

No. COA04-1695

TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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IN THE MATTER OF:  
N.F.

From Wake County  
File No.: 01 J 509

BRIEF FOR APPELLEE-JUVENILE,  
BY AND THROUGH HIS GUARDIAN AD  
LITEM, IN RESPONSE TO APPELLANT-RESPONDENT  
MOTHER, THERESA MARLOWE

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## STATEMENT OF THE CASE

Appellee juvenile, by and through his Guardian ad Litem (hereinafter Appellee-GAL) does not dispute Appellant Respondent-Mother's Statement of the Case.

## STATEMENT OF THE FACTS

Note: all references are to the record and referred to as "R," or to the adjudication hearing transcript (starting on 28 November 2001) and referred to as "T," or to Appellant-Respondent-Mother's written brief and referred to as "AB." Appellee-GAL does not dispute Appellant-Respondent Mother's Statement of the Facts except for the following:

Appellee-GAL can neither confirm nor deny Appellant Respondent-Mother's references to the non-secure custody hearings conducted on 27 August 2001 and 5 September 2001 and referred to as "1Tp." and "2Tp" in Appellant-Respondent Mother's written brief (AB p. 3, footnote 2). Appellee-Guardian ad Litem did not receive copies of the transcripts from those hearings (see Appendix of this brief). Appellee-GAL cannot dispute whether Appellant Respondent-Mother's characterization of that evidence is accurate. Appellee-GAL concedes that the same trial judge conducted the non-secure custody hearings and the adjudication hearing. Appellee-GAL also concedes that the trial court referenced testimony it received during the

non-secure custody hearings in its written order on adjudication (R p. 51). However, Appellant-Respondent-Mother appealed only the adjudication hearing order in this case (R pp. 55). Further, Appellant-Respondent-Mother argued only adjudication order issues (AB, pp. 14-35). As such, Appellant-Respondent-Mother should be allowed to reference non-secure custody hearing testimony only as it relates to the written adjudication order.

Thus, in those instances where the trial court does not reference the non-secure custody hearing, arguments should be limited to whether the adjudication hearing evidence supports particular adjudication order findings, even if those findings are controverted by evidence gathered at the non-secure custody hearing.

Appellee-GAL objects to Appellant-Respondent-Mother's references to evidence received during the non-secure custody hearings conducted on 27 August 2001 and 5 September 2001 to the extent the challenged adjudication order finding or conclusion does not rely on or reference non-secure custody hearing evidence. Thus, Appellee-GAL requests that this Court ignore all such references to the evidence from the non-secure custody hearings conducted on 27 August 2001 and 5 September 2001 and referred to as "1Tp.1" and "2Tp.1" in Appellant-Respondent-Mother's written brief (both the Statement of Facts and her Arguments).

## ARGUMENT

### I. APPELLANT ABANDONS ASSIGNMENTS OF ERROR NOT BRIEFED.

Assignments of Error Nos. 1-9, 11-14, and 18 (R p. 80-83)

Pursuant to Rule 28(b) (6) of the North Carolina Rules of Appellate Procedure, Appellant abandons assignments of error numbers one through nine (1-9), eleven (11) through 14, and 18 as she has not addressed them in her brief (AB pp. 14-35; R pp. 80-83). N.C. R. App. P. 28(b)(6) (2004). Appellee-GAL respectfully urges this Court to ignore these assignments of error and uphold the trial court's decision.

### II. THE ADJUDICATION ORDER SHOULD NOT BE VACATED BECAUSE ALL OF THE TRIAL COURT'S FINDINGS OF FACT WERE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE OR, IF THEY WERE NOT SO SUPPORTED, SUCH ERROR IS HARMLESS.

Assignment of Error No. 15 (R p. 82)

Standard of Review: "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2001). "When the court's findings of neglect are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Appellee-GAL addresses here only those facts controverted by Appellant-Respondent-Mother in the first argument of her written brief (AB pp. 14-18).

Finding of Fact #12 (R p. 46) Appellee-GAL agrees with Appellant-Respondent-Mother in the sense that N.F. was not in the exclusive care and control of his mother the entire period from Wednesday, 15 August 2001 through Friday, 17 August 2001 (AB pp. 14-15). There was a one-hour period during this time frame (mid-day Thursday, 16 August 2001) in which N.F. was in the exclusive care and control of his father (T pp. 121-22). In fact, the trial court notes this in other parts of its written adjudication order (R p. 48, FOF #25). However, standing alone this fact does not dispose of the trial court's conclusions that N.F. was both abused and neglected. The trial court concluded as a matter of law that N.F. was both abused and neglected without affirmatively stating by which parent (R p. 53).

