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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-314

No. COA21-344

Filed 3 May 2022

Cumberland County, Nos. 19JA386-388

IN THE MATTER OF:

L.M.

K.M.

K.M.

JUVENILES

Appeal by respondent-father from orders entered 17 February 2021 and 16 March 2021 by Judge Frances M. McDuffie in Cumberland County District Court. Heard in the Court of Appeals 16 November 2021.

Speaks Law Firm, PC, by Garron T. Michael, for respondent-appellant-father.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

Michelle Peter for appellee Village of Kaltag.

Matthew D. Wunsche for appellee guardian ad litem.

GORE, Judge.

Ki.M. (“Kim”), and L.M. (“Luke”) to be neglected juveniles.¹ Specifically, he contends there was not a valid consent adjudication order and the stipulated facts do not support a conclusion of neglect. We vacate and remand in part and reverse in part.

I. Factual and Procedural Background

¶ 2 On 20 September 2019, the Cumberland County Department of Social Services (“CCDSS”) filed a verified petition alleging Kelly, Kim, and Luke were neglected juveniles. At the time, Kelly was fifteen years old, Kim was thirteen years old, and Luke was one year old.

¶ 3 The petition alleges that on 3 September 2019, CCDSS received a Child Protective Services (“CPS”) referral. Respondent-father reportedly struck Kim in the mouth with a closed fist. Respondent-father then avoided a social worker who attempted to contact him after receiving the report. Respondent-father initially denied that he hit Kim, but later told the social worker that he could discipline his children however he wanted. After learning about the allegations in the CPS referral, respondent-father yelled at and berated Kelly and Kim. The petition also alleged respondent-father appeared in a video uploaded to Facebook, in which he was waving a semi-automatic handgun around with his finger on the trigger. In that video, Luke was seen sitting in a chair next to respondent-father.

¹ Pursuant to N.C.R. App. P. 42(b), pseudonyms are used to protect the identity of the juveniles and for ease of reading.

¶ 4 On 19 September 2019, Kelly and Kim were afraid to leave school and go home to respondent-father. They were “visibly shaking and upset,” concerned that respondent-father would yell at them and force them to move to New York. On 20 September 2019, Kelly and Kim did not attend school. Respondent-father called the school administrator to withdraw their enrollment and stated they were moving to New York.

¶ 5 Respondent-father has a history of homelessness and unemployment. At the time CCDSS filed its petition, respondent-father and the juveniles had been evicted from their home for non-payment of rent, and they lived with family friends in Fayetteville, North Carolina. Respondent-father is a United States Army veteran, honorably discharged, and receives financial benefits for his military service-connected disability. He previously generated supplemental income for his family through various employments.

¶ 6 Respondent-father has a mental health condition and was not receiving treatment at the time CCDSS filed its petition. Respondent-father received mental health services in 2017 for diagnoses of Post-Traumatic Stress Disorder, Depression, Traumatic Brain Injury, and Chronic Adjustment Disorder.

¶ 7 Kim and Kelly have an estranged relationship with their mother, respondent-

mother Marsh,² and had minimal contact with her in years prior. Respondent-mother Marsh's whereabouts were unknown during the CCDSS investigation that led to the petition. Luke's mother, respondent-mother Calhoun, resided in California and was not involved in Luke's daily care. In May of 2019, respondent-father obtained a one-month Domestic Violence Protective Order ("DVPO") against respondent-mother Calhoun, along with temporary custody of Luke. On 11 July 2019, respondent-father obtained sole custody of Luke in Cumberland County District Court.

¶ 8 The first non-secure custody hearing was held on 25 September 2019. Respondent-father and respondent-mother Calhoun were served and received their first appearances. The trial court found that the Indian Child Welfare Act ("ICWA") may apply in this matter, and an inquiry was sent to the Doyon Group in Alaska. Respondent-father's visitation was conditioned upon Kelly's submission to a forensic interview. Service remained outstanding for respondent-mother Marsh until service by publication was effectuated on 21 August 2020.

¶ 9 Non-secure custody was continued by the trial court following a second hearing on 2 October 2019. An additional hearing on non-secure custody and a Pre-Adjudication Conference was set for 12 November 2019. Respondent-father did not appear at the 12 November 2019 hearing. The trial court ordered continued non-

² We use pseudonyms for both respondent-mothers to protect the identity of the juveniles.

secure custody for all three juveniles and respondent-father was not permitted visitation with Kelly and Kim. The Adjudication was set for 23 January 2020.

