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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-105

No. COA21-405

Filed 15 February 2022

Mecklenburg County, Nos. 20 JA 60-61

IN THE MATTER OF: Z.B. & G.F.

Appeal by Respondent-Appellant Mother and Respondent-Appellant Father from an order entered 12 April 2021 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 12 January 2022.

*J. Thomas Diepenbrock for the Respondent-Appellant Mother.*

*Christopher M. Watford for the Respondent-Appellant Father.*

*Kathleen Arundell Jackson and Marc S. Gentile for the Petitioner-Appellee Mecklenburg County Department of Social Services, Youth & Family Services.*

*Matthew D. Wunsche for the Guardian ad Litem.*

JACKSON, Judge.

¶ 1

Respondent-Mother appeals from the trial court's order adjudicating her daughter Gianna<sup>1</sup> neglected. Respondent-Mother does not appeal the portion of the trial court's order adjudicating her daughter Zabrina abused and neglected. Respondent-Father is Zabrina's father and appeals the trial court's dispositional

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<sup>1</sup> We use pseudonyms to refer to the juveniles discussed in this opinion to protect the juveniles' privacy and for ease of reading. See N.C. R. App. P. 42(b).

order. E. Fuentes is Gianna’s father and he did not appeal.

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

¶ 2

On 3 February 2020, Respondent-Mother brought ten-month-old Zabrina to the emergency room. Upon examination, Zabrina was found to have an impacted fracture of her right femur bone, skull fractures, swelling and bruising of her face and lower back, and a black eye. After an initial investigation, the Mecklenburg County Department of Social Services, Youth and Family Services (“YFS”) filed a juvenile petition on 7 February 2020 alleging that Zabrina was abused and neglected and that nine-year-old Gianna was neglected and dependent. YFS assumed nonsecure custody of the children.

¶ 3

The matter came on for adjudication and disposition before the Honorable Aretha V. Blake on 30 October 2020, 22 February 2021, 23 February 2021, and 3 March 2021. During adjudication, YFS presented the testimony of Dr. E. Botzolakis as an expert in neuroradiology. Dr. Botzolakis testified that “the extent of the fractures [on Zabrina’s skull] would suggest that there . . . had to be a very high force trauma of some type[]” and that a fall from a bed would not explain the fractures. Dr. S. Kirby, who treated Zabrina in the emergency room on 3 February, testified that Respondent-Mother explained she left Zabrina in her playpen and Gianna in the same room while she showered and that after she got out of the shower, Zabrina was on the bed in the room. Dr. L. Castellano, who served as Zabrina’s pediatrician at

the hospital, testified that Respondent-Mother said she had showered the day before and wondered if Gianna had gotten Zabrina out of the playpen but that Zabrina was not “acting funny” when she got out of the shower. Dr. Castellano also testified, “There was no history that would explain these injuries to the child[.]”

¶ 4 YFS presented the testimony of Charlotte-Mecklenburg Police Officer M. Gibbons who interviewed Respondent-Mother at the hospital on 3 February. Officer Gibbons testified that Respondent-Mother stated after she got out of the shower around 2:00 p.m. on Sunday, 2 February, Zabrina was out of the playpen and Gianna told her, “Sorry.” Officer Gibbons stated Respondent-Mother explained she later noticed Zabrina’s face was swollen and tried applying icepacks and added that Zabrina started fussing during a diaper change at 2:00 a.m.

¶ 5 YFS also called Respondent-Mother to testify. Respondent-Mother testified that Zabrina and Gianna lived with her in an apartment and Respondent-Father had also lived in the home from June 2018 to December 2019 until she kicked him out. Respondent-Mother explained that a neighbor, Ms. T. Watson, babysat Zabrina during the week while she was at work and that Zabrina was uninjured when she picked her up from Ms. Watson on Friday, 31 January. Respondent-Mother also stated that Respondent-Father visited the home on 31 January and he did not do anything to harm Zabrina. Respondent-Mother testified that she was the only person to care for Zabrina on Saturday, 1 February.

¶ 6

Respondent-Mother then admitted she lied to officers on 3 February and that she had not actually taken a shower the day before. Respondent-Mother testified that on the afternoon of 2 February she had accompanied Ms. Watson to the store to buy supplies for a Super Bowl party Ms. Watson was hosting. Respondent-Mother stated Zabrina was sleeping at the time, so she left her and Gianna home for approximately 20 or 30 minutes while going to the store with Ms. Watson. Respondent-Mother testified that when she got home, Zabrina was asleep on the bed but she noticed swelling on her face so she applied icepacks and the swelling went down a little. Respondent-Mother explained that she took Zabrina to the hospital the morning of 3 February because she had pain in her leg.

¶ 7

Additionally, YFS presented the testimony of Ms. E. Eller, Gianna's special education teacher from kindergarten to second grade. Ms. Eller testified that at school Gianna, who is autistic, "benefitted from having visuals in order to communicate both expressively and receptively[.]" and "[s]he did need adult supervision to ensure her safety." Ms. Eller explained that Gianna was placed with her on 3 February and while Gianna's communication had "improved significantly . . . it's still not that of a typically developing nine year old."