The uncontroverted evidence was that N.F. suffered non-accidental trauma consistent with what is known as "shaken baby syndrome." (T p. 277, lines 16-19). Appellant Respondent-Mother's attorney even admitted that N.F. had suffered from shaken baby syndrome (T p. 387, lines 21-25). The uncontroverted evidence was that N.F. was in the exclusive care and control of both of his parents from Wednesday, 15 August 2001 through Friday, 17 August 2001. The expert witness's testimony was that N.F. was most likely injured close to the time he presented to the hospital the morning of Friday, 17 August 2001 (T pp. 322-24). In fact, if one wants to cut to the

chase of the matter, the expert witness testified that N.F.'s symptoms should have appeared within minutes after the shaking (T p. 328, lines 21-22; p 329, lines 5-11). Couple this with the evidence that emergency medical personnel observed N.F. at approximately 2:30 p.m. on Thursday, 16 August 2001 and saw no signs of trauma (T pp. 142, 149-50). This observation by emergency medical personnel occurred after the father's period of exclusive care and control of N.F. on that same day. Thus, the natural inference is that N.F. was in the exclusive care and control of his mother when his injuries occurred.

Finding of Fact #34 (R p. 52) This finding concerns Appellant-Respondent-Mother's failure to exhibit concern, anger, or outrage for her son's injuries during the course of the hearing (R p. 52). Most of Appellant-Respondent-Mother's references to the evidence concerning this finding are from the transcripts of the non-secure custody hearings. Such evidence was not before the trial court on adjudication except for purposes of challenging a witness's testimony based on prior inconsistent statements. Further, the trial court did not reference the non-secure custody hearing in its Finding of Fact #34 (R p. 52).

However, assuming *arguendo* that there existed some evidence on adjudication to show Appellant-Respondent-Mother demonstrated appropriate concern, anger, or outrage over what had happened to N.F., it

does not negate the conclusions of law that N.F. was abused and neglected. Appellee-GAL argues that the trial court was merely attempting to reflect, in writing, the non-testimonial evidence it had observed during the course of the adjudication hearing.

Finding of Fact #31 (R pp. 50-51) This finding concerns whether Appellant-Respondent Mother's testimony about the child's symptoms changed after she heard the medical expert witness testify. Appellee-Guardian ad Litem concedes that the medical expert testified at both the non-secure custody hearing and the adjudication hearing. However, Appellee-GAL can neither confirm nor deny Appellant-Respondent-Mother's arguments concerning the testimony from the non-secure custody hearing as Appellee GAL was not provided copies of those transcripts (see Appendix of this brief).

In Finding of Fact #31, the trial court is citing examples of Appellant-Respondent-Mother's testimony that give light to her credibility (R p. 51). In one of these examples, the trial court draws a distinction in what it remembered Appellant-Respondent-Mother testifying to at non-secure and what she testified to on adjudication concerning N.F.'s symptoms the night before he went to the hospital. It is important to note that the trial court did not have access to transcripts when preparing its written order and was

basing the distinction on its memory of Appellant Respondent-Mother's testimony during both hearings which covered several days. Again, assuming *arguendo* that some evidence existed to show Appellant-Respondent-Mother reported seeing N.F.'s foot jerking the night before she took him to the hospital before she heard the expert witness testify that this is what she should have seen, it does not negate the trial court's conclusions of law that N.F. was abused and neglected. This is especially true in light of the overwhelming and uncontroverted evidence to support these conclusions. The trial court was reflecting its view of Appellant Respondent-Mother's credibility during the course of the hearings. If the trial court was mistaken in its memory of the evidence concerning Appellant-Respondent-Mother's testimony (and thus her credibility), the mistake is not prejudicial as the trial court did not go on to indicate which parent perpetrated the trauma on N.F. (R p. 53).

Findings of Fact #25 and #31 (R pp. 50-51) Appellant-Respondent-Mother's fourth challenge of the findings concerns her alcohol consumption as it is described in Findings of Fact numbers 29 and 31. Appellant Respondent-Mother's testimony on her alcohol consumption was equivocal at best.