¶ 10 At the 23 January 2020 hearing, respondent-father's court-appointed counsel moved to withdraw due to a "breakdown of the client relationship." The motion was granted. Based on respondent-father's updated financial affidavit, the trial court determined that he no longer qualified for court-appointed counsel. The matter was continued to permit respondent-father time to retain counsel, and non-secure custody remained in effect.

¶ 11 At the next Continued Non-secure Custody/Adjudication hearing on 20 February 2020, the trial court found that the ICWA applied as to Kim and Kelly and permitted the Village of Kaltag Tribe to intervene as party to the proceedings. Respondent-father did not appear at the February hearing or at the next two hearings. The trial court determined that this matter necessitated a further continuance to allow a representative from the Village of Kaltag to be present. The 19 March 2020 and 20 May 2020 hearings were continued because of COVID-19 Administrative Orders made by Chief Justice Beasley.

¶ 12 Respondent-father did not appear for the 17 June 2020 non-secure hearing. He resided in Florida at that time. CCDSS moved the trial court to continue the adjudication to allow time for respondent-mother Marsh to be served by publication, and to provide the representative from the Village of Kaltag with requested

documentation. Over no objection, the trial court concluded that such a continuance was in the best interest of the parties and juveniles, granted the motion, and concluded that the “interim statutory days between hearings should be waived.”

¶ 13 The Adjudication was set for 17 September 2020. The juveniles Kelly and Kim were engaged in therapy at this time. Kelly and Kim had no desire to have contact with respondent-father and expressed fear of him. Visitation with respondent-father remained contingent upon being “therapeutically appropriate.”

¶ 14 On 17 September 2020, the trial court reconsidered respondent-father’s financial circumstances and appointed counsel to represent him. The trial court granted another continuance for CCDSS to effectuate service by publication.

¶ 15 This matter was continued to 19 November 2020 when the Adjudication was held. After respondent-father met “extensively” with his counsel over the course of two days, the parties arrived at a stipulation of facts that was signed by the parties present. The Village of Kaltag representative, who appeared by phone, also agreed to the stipulated facts after it was read on the record. There was no objection to the facts being read on the record, or the written version being submitted to the Court. Respondent-father was sworn and so verified his signature and confirmed his agreement with the stipulated facts as they were read into the record. The trial court found that, based on the stipulated facts and without receiving further evidence, all three children were neglected juveniles by clear, cogent, and convincing evidence.

Following the hearing, a written Order on Adjudication and Temporary Disposition was entered on 17 February 2021.

¶ 16 The Disposition hearing was continued from 21 January 2021 to 18 February 2021 based on the Adjudication Order not being in the file and to allow a tribal representative to appear from the Village of Kaltag. A substitute tribal representative appeared by phone at the Dispositional hearing with no objection.

¶ 17 The 18 February 2021 hearing began with counsel for respondent-father informing the trial court that respondent-father had concerns related to his representation. Respondent-father expressed discontent with his counsel's late-night email informing him of the continuance in January, a lack of effective communication, not receiving documentation, argued the petition was "falsely filed," and that "nobody wanted to explain to [him] what adjudication was." After hearing from the trial court, counsel for CCDSS and the Guardian ad Litem ("GAL"), respondent-father elected to proceed with the assistance of appointed counsel.

¶ 18 On Disposition, the trial court heard evidence from four witnesses including a CCDSS social worker, the GAL, the representative for the Village of Kaltag, and respondent-father. Following arguments of counsel, the trial court ordered legal and physical custody of the juveniles to remain with CCDSS. Respondent-father retained both in-person and electronic visitation with Luke. The trial court restricted visitation with Kim and Kelly, finding that the juveniles "expressed concerns about

returning to the [respondent-father]” Kim and Kelly’s therapist reported that “[t]he juveniles are making therapeutic progress, but have anxiety surrounding the [respondent-father]. [Kim] exhibits self-harming behaviors by way of hair pulling.” The trial court ordered family therapy for respondent-father, Kim, and Kelly.

