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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-390

No. COA20-271-2

Filed 16 August 2022

Cumberland County, No. 19 JA 211

IN THE MATTER OF: K.S.

Appeal by respondent-mother, and cross-appeal by petitioner Cumberland County Department of Social Services, from order entered 14 January 2020 by Judge Luis J. Olivera in Cumberland County District Court. Originally heard in the Court of Appeals 17 November 2020, with opinion issued 31 December 2020. On 11 February 2022, the Supreme Court vacated and remanded to this Court for reconsideration of the issue of neglect.

James D. Dill for petitioner-appellee/cross-appellant Cumberland County Department of Social Services.

N.C. Administrative Office of the Courts, by GAL Staff Counsel Michelle FormyDuval Lynch, for appellee guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant/cross-appellee mother.

ZACHARY, Judge.

¶ 1 Respondent Kayla Jeffcoat ("Mother") appealed from an order adjudicating her

newborn child, Kelly,[1] to be a dependent juvenile. Cumberland County Department of Social Services ("DSS") cross-appealed from the same order dismissing its neglect claim. On 31 December 2020, this Court filed an unpublished opinion (1) reversing the trial court's adjudication of Kelly as a dependent juvenile and remanding for further findings of fact; and (2) affirming the trial court's dismissal of DSS's neglect claim. *See In re K.S.* (*K.S. I*), 275 N.C. App. 979, 852 S.E.2d 738, 2020 WL 7974420 (2020) (unpublished), *vacated and remanded*, 2022-NCSC-7. Our Supreme Court allowed DSS's petition for discretionary review "only on issues related to neglect." *In re K.S.* (*K.S. II*), 2022-NCSC-7, ¶ 5 n.2. On 11 February 2022, the Supreme Court vacated our opinion in *K.S. I* and remanded to this Court with instructions to reconsider the issue of neglect. *Id.* ¶ 13.

¶ 2 Upon reconsideration, we affirm the trial court's dismissal of DSS's neglect claim. This Court's reversal of the trial court's adjudication of Kelly as a dependent juvenile was not before our Supreme Court, and thus remains undisturbed. *See id.* ¶ 5 n.2.

Background

¶ 3 The full factual and procedural background may be found in this Court's prior opinion, *K.S. I*. We restate here the facts, which are not in dispute, from that opinion:

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[1] The pseudonym adopted by the parties is used for ease of reading and to protect the juvenile's identity.

On 26 May 2019, Kelly was born to Mother and Respondent Oree Shipman ("Father"). Three days later, DSS filed a juvenile petition alleging that Kelly was a neglected and dependent juvenile. The trial court awarded nonsecure custody of Kelly to DSS, and appointed a guardian *ad litem* ("GAL") for Kelly. On 4 October 2019, DSS filed an amended juvenile petition with additional factual allegations, again alleging Kelly to be neglected and dependent.

The trial court ordered the parties and their attorneys to attend a pretrial judicial settlement conference, scheduled for 10 October 2019. It does not appear from the record as though Father attended the judicial settlement conference.

Thereafter, DSS, Mother, the GAL, and their attorneys executed a Stipulation Agreement and Written Agreement for Consent Adjudication Order Per 7B-801(b1) ("Stipulation Agreement"), in which the parties agreed that certain "allegations as set forth in the amended petition were true and accurate . . . at the time of the filing of the amended petition[.]" Mother reserved the right to argue at the adjudication hearing that these facts were not sufficient to establish Kelly's dependency or neglect.

On 14 November 2019, the matter came on for an adjudication and disposition hearing in Cumberland County District Court before the Honorable Luis J. Olivera. DSS, the GAL, Mother, and their attorneys attended the hearing; Father did not. Father's counsel reported to the trial court that Father went to Florida after his probation ended on 15 July 2019, where he was homeless and with no means of returning to this state. The trial court permitted Father's counsel to withdraw.

