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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-462

No. COA21-148

Filed 7 September 2021

Moore County, No. 20 JA 63

IN RE D.R.

Appeal by Respondents from orders entered 6 November and 16 December 2020 by Judge Warren McSweeney in Moore County District Court. Heard in the Court of Appeals 10 August 2021.

*Stephan Lapping for Petitioner-Appellee Moore County Department of Social Services.*

*McGuireWoods LLP, by Anita Foss, for Appellee Guardian ad Litem.*

*Robert W. Ewing for Respondent-Appellant Father.*

*Leslie Rawls for Respondent-Appellant Mother.*

COLLINS, Judge.

¶ 1 Respondents appeal from an order adjudicating their daughter “Daphne”<sup>1</sup> a

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<sup>1</sup> We use pseudonyms for the minors in this case to protect their identities. See N.C. R. App. P. 42(b).

neglected juvenile.<sup>2</sup> Respondent-Father contends that several of the trial court's findings of fact were not supported by clear and convincing evidence and the trial court erred by adjudicating Daphne neglected based upon the prior abuse, and death, of Daphne's sibling in Respondents' home. Respondent-Mother's appointed appellate counsel has filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). Because clear and convincing evidence supported the trial court's findings of fact, those findings supported the conclusion that Daphne was neglected, and the adjudication order was otherwise based on proper legal grounds, we affirm the adjudication order.

### **I. Procedural History and Factual Background**

¶ 2 Respondents are married and have continuously lived together since December 2017. Their son, "Nicholas," was born in April 2018. In June 2018, the Richmond County Department of Social Services ("RCDS") filed a petition alleging that Nicholas was abused and neglected, and RCDS received custody of Nicholas.

¶ 3 In September 2018, the Richmond County District Court adjudicated Nicholas abused and neglected. The court found the following facts by clear and convincing evidence: Respondents lived together with Nicholas and were his exclusive caregivers. Respondents took Nicholas to the emergency room on 24 June 2018.

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<sup>2</sup> Although Respondents each gave notice of appeal from the trial court's adjudication order and its disposition order, their appeals raise only issues concerning the adjudication order.

There, x-rays revealed that Nicholas had two fractures and physicians “were suspicious for nonaccidental trauma, as [Respondents] did not have a reasonable explanation for the injuries.” Two days later, personnel in another clinic observed the same fractures, “did not observe any symptoms of brittle bone disease or poor muscle tone[.]” and “concluded that these injuries were unlikely to have happened without any traumatic event[.]” On 13 July 2018, a physician and expert in pediatric medicine and pediatric maltreatment examined Nicholas. Based on a review of Nicholas’ medical records, a physical exam, and additional x-rays, the physician found healing fractures in several of Nicholas’ ribs and his right tibia, left clavicle, and left humerus. According to the physician, the humerus fracture “can occur with a direct blow or bending force on the upper arm greater than normal handling of the child[;]” such rib fractures were “usually caused by squeezing of the chest, with the compressive forces causing the ribs to bend and then subsequently break[;]” while “the mid-clavicle fracture . . . could have occurred due to birth, [Respondents] did not provide any mechanism to explain any of the other injuries observed on the child[;]” and “[t]here was no indication of any bone abnormality that would cause [Nicholas’] fractures.” Nicholas remained in the custody of RCDSS and Respondents exercised visitation.

Following a permanency planning hearing on 11 June 2019, the court found that Respondents had complied with their case plan toward reunification, moved into

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appropriate housing, were financially able to provide for Nicholas, and successfully visited with Nicholas. While Nicholas' Guardian ad Litem was "still concerned that no explanation exists for the serious injuries" to Nicholas, the court found that under the circumstances there were no barriers to reunifying Nicholas with Respondents. Accordingly, the court returned physical custody of Nicholas to Respondents.

¶ 5 Respondents and Petitioner stipulated that Nicholas died on 24 June 2019 while in the exclusive care of Father. Criminal charges against Mother arising from Nicholas' death were dismissed, but charges against Father arising from Nicholas' death remain pending.

¶ 6 Respondents' daughter Daphne was born in July 2020. Several days after Daphne's birth, Petitioner Moore County Department of Social Services received a report expressing concern for Daphne's wellbeing, given the circumstances of Nicholas' abuse and death. Petitioner filed a juvenile petition alleging that Daphne was abused and neglected, and Petitioner received nonsecure custody of Daphne.

¶ 7 On 1 October 2020, the trial court held an adjudicatory hearing. Prior to the hearing, Respondents and Petitioner stipulated to multiple facts regarding the petition concerning Nicholas, Nicholas' death, and the criminal charges against Respondents. At the hearing, the trial court admitted into evidence the October 2018 order adjudicating Nicholas abused and neglected.