¶ 19 The trial court further ordered a home study to be conducted on respondent-father’s home in Alaska, noting that respondent-father had moved several times during the pendency of this action. Additionally, the trial court ordered respondent-father to comply with recommendations from his psychological evaluation, participate in a parenting class, obtain a pain management consult, and maintain stable housing and employment or income.

¶ 20 The trial court entered its Disposition Order on 16 March 2021. On 1 April 2021, respondent-father timely filed notice of appeal.

II. Consent Adjudication Order

¶ 21 Respondent-father argues the trial court’s Adjudication and Temporary Disposition Order is not a valid consent adjudication order. CCDSS concedes this issue, and we agree.

¶ 22 “The Juvenile Code provides two procedural paths for an adjudication of abuse, neglect, or dependency: an adjudicatory hearing or an adjudication by consent.” *In re R.L.G.*, 260 N.C. App. 70, 73, 816 S.E.2d 914, 916-17 (2018) (*purgandum*). “A judgment by consent is the agreement of the parties, their decree, entered upon the

record with the sanction of the court.” *In re L.G.I.*, 227 N.C. App. 512, 515, 742 S.E.2d 832, 835 (2013) (*purgandum*). “N.C. Gen. Stat. § 7B-801(b1) permits a trial 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.” *In re R.L.G.*, 260 N.C. App. at 73, 816 S.E.2d at 917 (quoting § 7B-801(b1) (2017)) (emphasis in original).

¶ 23 In this case, the parties agreed to enter into a Stipulation of Facts Agreement pursuant to § 7B-807. Respondent-father willfully and voluntarily entered into this agreement, and the juveniles were represented by counsel. The stipulated facts were read in open court and assented to by all parties present, and the trial court based its Adjudication Order on those factual stipulations. However, the first requirement of § 7B-801(b1) was not met. Only CCDSS, the GAL, and respondent-father consented to the agreement. Both respondent-mothers were not present at the adjudicatory hearing, and neither of their respective counsel were present at the time the agreement was submitted to the court.

¶ 24 We necessarily determine that the stipulation agreement entered by the parties did not meet the requirements for a valid consent adjudication order. *See In re R.L.G.*, 260 N.C. App. at 74, 816 S.E.2d at 917 (concluding that “the trial court’s Adjudication Order . . . was not a valid consent adjudication order under N.C. Gen. Stat. § 7B-801(b1).”). Therefore, our next consideration is whether the trial court’s

Adjudication Order contained sufficient findings of fact based on clear and convincing evidence to support its determination that Luke, Kim, and Kelly, were neglected juveniles. *Id.* at 74, 816 S.E.2d at 917-18.

III. Adjudication of Neglect

¶ 25 “A proper review of a trial court’s finding of neglect entails a determination of (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.” *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (*purgandum*). “Findings of fact which are supported by clear and convincing competent evidence are deemed conclusive on appeal, even where some evidence supports contrary findings. The trial court’s conclusions of law are reviewed *de novo*.” *In re S.G.*, 268 N.C. App. 360, 363, 835 S.E.2d 479, 483 (2019) (*purgandum*).

¶ 26 The Juvenile Code defines a “neglected juvenile,” in part, as one

whose parent, guardian, custodian, or caretaker 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.

§ 7B-101(15) (2019). “In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful. However, not every act of negligence on part of the parent results in a neglected juvenile.” *In*

re V.M., 273 N.C. App. 294, 297, 848 S.E.2d 530, 533 (2020) (quotation marks and citations omitted).

¶ 27 “[T]his Court has consistently required 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) (citations omitted). “Generally, North Carolina courts have found neglect where the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile.” *In re V.M.*, 273 N.C. App. at 297, 848 S.E.2d at 533 (quotation marks and citation omitted). “Section 7B-101(15) affords the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.” *In re A.L.T.*, 241 N.C. App. 443, 451, 774 S.E.2d 316, 321 (2015) (quotation marks and citation omitted).

¶ 28 Respondent-father argues the stipulated facts are insufficient to support a conclusion that Luke, Kim, and Kelly were neglected juveniles. Finding of fact 9 is the only adjudicatory finding containing substantive facts pertaining to the alleged neglect of the three juveniles.

