IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-3

Filed: 16 July 2019

Watauga County, No. 18 JA 41

IN THE MATTER OF: M.C.

Appeal by respondent-mother from orders entered 12 October 2018 by Judge Rebecca Eggers-Gryder in Watauga County District Court. Heard in the Court of Appeals 27 June 2019.

Di Santi Watson Capua Wilson & Garrett, PLLC, by Chelsea Bell Garrett, for petitioner-appellee Watauga County Department of Social Services.

Elon University School of Law Guardian ad Litem Advocacy Clinic, by Alan D. Woodlief, Jr., for guardian ad litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant mother.

BERGER, Judge.

Respondent-mother appeals from the trial court's orders adjudicating her newborn son "Mark"[1] a neglected and dependent juvenile and maintaining him in the legal and physical custody of the Watauga County Department of Social Services

[1] We use pseudonyms to refer to the juveniles discussed in this opinion.

("DSS"). *See* N.C. Gen. Stat. § 7B-101(9), (15) (2017).[2] Because we conclude the trial court failed to make sufficient findings of fact to support its adjudications of dependency and neglect, we reverse the orders and remand for further proceedings.

Factual and Procedural Background

On June 22, 2018, when Mark was less than one week old, DSS obtained nonsecure custody of the newborn and filed a juvenile petition alleging he was neglected and dependent. The petition averred that Mark was born at 34 weeks gestation weighing just four pounds; that his older sibling, "Sally", was in DSS custody after testing positive for "meth" at birth; that Respondent-mother and Respondent-father[3] (collectively, "Respondents") were non-compliant with their court-ordered case plans in the sibling's case and continued to test positive for illicit drugs; and that Respondent-mother had tested positive for amphetamines when Mark was born. At the time DSS filed its petition, Mark had been transferred to Johnson City Medical Center in Tennessee for treatment.

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[2] The definition of "[n]eglected juvenile" in subsection 7B-101(15) was amended effective October 1, 2018. *See* An Act to Amend Various Provisions Under the Laws Governing Adoptions and Juveniles, S.L. 2018-68, §§ 8.1(b), 9.1, ___ N.C. Sess. Laws ___, ___ (June 25, 2018). Because the amendment made no substantive change to the portions of the definition that apply in this case, we use the current language in our discussion.

[3] We use the term "Respondent-father" to refer to the father because that was the term used in the trial court's orders to refer to the father; however, we note that only Respondent-mother appeals here.

Proceedings were continued from July 2018 until August 2018 to allow for service upon Respondents and to confirm that Mark is not a member of a state-recognized Indian tribe for purposes of the Indian Child Welfare Act ("ICWA").[4] After a hearing on August 16, 2018,[5] the trial court entered a Consent Order on Adjudication adjudicating Mark to be a neglected and dependent juvenile and a Disposition Order leaving Mark in the legal and physical custody of DSS. Respondent-mother filed timely notice of appeal from both orders.

Analysis

Respondent-mother first claims the trial court erred in entering a consent adjudication order in this cause pursuant to N.C. Gen. Stat. § 7B-801(b1) (2017), because the record does not show that Respondents consented to the adjudications of neglect and dependency. Rather, she contends, "the parties' obvious intent was a stipulation of facts, not a consent order."

As a general matter, "[w]hen a juvenile is alleged to be abused, neglected, or dependent, N.C. Gen. Stat. § 7B-802 (201[7]) requires the court to conduct an 'adjudicatory hearing' in the form of 'a judicial process designed to adjudicate the

[4] Mark's guardian *ad litem* ("GAL") filed a motion to amend the record on appeal to include "a letter form the Eastern Band of Cherokee Indians . . . stating that [Mark] was neither registered nor eligible for tribal membership, that is relevant to one of the issues raised in respondent mother's brief" on appeal. On March 15, 2019, however, this Court allowed Respondent-mother's motion to withdraw the argument in her appellant's brief challenging the trial court's determination that Mark is not an Indian child covered by the ICWA. Because the document at issue is no longer relevant to Respondent-mother's appeal, we dismiss the GAL's motion as moot.

[5] Although the trial court's orders list the date of the hearing as August 17, 2018, the transcript records a hearing date of August 16, 2018.

existence or nonexistence of any of the conditions alleged in a petition.' " *In re K.P.*, 249 N.C. App. 620, 623, 790 S.E.2d 744, 747 (2016). As part of an adjudicatory hearing, the trial court may accept stipulations of fact offered by the parties pursuant to N.C. Gen. Stat. § 7B-807(a) (2017). However,

> "[a]n adjudication of abuse, neglect or dependency in the absence of an adjudicatory hearing is permitted only in very limited circumstances." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002). N.C. Gen. Stat. § 7[B]-801(b1) . . . authorizes the court to enter "a consent adjudication order" only if: (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact.