At the hearing, DSS submitted the Stipulation Agreement to the court, and the stipulations were "assented to by all parties present." The stipulated facts, as incorporated into the trial court's order, were as follows:

1. The Cumberland County Department of Social Services (CCDSS) received a Child Protective Services (CPS) referral on 05/27/2019 concerning the safety of the juvenile.

2. Respondent Mother, Kayla Jeffcoat named Respondent Father Oree Shipman as the child's biological father. Respondent Father Oree Shipman signed the Affidavit of Paternity as to the juvenile and his name appears on the juvenile's birth certificate.

3. Respondent Mother and Respondent Father Shipman have two older children who are currently in the custody of CCDSS (16 JA 493 and 17 JA 530). Further, the Respondents have an older child that was placed in the legal and physical custody of a relative (15 JA 121)[.]

4. The oldest child (15 JA 121) was adjudicated abused and neglected on 2/1/16 based on Respondent Father Shipman physically abusing the child and the child having sustained severe injuries. The child was approximately three months old when the abuse occurred. Respondent Father Shipman pled guilty and was convicted of felony child abuse. (Cumberland County District Court, Juvenile Division, 15 JA 121)[.]

5. On 1/18/17, the juvenile K.S. (16 JA 493), a sibling of this juvenile and a child of Respondent Mother and Respondent Father Shipman was adjudicated dependent, and on 5/10/18, the juvenile K.S. (17 JA 530), a sibling of this juvenile and another child of Respondent Mother and Respondent Father Shipman was adjudicated neglected. These adjudications were based on the adjudication of the older child in 15 JA 121 and the Respondents had not alleviated the conditions for which that child was removed from their care. At the time of said

adjudications, Respondent Mother and Respondent Father continued to be involved in a relationship with each other. (Cumberland County District Court, Juvenile Division, 16 JA 493 and 17 JA 530).

10. At the time of the filing of the original petition in this matter, Respondent Mother and Respondent Father Shipman did not have essential necessities for the child [Kelly].

12. On June 15, 2019, Respondent Mother and Respondent Father were involved in a verbal and physical altercation with each other in the presence of the juvenile A.S. (15 JA 121) when the Respondent Mother drove the Respondent Father and the juvenile A.S. in a vehicle. Respondent Mother hit Respondent Father Shipman and Respondent Father Shipman hit Respondent Mother. In addition, Respondent Father Shipman physically choked the Respondent Mother after grabbing her. Respondent Mother knew Respondent Father was not allowed around A.S. when Respondent Mother allowed Respondent Father into the vehicle with A.S. (15 JA 121).

13. The June 15, 2019 altercation occurred as a result of Respondent Father telling the juvenile A.S. that he would bite A.S. back after A.S. bit him, Respondent Mother taking Respondent Father's statement seriously, Respondent Mother hitting Respondent Father, Respondent Mother beginning to drive like a maniac with A.S. in the vehicle, and Respondent Father trying to grab Respondent Mother.

14. Pursuant to the last order of the Court in 15 JA 121, Respondent Father Shipman was not allowed any contact with the juvenile A.S. (15 JA 121) and that remained the order of the Court at the time of the June 15, 2019 incident.

> 15. An altercation did in fact occur in June 2019 between Respondent Mother and Respondent Father when Respondent Mother picked Respondent Father up after Respondent Father demanded a car ride.
>
> In the Stipulation Agreement, Mother, DSS, and the GAL also agreed to the "[i]ssue[s] that led to [r]emoval: current and prior CPS history, Respondent Father's conviction for Felony Child Abuse as to this juvenile's sibling, [A.S.] (Docket No. 15 JA 121), unstable housing, and domestic violence issues between Respondent Mother and Respondent Father."
>
> The trial court accepted the Stipulation Agreement, and found that "[t]he facts as admitted to by the parties[would] constitute[ ] the factual basis for this adjudication." The parties offered no additional evidence in the adjudication hearing.
>
> After hearing the arguments of counsel as to whether the stipulated facts were sufficient to support an adjudication of dependency or neglect, the trial court concluded that Kelly was a dependent juvenile. The trial court further dismissed the claim of neglect. The trial court then held the dispositional hearing, and at its conclusion, ordered that Kelly remain in the nonsecure custody of DSS. On 14 January 2020, the trial court entered its adjudication and disposition order memorializing its findings and conclusions.