¶ 8 At the close of Petitioner’s evidence, Respondents jointly moved to dismiss the petition. The trial court granted the motion as to the abuse allegation but denied the motion as to the neglect allegation. Mother then testified on her own behalf. At the conclusion of all the evidence, the trial court denied Respondents’ renewed motions to dismiss. The trial court adjudicated Daphne neglected as defined in N.C. Gen. Stat. § 7B-101(15) and entered a written adjudication order on 6 November 2020. The trial court concluded that there was a “substantial risk of future neglect or abuse” based on the historical facts surrounding Nicholas and Respondents’ “failure to acknowledge abuse or neglect.”

¶ 9 Following a disposition hearing, the trial court entered a disposition order maintaining Daphne in the legal custody of Petitioner and requiring Petitioner to make efforts to reunify Daphne with Respondents. Respondents each timely filed notices of appeal.

## II. Discussion

¶ 10 We review an adjudication of neglect to determine whether the trial court’s findings of fact are based on clear and convincing evidence and whether the trial court’s findings support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings are deemed to be supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The determination that a child is neglected is a conclusion of

law we review de novo. *In re J.R.*, 243 N.C. App. 309, 312-13, 778 S.E.2d 441, 443-44 (2015).

### **A. Father's Appeal**

¶ 11 Father argues that several of the trial court's findings of fact in the adjudication order were not supported by the parties' stipulations or competent evidence presented at the adjudicatory hearing, and challenges the trial court's conclusion that Daphne was a neglected juvenile.

#### ***1. Challenged Findings of Fact***

¶ 12 At the outset, we note that Father mischaracterizes some of the trial court's findings as findings that he "murdered and abused" Nicholas. The trial court never found that Father murdered Nicholas. The first two findings of fact challenged by Father state:

41. That on June 24, 2019, [Nicholas], while in the exclusive care of [Father], died as a result of physical injuries inflicted upon him.

42. That [Father] has pending criminal charges in Moore County relating to the homicide and abuse of [Nicholas].

¶ 13 Each of these findings is supported by clear and convincing evidence. Mother testified that Nicholas was "solely in the care of" Father at the time Nicholas sustained his fatal injuries. Respondents and Petitioner likewise stipulated that Nicholas, "while in the care of [Father], died as a result of physical injuries" on 24 June 2019. Mother also testified that Father had pending criminal charges for

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homicide and child abuse. Respondents and Petitioner stipulated that Father “has pending criminal charges in Moore County arising from [Nicholas]’ death.”

¶ 14 Father challenges these findings on the basis that “DSS did not present any evidence . . . about the manner in which Nicholas died” or “any testimony or records from law enforcement or medical personnel concerning the details surrounding” Nicholas’ death. To the extent Father contests the finding that the injuries were “inflicted upon” Nicholas, Mother told Petitioner that Nicholas’ injuries were accidentally inflicted by Father falling on him. Alternatively, the trial court could permissibly infer that Nicholas’ injuries were intentionally inflicted where they occurred within two weeks of Nicholas’ return to a home where he was previously found to be physically abused. *See In re T.H.*, 266 N.C. App. 41, 45, 832 S.E.2d 162, 165 (2019) (“It is the trial judge’s duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.” (quotation marks and citation omitted)).

¶ 15 Father next challenges the trial court’s “consider[ation of] the failure to acknowledge abuse or neglect[.]”<sup>3</sup> This finding was supported by clear and convincing

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<sup>3</sup> Though the trial court denominated this as a conclusion of law, it is more accurately characterized as a finding of fact, and we will review it as such. *See Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001) (“[A] pronouncement by the trial court

evidence as well. Mother was party to the proceeding adjudicating Nicholas abused and neglected due to severe physical injuries, she knew Nicholas died as a result of injuries he sustained in Father’s care within two weeks of his return to Respondents’ physical custody, and was aware of charges for homicide and child abuse against Father stemming from Nicholas’ death. Nonetheless, Mother testified that she had not inquired into the results of Nicholas’ autopsy, and was “not sure” if it would concern her if the autopsy resulted in findings that were detrimental to the family. She further testified that she believed Nicholas’ death was an accident, she had no concerns regarding Daphne’s safety with Father, and she felt safe about him living with Daphne. The trial court found that Mother “expresses no safety concerns with Daphne being in [the] care of [Father],” and Father does not challenge this finding. These circumstances amount to clear and convincing evidence in support of the trial court’s finding that Respondents had failed to acknowledge abuse and neglect.