¶ 8

Lastly, Charlotte-Mecklenburg Police Detective D. Jones testified for YFS that he conducted a recorded interview with Respondent-Mother at the hospital on 3 February 2020. The recording was admitted into evidence and played for the trial

court. During the interview, Respondent-Mother explained that Gianna is high functioning but has “very limited speech” and that while she’s “verbal on certain things . . . she can’t really explain herself.” Respondent-Mother told Detective Jones that on Sunday afternoon, 2 February, she got ready to take a shower around 2:00 p.m. Right beforehand, Respondent-Mother saw Gianna jumping on the bed and told her to stop because it is dangerous and Zabrina was watching from her playpen. Respondent-Mother stated she heard jumping and the sound of Zabrina giggling while she was in the shower until she heard a “thump, wah” and Zabrina start crying. Respondent-Mother further explained that she rushed out of the shower and found Zabrina on the bed “looking like she got beat up” and Gianna told her, “Sorry, mommy, sorry, mommy.” Additionally, Respondent-Mother described Zabrina screaming when she changed her diaper early the next morning and she therefore decided to take Zabrina to the hospital after Gianna left for school.

¶ 9 After closing arguments, the trial court adjudicated Zabrina abused and both children neglected. The matter then proceeded to disposition. Following disposition, the trial court entered a written order on adjudication and disposition on 12 April 2021.

¶ 10 Respondent-Mother entered timely notice of appeal on 4 May 2021 and 7 May 2021. Respondent-Father entered notice of appeal on 19 May 2021 and filed a Petition for Writ of Certiorari on 25 August 2021.

## II. Appellate Jurisdiction

¶ 11 An appeal of right lies directly with this Court from an “initial order of disposition and the adjudication order upon which it is based.” N.C. Gen. Stat. § 7B-1001(a)(3) (2021). “Notice to preserve the right to appeal shall be given in writing . . . within 30 days after entry and service of the order[.]” *Id.* § 7B-1001(b).

¶ 12 The trial court’s order was entered on 12 April 2021 and was served on 15 April 2021. Although the 30-day period likely began on 12 April per North Carolina Rule of Appellate Procedure 3(c)(1), even if the 30-day period began on 15 April, notice of appeal had to be given by 16 May 2021 (as 15 May 2021 was a Sunday). Accordingly, Respondent-Father’s notice of appeal on 19 May 2021 was untimely.

¶ 13 Typically, “[a]n appellant’s failure to give timely notice of appeal is jurisdictional, and an untimely attempt to appeal must be dismissed.” *In re J.C.B.*, 233 N.C. App. 641, 645, 757 S.E.2d 487, 490 (2014) (internal quotation and citation omitted). Respondent-Father, however, has filed a Petition for Writ of Certiorari and asks this Court to exercise its discretion pursuant to North Carolina Rule of Appellate Procedure 21. “The decision concerning whether to issue a writ is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause.” *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016).

¶ 14 Respondent-Father argues that the trial court erred in finding an aggravated

circumstance existed under N.C. Gen. Stat. § 7B-901(c)(1)(f) at the dispositional hearing and that the trial court abused its discretion in ordering Respondent-Father to submit to a parenting capacity evaluation. The trial court, however, did not use the aggravating circumstance finding to cease reunification efforts in the dispositional order and it followed its statutory authority under N.C. Gen. Stat. § 7B-904(d1)(1) in ordering the parenting capacity evaluation to determine if further parenting classes were needed. Accordingly, we find no merit in Respondent-Father's arguments and therefore deny his Petition for Writ of Certiorari. We proceed only to review Respondent-Mother's timely appeal of the trial court's adjudication of Gianna as neglected.

### III. Analysis

¶ 15 Respondent-Mother argues that the trial court erred by adjudicating Gianna neglected. Specifically, Respondent-Mother argues that the trial court relied solely on the adjudication of Zabrina as abused and neglected to adjudicate Gianna neglected. We disagree.

¶ 16 We review adjudication orders to determine whether the trial court's findings of fact are supported by clear and convincing evidence, and whether the findings support the trial court's conclusions of law. *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016). The trial court's conclusions of law are reviewed *de novo*. *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010).

¶ 17       Adjudicatory hearings on juvenile petitions are “designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition.” N.C. Gen. Stat. § 7B-802 (2021). The allegations in a petition—whether a juvenile is abused, neglected, and/or dependent—must be proven by clear and convincing evidence. *Id.* § 7B-805. The Juvenile Code defines “neglected juvenile” in pertinent part as a juvenile “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.” *Id.* § 7B-101(15)(ii)(a), (e). “In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment.” *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007). “Similarly, in 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). Crucially, “the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home.” *In re T.S.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006).