In the same sentence, she reported having quit drinking in January

[2001] but that she had an occasional glass of wine after that (T p. 113). It is uncontroverted that she consumed alcohol after January 2001 (T p. 113). It is uncontroverted that her psychiatrist of many years felt her alcohol consumption was important enough to ask her about it on a regular basis (T p. 530, lines 6-7). And it is uncontroverted that her psychiatrist, when he testified on adjudication, believed she had not consumed alcohol since January 2001 (T p. 548, lines 2-6). Thus, it was reasonable for the trial court to doubt Appellant-Respondent-Mother's testimony concerning her alcohol consumption.

However, again, what is the point? Even if the trial court incorrectly characterized Appellant-Respondent Mother's alcohol consumption up to the night N.F. was injured, it does not negate the conclusion that he was non accidentally injured.

Finding of Fact #10 (R p. 46) Appellant-Respondent-Mother's last attack of the trial court's findings concerns when the father returned to the Appellant-Respondent-Mother's apartment after he moved out (Rp.46). Without going into the details, Appellee-Guardian ad Litem again points out that it does not matter if the trial court was incorrect on this particular finding. This is because it does not change the time frame in which N.F. was injured, it does not change who had access to N.F. when he was injured, and

it does not change the fact that N.F. was non-accidentally injured.

In summary, even if Appellant-Respondent-Mother is correct in her assertions concerning all five findings, it does not change the trial court's conclusions because the trial court's conclusions would stand up without those five findings in the adjudication order. Even if they are errors, they amount to nothing more than harmless errors because the trial court's conclusions are supported by the remaining findings of fact. Appellant-Respondent-Mother's Argument I amounts to nothing more than quibbling over non-essential facts. Appellee-GAL respectfully urges this Court to uphold the trial court's conclusions and decisions in this case.

### III. THE TRIAL COURT DID NOT CONDUCT AN EX PARTE FACTUAL INVESTIGATION INTO CRITICAL TRIAL ISSUES AND CONSIDER THOSE ISSUES ON ADJUDICATION.

Assignment of Error No. 10 (R p. 81)

Appellant-Respondent-Mother's brief violates Rule 10(b) of the North Carolina Rules of Appellate Procedure in that Appellant has included this exception despite not having properly preserved it for review by action of her counsel taken during the course of the trial. N.C. R. App. P. 10(b) (2004). Specifically, Appellant-Respondent-Mother made no objection or motion to recuse after the trial court disclosed to the parties the information concerning its out of-court communication (T p. 15). Assuming *arguendo*

that the Court is willing to suspend its own rules pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, Appellee-GAL argues as follows:

Appellant-Respondent-Mother argued the following on appeal: Although the Trial Court did not explicitly cite in the finding the opinions and information he improperly received, the findings in this precise area of its investigation were surely based on and highly influenced by information received during the investigation. (AB p. 21) Appellant-Respondent-Mother does not then give any examples or explanation as to why she thinks the outside information influenced the trial court's decision (AB pp. 21-22). Thus, Appellant-Respondent-Mother is merely assuming the outside information influenced the trial court's decision. However, the trial judge explained to the parties that he was not influenced by the outside information. He told the parties, "And certainly basically what the doctors did was confirm what I had already had in my own preconceived notion about the brain injuries." (T p. 15, lines 17-19).

Further, in a bench trial, absent a showing to the contrary, the trial court is presumed to have ignored incompetent evidence. *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (2001). Appellant-Respondent Mother has failed to show that the trial court failed to ignore the

incompetent evidence in the case *sub judice*. Therefore, Appellee-GAL respectfully urges the Court to uphold the trial court's decision in this matter.

IV. THE TRIAL COURT DID NOT ERR BECAUSE IT DID STATE IN ITS WRITTEN ADJUDICATION ORDER THAT THE FINDINGS OF FACT WERE MADE BY CLEAR, COGENT, AND CONVINCING EVIDENCE.

Assignments of Error Nos. 15-17, 19 (R p. 82)

Standard of Review: "If the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807 (2001). Failure by the trial court to state the standard of proof applied is reversible error. *In re Wheeler*, 87 N.C. App. 189, 193, 360 S.E.2d 458, 461 (1987). "However, there is no requirement as to where or how such a recital of the standard should be included." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004).