Id. at 623-24, 790 S.E.2d at 747.

A review of the hearing transcript shows the parties' clear intention to consent to adjudications of dependency and neglect, as authorized by Section 7B-801(b1). The following exchange between the trial court and counsel at the beginning of the hearing makes it apparent the parties did not merely stipulate to certain facts alleged by DSS in its petition but expressly agreed to the court's adjudication of Mark as a dependent and neglected juvenile:

> [COUNSEL FOR DSS]: – for the petition alleging neglect and dependency. When we spoke with counsel for respondent parents *they agreed to stipulate to dependency in this matter. So, we would ask that that be the adjudication today*.
>
> . . . .

THE COURT: Thank you. Let me read the petition again please. . . . I hate to be disagreeable but I'm not going to – they can – if they want to – *if there is a factual basis but it*[*'*]*s neglect. I am not going to take a dependency*.

[COUNSEL FOR GAL]: I would just point out Your Honor that they didn't do a meconium test on [Mark], and the umbilical cord test has never come back. So, while she – the mother tested positive there's nothing showing the child did.

[COUNSEL FOR DSS]: We don't have the test back yet Your Honor.

. . . .

[COUNSEL FOR GAL]: That's the problem. The child is still at the Tennessee Medical Facility.

THE COURT: He's a preemie.

[COUNSEL FOR GAL]: That's correct. The child was born at four pounds.

THE COURT: This says Guardian Ad Litem. I know you don't really get adjudication, you don't care.

[COUNSEL FOR GAL]: *It's a neglect petition Your Honor that should be (inaudible) adjudication*.

THE COURT: *Well that's where I'm gonna go. So, if you want to have a hearing we'll have a hearing*.

. . . .

[COUNSEL FOR DSS]: *Counsel has informed me that [respondents] will stipulate to neglect and dependency regarding this petition*.

THE COURT: All right. *If you'll get the factual basis*

in please.

> [COUNSEL FOR DSS]: Yes, Your Honor. . . . The parents have another child in DSS custody that was born positive for meth. Both parents have been struggling with drug issues, including meth. The parents have not been doing their Court ordered case plan and continue to test positive.
>
> THE COURT: For drugs?
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> [COUNSEL FOR DSS]: That's correct Your Honor. At the birth of [Mark], the mother was positive for amphetamines. He was born at thirty four weeks and was four pounds. He is currently located at the Johnson City Medical Center for care but was born in North Carolina.
>
> . . . .
>
> [COUNSEL FOR GAL]: No, this was at the time of the petition.
>
> THE COURT: He's not there now?
>
> [COUNSEL FOR GAL]: He's in a foster home here in Watauga with –
>
> THE COURT: Thank you. All right. I'd like to have the parents sworn.

(Emphasis added).

As shown above, the trial court refused to accept the parties' agreement to an adjudication of dependency alone given the facts alleged in the petition. Instead, the court presented the parties with the choice of either consenting to adjudications of dependency *and* neglect or proceeding with an adjudicatory hearing. Upon securing

Respondents' consent to the adjudications, the court also required counsel for DSS to articulate the "factual basis" for the adjudications in open court. Had the parties merely intended to stipulate to the facts alleged by DSS in its petition, the court would have had no occasion to demand a factual basis for their stipulations.

The trial court also placed both Respondents under oath and asked them a series of questions to ensure their knowing consent to the adjudications of dependency and neglect, as follows:

> THE COURT: All right, I'm gonna start with you, [respondent-father], stand up, both of you stay standing. You heard the department's attorney read the allegations that – about your child, [Mark]?
>
> [RESPONDENT-FATHER]: Yes.
>
> THE COURT: Do you understand it sir?
>
> [RESPONDENT-FATHER]: Yes.
>
> THE COURT: Do you understand it [respondent-mother]?
>
> [RESPONDENT-MOTHER]: Yes ma'am.
>
> THE COURT: All right. Is it true?
>
> [RESPONDENT-FATHER]: Yes.
>
> [RESPONDENT-MOTHER]: Yes ma'am.
>
> THE COURT: Is there anything in there that was not true?
>
> [RESPONDENT-FATHER]: (inaudible).

