciding that Mother has complied with the trial court's directives. For instance, the disposition order states that Mother "may have unsupervised weekend visitation from Friday afterschool until Sunday at 5 [p.m.]" after she "successfully completes drug treatment, [and] provides to the Respondent Father multiple negative drug tests." The disposition order further states that Mother "will divide all major school holidays" with Father and will have "two non-consecutive weeks of vacation during the summer" after she complies with other directives from the trial court, which include Mother providing Father with her future substance abuse assessments. This Court has been very clear that

[the] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.

In re Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). In the present case, we find that the trial court impermissibly delegated its judicial function to Father. The

trial court effectively turned Father into Mother's case worker and also gave Father the authority to determine whether Mother complied with the trial court's directives. The present case is distinguishable from cases such as *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005) and *Stancil*, 10 N.C. App. at 545, 179 S.E.2d 844, in which this Court vacated visitation orders that gave the respective juveniles' custodians *complete* discretion over the juveniles' parents' visitation rights, in that the trial court did place some bounds on Father's discretion. However, in the present case, the trial court's delegation to Father still goes too far. Therefore, we remand in order that the trial court can make findings and conclusions relating to visitation rights that comport with this opinion.

VIII. Conclusion

Our review of Mother's appeal has been limited to the arguments in her brief regarding the disposition order. We find that the trial court's adjudication of the Child as neglected was supported by the evidence, although the trial court made insufficient findings to support its adjudication of the Child as dependent. Moreover, the trial court made sufficient findings to award custody of the Child to Father, pursuant to N.C.G.S. § 7B-911(a). However, the trial court did not make

sufficient findings in order to terminate its jurisdiction over this action, pursuant to N.C.G.S. § 7B-911(c)(2)(a). Finally, the trial court impermissibly delegated its judicial function to Father in determining Mother's visitation plan.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and DAVIS concur.