K.S. I, 275 N.C. App. 979, 852 S.E.2d 738, 2020 WL 7974420, at *1–*2 (alterations in original).

¶ 4 Mother and DSS each appealed to this Court. *Id.* at *3. In *K.S. I*, "Mother challenge[d] the trial court's adjudication of Kelly as a dependent juvenile, and DSS challenge[d] the trial court's dismissal of the neglect claim." *Id.*

¶ 5 As to Mother's appeal, this Court agreed with Mother that "the Stipulation Agreement 'simply contained a stipulation by the parties as to certain facts,' and did not constitute a consent adjudication order." *Id.* at *4 (quoting *In re R.L.G.*, 260 N.C. App. 70, 74, 816 S.E.2d 914, 917 (2018)). Upon review of the stipulated facts, this Court concluded that there was insufficient evidence to support the trial court's determination that Kelly was a dependent juvenile, and accordingly, we reversed and remanded for additional findings of fact. *Id.* at *5.

¶ 6 As to DSS's cross-appeal, we disagreed with DSS's argument "that the trial court erred *as a matter of law* by failing to conclude that Kelly was a neglected juvenile." *Id.* After careful review of the stipulated findings of fact and the relevant case law, this Court "conclude[d] that the trial court did not err in dismissing DSS's neglect claim, and DSS's arguments to the contrary [we]re overruled." *Id.* at *6.

¶ 7 Our Supreme Court allowed DSS's petition for "discretionary review only on issues related to neglect[,]" *K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 5 n.2, with regard to which it concluded that this Court "failed to apply the proper standard of review," *id.* ¶ 1. Accordingly, our Supreme Court vacated and remanded the matter to this Court "with instructions to conduct a de novo review[.]" *Id.* ¶ 12. After careful reconsideration of the issue of neglect, we affirm the trial court's order.

Discussion

¶ 8 On cross-appeal from the trial court's order, DSS argues that the trial court

erred by dismissing the neglect claim because the stipulated findings of fact support a conclusion, as a matter of law, that Kelly is a neglected juvenile. We disagree.

I. Standard of Review

¶ 9 Our Supreme Court reiterated our standard of review in *K.S. II*:

> An appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. Conclusions of law made by the trial court are reviewable de novo on appeal.

380 N.C. 60, 2022-NCSC-7, ¶ 8 (citations, footnote, and internal quotation marks omitted). "Clear and convincing evidence is greater than the preponderance of the evidence standard required in most civil cases. It amounts to evidence which should fully convince." *In re A.K.*, 178 N.C. App. 727, 730, 637 S.E.2d 227, 229 (2006) (citations and internal quotation marks omitted).

¶ 10 As our Supreme Court observed, the trial court's findings of fact in this case "are largely based on facts agreed upon by the parties in the Stipulation Agreement and, thus, are supported by sufficient evidence. Further, as neither party challenges any of those findings, they are presumed to be supported by competent evidence and are binding on appeal." *K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 10. "[T]he determination of whether a juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15)

is a conclusion of law." *R.L.G.*, 260 N.C. App. at 76, 816 S.E.2d at 918–19. Accordingly, we conduct de novo review of the trial court's decision to dismiss DSS's neglect claim. *See K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 8.

¶ 11 The appellate court applying de novo review "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* (citation omitted). "De novo review of an adjudication of neglect or dismissal of a claim of neglect does not allow a reweighing of the evidence. Nor does it require deference to the trial court." *Id.* ¶ 11.

II. Analysis

¶ 12 On appeal, DSS asserts that the trial court's evidentiary findings of fact supported an adjudication that Kelly is a neglected juvenile as a matter of law. The GAL wholly adopts this argument.