This Court has held that the language "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE[.]" is sufficient to meet the requirements of N.C. Gen. Stat. § 7B-807. *Id.* "It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). Here, the trial court wrote the following in its written adjudication order: "... the Court makes the following findings of fact by clear, cogent and convincing evidence:" (R p. 45). The trial court then

proceeded to list its findings of fact, its conclusions of law, and its orders pursuant to those findings and conclusions (R pp. 45-54). Thus, it is intuitively obvious to the casual observer that the trial court met its burden under the statutory and case law regarding its duty to state the standard of proof it applied during the evidentiary course of the adjudication hearing. Appellee-GAL is unclear as to why Appellant-Respondent Mother would believe otherwise. Her argument appears to be that the law requires a pedantic adherence to the statutory language and thus necessitates a statement that the "allegations in the petition have been proven by clear and convincing evidence" (AB pp. 26-28).

However, as shown above, this is not the case. Appellee-GAL respectfully urges the Court to uphold the trial court's decision in this matter.

V. THE TRIAL COURT DID NOT VIOLATE RESPONDENT-MOTHER'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW OR HER STATUTORY RIGHTS BY FINDING THAT SHE REFUSED TO TALK TO CHILD PROTECTIVE SERVICES DURING THE COURSE OF ITS INVESTIGATION.

Assignment of Error No. 15 (R p. 82)

Standard of Review: The constitutional privilege against self-incrimination assures all individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties, or forfeiture. *Allred v. Graves*, 261 N.C. 31, 35, 134

S.E.2d 186, 190 (1964). However, the finder of fact in a civil cause may use a witness's invocation of her Fifth Amendment privilege against self-incrimination to infer that her truthful testimony would have been unfavorable to her. *Fedoronko v. American Defender Life Ins. Co.*, 69 N.C. App. 655, 657-58, 318 S.E.2d 244, 246 (1984).

The challenged finding of fact reads as follows: "Ms. Marlowe testified that she would not talk with Child Protective Services about their investigation[,] but she would discuss a care plan." (R p. 51, FOF #31). It is important to read this finding in the context of the surrounding findings. The finding immediately preceding the questioned finding reads as follows: "Ms. Marlowe told Wake County Child Protective Services that she did not have [the father's] address in Casablanca when she had the address, because she felt the address was none of their business." (R p. 51). The finding immediately following the questioned finding reads as follows: "Ms. Marlowe also testified that Child Protective Services' care plans were all wrong." (R p. 51). Again, Appellee-GAL can neither confirm nor deny that the exchange between the DSS Attorney and Appellant Respondent-Mother took place on 5 September 2001 because Appellee-GAL was not provided with a copy of that particular transcript (see Appendix of this brief).

Assuming *arguendo* that it is accurate and that the trial court was

referring to that exchange in its Finding of Fact #31, Appellee-Guardian ad Litem submits that the finding is supported by the evidence collected at the non-secure custody hearing on 5 September 2001. Appellant-Respondent-Mother essentially stated that she would not talk to DSS about the investigation of the case without her attorney present (AB p. 30). So the evidence supports the finding.

Secondly, the finding does not violate Appellant Respondent-Mother's due process rights or N.C. Gen. Stat. § 7B-802 because the trial court in a civil case may draw a negative inference from a witness's refusal to talk about something during the course of a criminal investigation per *Fedoronko*. The trial court's Finding of Fact #31 was devoted to Appellant-Respondent-Mother's credibility on the witness stand and contained examples of how the trial court came to suspect her credibility (R p. 51). The finding in no way violated her constitutional or statutory rights. Appellee-GAL respectfully urges the Court to uphold the trial court's decision in this matter.

## VI. THE TRIAL COURT DID NOT ERR IN CONCLUDING AS A MATTER OF LAW THAT THE JUVENILE WAS NEGLECTED.

Assignment of Error No. 16 (R p. 82)

Standard of Review: When reviewing an adjudication of neglect, the Court must determine whether the trial court's findings of fact are supported

by clear and convincing evidence and whether the trial court's conclusions of law are supported by those findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). Under the Juvenile Code, a neglected juvenile is one who meets the following criteria.