> THE COURT: I can't hear you.
>
> [RESPONDENT-FATHER]: No.
>
> [RESPONDENT-MOTHER]: No.
>
> THE COURT: Okay. And, have you discussed this with your attorneys about the petition?
>
> [RESPONDENT-FATHER]: Yes.
>
> THE COURT: *Do you understand what the petition and the ramifications of neglect and dependency are . . . as alleged in this petition*?
>
> [RESPONDENT-FATHER]: *Yes*.
>
> [RESPONDENT-MOTHER]: *Yes ma'am*.
>
> THE COURT: You satisfied with your attorney services sir?
>
> [RESPONDENT-FATHER]: Yes sir.
>
> THE COURT: Are you satisfied with your attorney services ma'am?
>
> [RESPONDENT-MOTHER]: Yes.

(Emphasis added).

Finally, having engaged Respondents in this colloquy, the trial court announced its adjudicatory findings of fact and conclusions of law in open court and directed counsel to draft an order consistent with the parties' agreement.

We recognize, as Respondent-mother observes, that counsel used the term

"stipulate" rather than "consent" to describe Respondents' agreement to the adjudications of dependency and neglect. "In North Carolina, 'stipulations are judicial admissions . . . relieving the other party of the necessity of producing evidence to establish an admitted *fact*.' " *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013) (emphasis added) (quoting *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981)). By contrast, "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *Id.* (quoting *State v. Prush*, 185 N.C. App. 472, 480, 648 S.E.2d 556, 561 (2007)). The determination that a juvenile is neglected or dependent within the meaning of the Juvenile Code is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999).

Accordingly, a respondent-parent may not simply "stipulate" to a juvenile's dependent or neglected status. As provided in Section 7B-801(b1), an adjudication entered by consent must be supported by sufficient findings of fact. However, the colloquial use of the term "stipulate" during the hearing does not affect the validity of a consent adjudication order, provided the requirements of Section 7B-801(b1) are satisfied.

Respondent-mother further notes the parties did not present "a draft of a consent order" to the court or otherwise reduce to writing their agreement regarding the terms of the adjudication order. Section 7B-801(b1) does not require a written

agreement between the parties as a condition of entering a consent adjudication order. While this Court has cited the parties' tender of a draft order to the trial court as evidence of their consent to an adjudication, *see In re J.N.S.*, 207 N.C. App. at 678, 704 S.E.2d at 517, it is by no means the only method of evincing consent. Here, the trial court created a record of Respondents' consent to the adjudications through direct questioning at the hearing. Respondent-mother's exception on this issue is overruled.

Respondent-mother next claims the trial court's Consent Order on Adjudication lacks sufficient findings of fact to support the adjudications of dependency and neglect. We agree.

Even where the parties have consented to an adjudication, the trial court's order must still contain "sufficient findings of fact" to support the conclusion that the juvenile is abused, neglected, or dependent. N.C. Gen. Stat. § 7B-801(b1)(3); *see also In re C.M.*, 183 N.C. App. 207, 211, 644 S.E.2d 588, 592 (2007) ("In an abuse, neglect and dependency case, review is limited to the issue of whether the conclusion is supported by adequate findings of fact."). As we have explained,

> N.C. Gen. Stat. § 7B-807(b) . . . requires that an adjudicatory order shall be in writing and shall contain appropriate findings of fact and conclusions of law. [T]he trial court's findings must consist of more than a recitation of the allegations contained in the juvenile petition. [T]he trial court must, through processes of logical reasoning, based on the evidentiary facts before it, find the ultimate facts essential to support the conclusions of law.

In re K.P., 249 N.C. App. at 624, 790 S.E.2d at 747 (alterations in original) (citations and quotation marks omitted).

The trial court's Consent Order on Adjudication includes the following findings:

> 5. Adjudication. . . . Respondent Parents consented and acknowledged that facts exist to the Adjudication of Neglect and Dependency. Respondent Parents acknowledged that each of the facts as read by the attorney for DSS in this proceeding are true, accurate and correct . . . . The Court finds these facts by clear, cogent and convincing evidence.
>
> . . . .
>
> 8. Visitation. Respondent Parents shall have no visitation as it is not in the Juvenile's best interest.
>
> . . . .
>
> 10. Additional Findings of Fact. The Court makes the following additional findings of fact:
>
> - Both parents have been struggling with drug issues, including the use of methamphetamines, based on evidence arising in a juvenile proceeding, as it relates to their other child, [Sally], born [September 2017].
>
> - Neither parent has followed their court ordered Case Plans;
>
> - Respondent Mother . . . tested positive for amphetamines at the birth of this Juvenile; and, as of today's hearing date, the father tested positive for methamphetamines.