¶ 13 In its order, the trial court explicitly stated that "[t]he facts as admitted to by the parties . . . constitute[ ] the factual basis for this adjudication." And as this Court recognized in *K.S. I*, DSS and the GAL "do not challenge the evidentiary underpinnings of these findings of fact, but rather the legal import of these findings." 275 N.C. App. 979, 852 S.E.2d 738, 2020 WL 7974420, at *5. DSS argues that "adequate findings of fact exist that support a conclusion of law that Kelly was a neglected juvenile *as a matter of law*." (Emphasis added). Accordingly, "[w]ith the facts in this case being supported by competent evidence and binding," our task is

merely to determine whether those facts compel a conclusion, as a matter of law, that Kelly is a neglected juvenile. *K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 10.

¶ 14 The Juvenile Code defines a "neglected juvenile," in pertinent part, as one who does not receive "proper care, supervision, or discipline" from the juvenile's parent, or one whose parent "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(a), (e) (2021). "[O]ur Courts have required 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 order to adjudicate a juvenile neglected." *In re E.P.-L.M.*, 272 N.C. App. 585, 596, 847 S.E.2d 427, 436 (2020) (citation and internal quotation marks omitted), *disc. review denied*, 376 N.C. 674, ___ S.E.2d ___ (2021). "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).

¶ 15 "In neglect cases involving newborns, 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." *K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 9 (citation and internal quotation marks omitted). As such, in certain contexts a "child may be adjudicated as neglected

by a parent even if the child has never resided in the parent's home." *In re K.J.D.*, 203 N.C. App. 653, 661, 692 S.E.2d 437, 443 (2010). However, our Supreme Court has held that a "court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019). "Rather, in concluding that a juvenile 'lives in an environment injurious to the juvenile's welfare,' the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *Id.* (quoting N.C. Gen. Stat. § 7B-101(15)).

¶ 16 On appeal, DSS contends that several of the trial court's evidentiary findings of fact—that Mother and Father have a history with child protective services prior to Kelly's birth, with three older children having been removed from their care; that following Kelly's birth, Mother allowed Father to be in the presence of one of Kelly's siblings in violation of a court order, and during which time Mother and Father engaged in "a verbal and physical altercation in the presence of" that sibling; and that Mother and Father "lacked essential necessities for Kelly in May 2019"—sufficiently support a conclusion that Kelly is neglected as a matter of law. However, none of these findings of fact speak to the "current circumstances that present a risk" to Kelly. *Id.*

¶ 17 It is well established that "evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile." *In re Nicholson*, 114

N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). Here, it is undisputed that Kelly's siblings were removed from the home as a result of being adjudicated abused, neglected, or dependent. Nonetheless, evidence of prior abuse "standing alone . . . is not sufficient to support an adjudication of neglect." *In re K.L.*, 272 N.C. App. 30, 51, 845 S.E.2d 182, 197 (citation omitted), *disc. review denied*, 376 N.C. 546, ___ S.E.2d ___ (2020). "Instead, we require the presence of other factors to suggest that the neglect or abuse will be repeated." *J.A.M.*, 372 N.C. at 9–10, 822 S.E.2d at 699 (citation and internal quotation marks omitted).

¶ 18 The presence of domestic violence is another relevant factor for the trial court's consideration in making a neglect determination. *See K.L.*, 272 N.C. App. at 51, 845 S.E.2d at 197 ("Other factors that suggest that the neglect or abuse will be repeated include the presence of domestic violence in the home and current and ongoing substance abuse issues . . . ."). However, the stipulated facts regarding a verbal and physical altercation between Mother and Father in June of 2019, in the presence of one of Kelly's siblings and thus in violation of a court order, did not *compel* a conclusion that Kelly was neglected *as a matter of law*, as DSS argues. Thus, the altercation between Mother and Father, although certainly an important factor for the trial court's consideration, was neither dispositive nor must it *compel* the conclusion that Kelly was neglected *as a matter of law*.