## ***2. Adjudication of Neglect***

¶ 16 Father also challenges the trial court’s conclusion of law that Daphne was a neglected juvenile.

¶ 17 A neglected juvenile is defined, in pertinent part, as one “whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or

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which does not require the employment of legal principles will be treated as a finding of fact, regardless of how it is denominated in the court’s order.”).

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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) (2020). “[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm.” *In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016). Where a neglect case concerns a newborn, “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, 396, 521 S.E.2d 121, 127 (1999).

¶ 18 “In 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). “[T]he neglect statute affords the trial judge some discretion in determining the weight to be given evidence” of prior abuse or neglect. *In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127 (quotation marks and citation omitted). “[T]he 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 per curiam*,

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362 N.C. 229, 657 S.E.2d 355 (2008), our cases “require the presence of other factors to suggest that the neglect or abuse will be repeated,” *In re J.A.M.*, 372 N.C. 1, 9-10, 822 S.E.2d 693, 699 (2019) (quotation marks, citation, and brackets omitted).

¶ 19 Here, Petitioner alleged that Daphne was neglected because she lived in an environment injurious to her welfare. The trial court’s findings reflect that Daphne was both “liv[ing] in a home where [Nicholas] . . . died as a result of suspected abuse or neglect” and “where [Nicholas] ha[d] been subjected to abuse or neglect by an adult who regularly lives in the home.” *See* N.C. Gen. Stat. § 7B-101(15). Specifically, the trial court found that Respondents had been Nicholas’ exclusive caretakers; Nicholas was adjudicated abused and neglected due to “numerous and multiple injuries[;]” Nicholas died of physical injuries while in Father’s exclusive care; Father had pending criminal charges for homicide and abuse arising from Nicholas’ death; Respondents continued to live together after Nicholas’ death; and Daphne lived in the same residence with Respondents after her birth.

¶ 20 Additionally, the trial court’s findings sufficiently demonstrate “the presence of other factors to suggest that the neglect or abuse will be repeated.” *In re J.A.M.*, 372 N.C. at 9-10, 822 S.E.2d at 699 (quotation marks, citation, and brackets omitted). The trial court found that Nicholas had been removed from Respondent’s care in a previous abuse case, Nicholas died in Father’s care less than two weeks after being returned to Respondents’ physical custody, and Respondents had failed to

acknowledge the abuse and neglect of Nicholas. Additionally, the trial court found that Mother believed that Nicholas' death was an accident and expressed no safety concerns about Daphne being in Father's care, despite the previous adjudication of abuse, Nicholas' death, and the resulting criminal charges against Father.

¶ 21 Together, these findings support the trial court's conclusion that Daphne was a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15) because she faced a "substantial risk of future neglect or abuse."

### **B. Mother's Appeal**

¶ 22 Mother's appellate counsel has filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). Mother's appellate counsel represents that she "has thoroughly reviewed the record and transcripts" and "has concluded there are no non-frivolous issues on which to base an argument for relief." Consistent with Rule 3.1(e), Mother's appellate counsel has "provide[d Mother] with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court" and has "inform[ed Mother] in writing that [she] may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief." Mother did not do so.

¶ 23 Mother's appellate counsel identified three issues that arguably support the appeal and has "state[d] why those issues lack merit or would not alter the ultimate result." Rule 3.1(e) requires independent appellate review of these issues. *In re*

*L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). We have carefully reviewed the issues identified in the no-merit brief and examined the record as a whole and are satisfied that the adjudication order was based on proper legal grounds.<sup>4</sup>

### III. Conclusion

¶ 24 The trial court’s adjudicatory findings of fact were supported by clear and convincing evidence, and those findings supported the trial court’s conclusion that Daphne was a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15). After an independent review of the issues presented by Mother’s appellate counsel, we are satisfied that the adjudication order is otherwise based on proper legal grounds. Accordingly, we affirm the trial court’s adjudication order.

AFFIRMED.

Judges DIETZ and GORE concur.

Report per Rule 30(e).

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<sup>4</sup> As Mother’s appellate counsel indicates, the trial court’s finding that Respondents were “placed under oath and with assistance of counsel, affirmed their stipulation in open court” was not supported by the evidence. This erroneous finding is harmless, however, because it does not affect the validity of the stipulations. Though Respondents did not affirm the stipulations under oath, “[a] stipulation need not follow any particular form[.]” *In re Est. of Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004) (citation omitted). It is “essential that the parties or those representing them assent to the stipulation[.]” *id.*, and in this case counsel for Respondents and Petitioner signed the stipulations and presented them to the trial court in Respondents’ presence.