> - The Juvenile was born at 34 weeks, was premature and weighed 4 pounds.
>
> - This Juvenile came into custody almost under an identical situation as an older sibling, who is less than a year old; that Juvenile being [Sally] . . . .
>
> - The mother tested positive while this Juvenile was born premature.
>
> - There were drug substances found in the mother's blood at the time she gave birth, to wit, being amphetamines.

To the extent Respondent-mother either stipulated to these findings or does not specifically challenge them on appeal, they are binding. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

However, three of the quoted findings are unsupported by either a stipulation of the parties or evidence adduced for purposes of adjudication. Finding number eight, which addresses Respondents' right to visitation, is more in the nature of a decretal provision and was neither agreed-upon by the parties nor supported by evidence. Furthermore, it is not germane to an adjudication of dependency or neglect. *See* N.C. Gen. Stat. § 7B-802 (2017). Equally unsupported and irrelevant is the finding that Respondent-father tested positive for methamphetamine on the day of the hearing. *See generally In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14-15 (2006) (ruling post-petition evidence inadmissible at the adjudicatory stage of an abuse, neglect, or dependency proceeding). Finally, Respondent-mother is correct

that the parties did not stipulate she had amphetamines in her *blood* at the time of Mark's birth, but that she tested positive for amphetamines in some unspecified manner.[6] "We will disregard these unsupported findings for purposes of our review." *In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 444 (2015).

The Juvenile Code defines a neglected juvenile, *inter alia*, as a child under eighteen years of age "whose parent . . . 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[.]" N.C. Gen. Stat. § 7B-101(15). Moreover, "[i]n 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).

Our courts have further required that the juvenile experience "some type of physical, mental, or emotional impairment or a substantial risk of such impairment" in order to be adjudicated as neglected. *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007). Where the juvenile is a newborn who has yet to reside in the parents' 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 of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387,

[6] As Respondent-mother notes, amphetamines could have been detected in her urine or hair rather than her blood.

396, 521 S.E.2d 121, 127 (1999).

The trial court's findings that Mark was born prematurely and that Respondent-mother had a history of "drug issues" and tested positive for amphetamines at the time of Mark's birth do not support an adjudication of neglect under Section 7B-101(15). The findings do not attribute Mark's premature birth or low birthweight to Respondent-mother's drug use. Nor did the court find that Mark was exposed to the amphetamines detected in Respondent-mother's system or that he was either harmed or placed at substantial risk of harm by Respondent-mother's amphetamine use.[7]

Similarly, the trial court's few findings about Sally's case do not support a conclusion that Mark is neglected. The court made no finding that Sally was "subjected to abuse or neglect" by Respondent-mother or Respondent-father as contemplated by Section 7B-101(15). It found only that Sally "came into [DSS] custody" in a "situation" substantially similar to Mark's.

Although the circumstances alleged by DSS in its petition are suggestive of neglect, we hold the facts found by the trial court do not support Mark's adjudication as neglected. The findings in the Consent Order on Adjudication neither elaborate upon the petition's allegations nor disclose what inferences the trial court may have

[7] The trial court's failure to make an explicit finding of harm or a substantial risk of harm to a juvenile does not amount to reversible error if "all the evidence supports such a finding." *In re Safriet*, 112 N.C. App. 747, 753, 436 S.E.2d 898, 902 (1993). Given the limited record before us, we cannot say all the evidence supports such a finding here.

drawn from the events surrounding Mark's birth. *See generally In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) (concluding that when the trial court sits as finder of fact, it "alone determines which [reasonable] inferences to draw and which to reject."). Moreover, the trial court failed to "find the ultimate facts essential to support the conclusion[] of law" that Mark is neglected. *In re K.P.*, 249 N.C. App. at 624, 790 S.E.2d at 747 (citation and internal quotation marks omitted).

The trial court's findings likewise fail to support an adjudication of dependency.

> A dependent juvenile is defined as one in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement. In determining whether a juvenile is dependent, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements. 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, 647-48 (2007) (citation and quotation marks omitted). The trial court did not find that Respondents are unable to provide for Mark's care or supervision or that they lack an alternative child care arrangement.

Accordingly, we reverse the Consent Order on Adjudication and remand to the

trial court for entry of additional findings of fact to support its conclusions that Mark is a neglected and dependent juvenile. The trial court may proceed either by consent of the parties pursuant to Section 7B-801(b1) or by holding an adjudicatory hearing under Section 7B-802. Because we reverse the trial court's adjudications, we must also reverse the resulting Disposition Order.[8] *See In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011) ("Since we reverse the adjudication order, the disposition order must also be reversed . . . .").

REVERSED AND REMANDED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).

[8] Because respondent-mother has withdrawn the argument in her brief challenging the dispositional order, we do not address it.