¶ 19 DSS compares this case to *J.A.M.* and *In re McLean*, 135 N.C. App. 387, 521

S.E.2d 121 (1999). However, these comparisons are inapposite. In *J.A.M.*, the trial court found as fact that the mother

> (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who had engaged in domestic violence even though domestic violence was one of the reasons her children were removed from her home.

372 N.C. at 10, 822 S.E.2d at 699 (citation omitted).

¶ 20 By contrast, in the instant case, Mother's parental rights have not been terminated with respect to any of her children. Neither do the stipulated facts in this case address whether Mother has "denied the need for any services" in her child's case. *Id.* (citation omitted).

¶ 21 Similarly inapposite is *McLean*, in which the trial court concluded that a juvenile was neglected as a matter of law where "the home environment remained unchanged since the death of [another of the parents' children due to shaken-baby syndrome] and that the family did not share or understand the State's concern for the safety of" the juvenile at issue. 135 N.C. App. at 396, 521 S.E.2d at 127. Although the father had been convicted of causing the death of the other child, the mother "continued to support the claims of her husband, [the] father, that the death" had been accidental. *Id.* Additionally, "the parents were not cooperative with the social worker who was investigating the matter[,]" and they "neither expressed nor

exhibited any concern for the future safety of [the juvenile at issue] in their home[.]" *Id.* Given those circumstances, "the trial court carefully weighed and assessed the evidence, and concluded that [the juvenile at issue]—then an infant less than three months of age—would be at risk if allowed to reside with her parents in their home." *Id.* In the case at bar, however, the trial court made no such finding of risk.

¶ 22 DSS argues that "[a]s a matter of law, and like the newborns in *McLean* and *J.A.M.*, the findings in the stipulation are adequate to support a conclusion of law that Kelly was a neglected juvenile at the time of the filing of the amended petition[.]" We disagree. When compared with the findings of fact in *McLean* and *J.A.M.*, the trial court's findings of fact in the present case are not so stark and do not compel the same conclusion of neglect *as a matter of law*, as DSS contends.

¶ 23 This Court has previously affirmed challenges to a trial court's failure to adjudicate a juvenile as neglected where the trial court received no clear and convincing evidence to support an adjudication of neglect, *see E.P.*, 183 N.C. App. at 307, 645 S.E.2d at 775–76, or where the evidence presented was conflicting, *see In re H.M.*, 182 N.C. App. 308, 312–13, 641 S.E.2d 715, 717–18 (2007); *In re Ellis*, 135 N.C. App. 338, 343, 520 S.E.2d 118, 121–22 (1999); *Nicholson*, 114 N.C. App. at 92–94, 440 S.E.2d at 853–54.

¶ 24 Here, the undisputed—and thus, binding, *K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 10—findings of fact do not directly address the existence of "some physical, mental,

or emotional impairment of [Kelly] or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline[,]" *E.P.-L.M.*, 272 N.C. App. at 596, 847 S.E.2d at 436 (citation omitted). The undisputed findings also fail to address whether Kelly resides in an environment which has resulted in harm or a substantial risk of harm to him, or whether Kelly would be at a substantial risk of harm if returned to his mother's care. *See K.J.B.*, 248 N.C. App. at 354, 797 S.E.2d at 518. Accordingly, we cannot accept DSS's argument that Kelly is neglected *as a matter of law*.

¶ 25 "Based on the review of the cold record, we are not persuaded that the evidence presented at the hearing rises to the level of such evidence that would 'fully convince' a fact finder that [Kelly] suffered harm or a substantial risk of harm in his mother's care." *In re R.B.*, 280 N.C. App. 424, 2021-NCCOA-654, ¶ 26. Accordingly, the trial court's order is properly affirmed as to its dismissal of the claim of neglect.

Conclusion

¶ 26 For the foregoing reasons, the trial court's order is affirmed as to its dismissal of the claim of neglect. Because our Supreme Court allowed discretionary review only as to issues related to neglect, our previous reversal of the trial court's adjudication of Kelly as a dependent juvenile remains undisturbed. *See K.S. II*, 380 N.C. 60, 2022-NCSC-7, ¶ 5 n.2.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).