¶ 29 Finding of fact 9 states:

[respondent-father], by and through his counsel,

specifically admits and stipulates that allegations 2 (amended), 6-7 (amended), 9-10, 13 (amended), 14 (amended), 15 (amended), 16 (amended), and 17 as contained and stated in the petition are true, and all of these facts are accurate. Furthermore, the investigative social worker verified and attested to the fact that all of these facts were true and accurate. Based on stipulation,

1) [CCDSS] received a [CPS] referral on [3 September 2019] concerning the safety of the juveniles.

2) [Amended] That on [3 September 2019] the Respondent Father popped the juvenile [Kim] in the mouth. The Respondent Father initially denied that he popped [Kim] but then stated that he can discipline his children however he wants.

6) [Amended] That after learning about the allegations in the referral, the juveniles [Kim] and [Kelly] reported that the Respondent Father yelled and berated them about the referral.

7) [Amended] Respondent Father recently lost his home and was living with family friends.

9) That Respondent Father is prior military and is 100% disabled.

10) The Respondent Father stated to the Social Work Supervisor that he has mental health diagnoses and was receiving treatment from the Veterans Administration but is not attending anymore.

13) [Amended] That on [19 September 2019], the juveniles [Kelly] and [Kim] were afraid to leave school and go home to the Respondent Father. The juveniles were visibly shaken and upset.

14) [Amended] That on [20 September 2019], the Respondent Father called the school administrator to

withdraw the juveniles from school and stated that they were moving to New York.

15) That Respondent Mother [Calhoun] resides in California and has contact with the Department.

16) [Amended] That when the juvenile [Luke] was born, he tested positive for THC. The Department received a referral regarding [Luke] on [14 June 2018]. The Respondent Mother [Calhoun] engaged in services at Elite Care, and the Department closed out the referral with services recommended.

17) That the Department has had no contact with Respondent Mother [Marsh], and that upon information and belief, she resides in the state of Ohio.

¶ 30 Both respondent-father and the GAL rely on the same decision, *In re A.L.T.*, 241 N.C. App. 443, 774 S.E.2d 316 (2015), to support their respective positions in this matter. In *In re A.L.T.*, the trial court found that the father had struck both the juveniles, “Clara” and “Anna,” on at least one occasion. *Id.* at 448, 774 S.E.2d at 319. The juvenile Clara, having witnessed the father strike Anna, was “fearful or scared” that she would be struck if she reported the incident. *Id.* On appeal, the father argued that the trial court “mischaracterized [his] single act of discipline as domestic violence.” *Id.* at 449, 774 S.E.2d at 320. This Court affirmed the adjudication of neglect as to both juveniles. *Id.* at 451, 774 S.E.2d at 321.

¶ 31 The GAL contends that the facts in the instant matter are similar to *In re A.L.T.*, and we should affirm the adjudication of neglect because the trial court’s findings show that the children were at a substantial risk of harm in respondent-

father's care. Here, like the facts in *In re A.L.T.*, respondent-father struck Kim in the mouth, which caused Kim and Kelly to be visibly shaken and upset, to the point that they were afraid to return home from school. When respondent-father learned about the CPS report, he "yelled at and berated" the children. CCDSS further argues that respondent-father's lack of mental health treatment and stable housing are additional factors demonstrating a substantial risk of harm to Kim, Kelly, and Luke if they remain in the care of respondent-father.

¶ 32 Respondent-father argues *In re A.L.T.* is distinguishable. In *In re A.L.T.*, the trial court conducted a full evidentiary hearing, with admissions and testimony about the physical act from the father, the mother, and Clara. *Id.* at 449-50, 774 S.E.2d at 320. Furthermore, this Court relied on several supplemental facts supporting the adjudication of neglect, citing findings that

Clara and Anna resided in a home where Father had punched holes in walls when he was angry, Father engages in aggressive and violent behaviors in the home, Father "popped" Clara in the mouth causing a "busted lip[,] Clara is scared of Father, Anna has been physically struck by Father on at least one occasion, Clara witnessed Father strike Anna, and Anna cried as a result of being struck.

Id. at 451, 774 S.E.2d at 321.

¶ 33 It is respondent-father's contention that the stipulated facts in the instant case simply do not show a pattern of chronic behavior that was present in *In re A.L.T.* Moreover, none of the stipulated facts indicate or correlate to an injurious

environment of lack of proper care for Luke. In respondent-father's estimation, the stipulated facts contained in finding of fact 9, when viewed collectively, fail to support a conclusion that either Kim, Kelly, or Luke were neglected juveniles.