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker, 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, or who has been placed for care or adoption in violation of law. 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) (2001). In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. The issue here is whether a trial court must assign culpability to a parent before adjudicating a child neglected. Appellee-GAL submits that the answer to that question should be in the negative. Appellant-Respondent-Mother argues that it was error for the trial court to conclude that N.F. was neglected and not find that Appellant-Respondent-Mother had inflicted his injuries (AB p. 32). She further argues that the conclusion is improper because Appellant-Respondent-Mother had

no reason to believe that N.F.'s father would inflict such injuries and the trial court failed to find that he had done so (AB p. 32). Thus, she concludes that there is no finding that she allowed someone to inflict injuries upon her son.

In addition to these arguments appearing to be based on the definition of abuse rather than neglect (N.C. Gen. Stat. § 7B-101(1)), they are irrelevant as a matter of law based on the ruling in *Montgomery* cited above. The uncontroverted evidence was that N.F. was in the sole care, custody, and control of his parents during the period in which he suffered serious physical injury as a result of non-accidental trauma. Hypothetically, Appellant Respondent-Mother could argue that Respondent-Father inflicted these injuries upon the child during the period he had sole care and control of N.F. and that she neither saw the harm coming, nor was there anything she could do to prevent the harm.

Appellee-GAL argues that the evidence did not lead to such a finding but if the trial court so found, it would not negate the fact that N.F. was abused and neglected. Regardless of who was the perpetrator, the evidence showed that N.F. was abused (because he suffered a serious physical injury through non-accidental trauma) and that he was neglected (because he lived in an environment injurious to his welfare). The General Assembly has not included foreseeability in the definitions of "abuse" and "neglect." N.C. Gen.

Stat. § 7B-101 (2001).

Appellant-Respondent-Mother further argues that the only evidence that N.F. suffered an intentional, non-accidental injury was the expert witness's testimony (AB pp. 32-33). She also points out that this witness's testimony should have been discounted on the basis that she was a "classic interested witness." (AB p. 33). This is based on the fact that the expert witness worked for the hospital that gave N.F. his immunizations a couple of days before he presented to the (same) hospital with retinal bleeding and subdural hematomas (AB pp. 33-34). This is a rather peculiar argument because it seems to imply that N.F.'s injuries were the result of an anaphylactic response to the immunizations and the expert witness testified that the immunizations had nothing to do with N.F.'s injuries in order to protect her employer from liability. It is peculiar because Appellant-Respondent Mother's trial attorney admitted that N.F. had suffered from shaken baby syndrome while the expert witness was being questioned at trial (T p. 387, lines 21-25). So what is it that Appellant-Respondent-Mother wishes the Court to believe at this time?

N.F. was in an environment injurious to his welfare because it was reasonable for the trial court to conclude that he had suffered from shaken baby syndrome at the hands of one of his two parents. It was reasonable for

the trial court to believe that if it immediately sent N.F. back to that environment, he might be further injured. The trial court did not need to figure out "who done it." The trial court did not need to send N.F. back home and wait to see if he would be injured again before determining that he came from an injurious environment to begin with. *See In re Nicholson & Ford*, 114 N.C. App. 91, 440 S.E.2d 852 (1994). *See also In re E.N.S.*, --- N.C. App. ---, 595 S.E.2d 167 (2004); *In re McLean*, 135 N.C. App. 387, 521 S.E.2d 121 (1999). Appellee-GAL respectfully urges the Court to uphold the trial court's decision in this matter.

#### CONCLUSION

On the basis of the arguments and authorities cited herein, Appellee-GAL respectfully requests that the Court uphold the trial court's decision in all respects. Respectfully submitted this 13<sup>th</sup> day of ---- 2005.

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## CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the original of the foregoing BRIEF FOR APPELLEE-GAL was duly served with the Office of the Clerk of the North Carolina Court of Appeals by hand delivery to the following address:

Mr. John Connell, Clerk  
North Carolina Court of Appeals  
1 West Morgan Street  
Raleigh, NC 27601

The undersigned attorney hereby certifies that copies of the foregoing BRIEF FOR APPELLEE-GAL were duly served upon the other parties this day by placing copies thereof in a depository under the exclusive care and custody of the United States Postal Service in first class, postage-prepaid envelopes and properly addressed as follows:

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This 13<sup>th</sup> day of ---- 2005.

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