¶ 18       Whether a juvenile “lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home[]” is relevant to an



adjudication of neglect. N.C. Gen. Stat. § 7B-101(15) (2021). Our Court has previously held that it is improper to adjudicate a juvenile as neglected based solely on the fact that another child in the home was abused. *In re J.C.B.*, 233 N.C. App. 641, 644-45, 757 S.E.2d 487, 489–90 (2014); *In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 801-02 (2020). If relying on this factor, “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). The trial court must also identify other factors that suggest “the abuse or neglect will be repeated.” *In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489 (2014).

¶ 19 Recently, our Supreme Court in *In re A.W.*, 377 N.C. 238, 2021-NCSC-44, affirmed the adjudication of a child, Abigail, as neglected based on the previous abuse and death of Abigail’s older sister, Anna. The Court highlighted the trial court’s findings that Abigail faced a substantial risk of harm due to the respondent-mother’s continual provision of an implausible explanation for one of Anna’s injuries and her failure to provide an explanation for Anna’s other injuries. *Id.* at 248, 2021-NCSC-44, ¶19. The Court held “the findings of respondent-mother’s ongoing failure to recognize and accept the cause of Anna’s injuries and resulting death,” in combination with the fact Anna sustained her injuries and died at the hands of one or both parents and the respondent-mother continued her relationship with respondent-father,

established “that respondent-mother was unable to ensure Abigail’s safety and that Abigail was at a substantial risk of impairment.” *Id.* at 249, 2021-NCSC-44, ¶19.

¶ 20 Here, the trial court made the following findings of fact relevant to the adjudication of Gianna as neglected:

11. Ms. Watson took a picture of [Zabrina] and sent it to the mother on Friday and [Zabrina] was fine. [Respondent-Father] saw [Zabrina] that evening. He left at 10:15 p.m. to 10:30 p.m. and [Zabrina] was fine. [Zabrina] had no injuries and [Respondent-Father] had no concerns.

12. On February 1, 2020, [Zabrina] was with her mother all day.

13. On February 2, 2020, [Zabrina] was with her mother all day.

14. [Gianna] is autistic but high functioning. [Gianna] does not demonstrate aggressiveness, except to herself. She is 60 lbs. and less than 5 foot tall. She is minimally verbal.

15. The mother has provided contradictory accounts as to what happened to [Zabrina] on February 2, 2020. One account was that the mother was in the shower for up to 45 minutes, while in the shower she heard laughing and giggling and then a thump. When the mother came out of the shower, [Zabrina] was no longer in her playpen. The mother didn’t realize [Zabrina] was injured until 2:00 a.m. The other story was that the mother left the children home alone while the mother and Ms. Watson went shopping to several stores for Super Bowl party supplies. Upon the mother’s return, she found [Zabrina] injured.

16. The mother did not take [Zabrina] to the hospital overnight. She used ice packs for swelling, which was corroborated by Ms. Watson. The mother took [Zabrina] to

the Novant Presbyterian Emergency Department on February 3, 2020.

...

20. The mother's various explanations do not explain the injuries that were sustained by the child.

These findings are supported by clear and convincing evidence, namely the testimonies of Dr. Kirby, Dr. Castellano, Officer Gibbons, and Respondent-Mother, and the recording of Respondent-Mother's interview with Detective Jones.

¶ 21 The trial court's findings in turn support its conclusion of law that Gianna is a neglected juvenile in that she does not receive proper care and supervision, lives in an environment injurious to her welfare, and "lives in a home where another child was abused and neglected[,] and its conclusion of law that "[t]here is a substantial risk of physical, emotional and/or mental impairment of the children while in their mother's care."

¶ 22 While the trial court considered the abuse and neglect of Zabrina to adjudicate Gianna neglected, it did not base its adjudication solely on the abuse of Zabrina. The trial court assessed the substantial risk of harm to Gianna based on the historical facts of the case and pointed to other factors suggesting the abuse or neglect may be repeated. Specifically, like in *In re A.W.*, the trial court found Respondent-Mother gave various and contradictory explanations for Zabrina's injuries and determined that the explanations she did provide did not actually explain the injuries. These

findings are especially significant given that the trial court has “the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.” *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167-68 (2016) (internal marks and citation omitted).

¶ 23           Additionally, as the trial court in *In re A.W.* found that Anna’s injuries occurred in the home at the hands of one or both parents, the trial court here made findings that Zabrina’s injuries occurred while she was in her mother’s care and not the care of Ms. Watson or Respondent-Father. Further, the trial court’s finding that Gianna is autistic and minimally verbal heightens the risk of future abuse or neglect as Gianna is limited in her ability to seek help or communicate what occurs in the home and Respondent-Mother has failed to provide an adequate explanation for Zabrina’s injuries. Together the trial court’s findings constitute sufficient factors to conclude Gianna is at a substantial risk of impairment and harm in Respondent-Mother’s care. Accordingly, we affirm the trial court’s adjudication of Gianna as neglected.

#### IV. Conclusion

¶ 24           For the foregoing reasons, we affirm the trial court’s adjudication of Gianna as neglected.

AFFIRMED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).