¶ 34

Finding of fact 9, stipulation 2 states: “[Amended] That on [3 September 2019] the Respondent Father popped the juvenile [Kim] in the mouth. The Respondent Father initially denied that he popped [Kim] but then stated that he can discipline his children however he wants.” This admission is clear and convincing evidence that respondent-father struck Kim on at least one occasion and is indicative of mistreatment or abuse. “This Court has acknowledged, however, that the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect. Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated.” *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (citation omitted). As the concurring opinion in *In re A.L.T.* observed:

while Father's admission to hitting Clara in the lip does not necessarily mandate an adjudication of neglect for Anna, the presence of “other factors”—specifically, the history of domestic violence between Father and Mother and evidence of Father's violent and aggressive acts—in addition to Father's act of domestic violence against Clara are sufficient to support a determination, on clear and convincing evidence, that Anna is also neglected based on the likelihood that the acts of violence perpetuated against Clara and Mother will be repeated against her.

In re A.L.T., 241 N.C. App. at 459-60, 774 S.E.2d at 326 (Inman, J., concurring).

¶ 35 The facts in this case resemble those in *In re A.L.T.*, but we are not presented with sufficient supplemental findings to support the same conclusion of neglect based on clear and convincing evidence. The record reveals that domestic violence occurred between respondent-father and respondent-mother Calhoun in 2019, but respondent-father obtained a DVPO in that matter, and the findings of fact in the Adjudication Order are devoid of any reference to domestic violence whatsoever.

¶ 36 We agree with respondent-father that the trial court's findings of fact do not support the adjudication of Kim and Kelly as neglected juveniles. "The findings need to be stated with sufficient specificity in order to allow meaningful appellate review." *In re S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 712 (2011). Here, the trial court found two forms of alleged neglect to exist based on the stipulation agreement: (1) lack of proper care, supervision, or discipline; and (2) an injurious environment. However, the trial court made no finding of any "physical, mental, or emotional impairment of the juvenile[s] or a substantial risk of such impairment" as consistently required by our case law. See *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003); *In re Safriet*, 112 N.C. App. at 752, 436 S.E.2d at 901-02.

¶ 37 Upon review of the record, there are facts that support, but do not compel, sufficient findings necessary to support the adjudication of Kim and Kelly as neglected juveniles. Without further fact-finding, we cannot determine whether the trial court's conclusions are supported by its findings. Accordingly, we vacate the

trial court's adjudication of Kim and Kelly as neglected juveniles, and remand for additional findings of fact on the issue of Kim and Kelly's neglected status. *See In re D.R.B.*, 182 N.C. App. 733, 739, 643 S.E.2d 77, 81 (2007) (vacating and remanding a termination order for entry of adequate findings of fact and conclusions of law to demonstrate grounds for termination and permitting the trial court to receive additional evidence on remand). "On remand, the trial court should rely upon the existing record, but might in its sole discretion receive such further evidence and further argument from the parties as it deemed necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 37, 509 S.E.2d 804, 804 (1999). Considering our holding above, we must also vacate the trial court's Disposition Order regarding Kim and Kelly, and remand for entry of a new Disposition Order if warranted by further proceedings on remand. *See In re S.C.R.*, 217 N.C. App. at 170, 718 S.E.2d at 713 (reversal of an underlying adjudication order necessitates reversal of a subsequent order on disposition).

¶ 38 Regarding the trial court's adjudication of Luke as a neglected juvenile, none of the stipulations in finding of fact 9 indicate he was receiving improper care or living in an injurious environment at the time the petition was filed. Moreover, there are no facts in the record that support or compel additional findings that Luke faces "a substantial risk of future abuse or neglect . . . based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). Accordingly, we

reverse the trial court's Adjudication Order determining Luke is a neglected juvenile within the meaning of § 7B-101(15) and the subsequent Disposition Order. *See In re S.C.R.*, 217 N.C. App. at 170, 718 S.E.2d at 713.

IV. Conclusion

¶ 39 The trial court did not enter a valid Consent Adjudication Order. Regarding Kim and Kelly, we vacate and remand the Adjudication and Disposition Orders for additional findings not inconsistent with this opinion. We reverse the Adjudication and Disposition Orders as applied to Luke.

VACATED AND REMANDED IN PART; REVERSED IN PART.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).