

No. COA05-1417
DISTRICT

NINTH JUDICIAL

NORTH CAROLINA COURT OF APPEALS

IN THE MATTER OF:
County
K.A.

From Vance
04-J-91

APPELLEE GUARDIAN AD LITEM'S BRIEF

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STATEMENT OF THE CASE

The Vance County Department of Social Services ("DSS") filed a petition alleging sexual abuse and neglect in this case after taking the child, K.A., into custody on August 31, 2004 (R. pp. 2-5, 8-9). At the time she came into DSS custody, K.A. (hereinafter "Karen")¹ was five years old. The trial court conducted hearings reviewing nonsecure custody in September, October, November and December of 2004. (R. pp. 10-20, 24). The adjudication hearing commenced on January 5, 2005 and, after several continuances, was completed on February 18, 2005. (R. pp. 25-28, 570). The adjudication order was filed on April 18, 2005, and the disposition order was filed on April 27, 2005. (R. p. 57, 66). The dispositional order placed Karen in the custody of her maternal grandparents and released DSS from its obligation to continue reunification efforts with Appellant Father. (R. pp. 66-68). Appellant Father filed his notice of appeal from the adjudication and disposition orders on May 10, 2005. (R. p. 70).

STANDARD OF REVIEW

This Court trial court reviews determinations regarding admissibility of evidence under an abuse of discretion standard. *See*

State v. Washington, 141 N.C. App. 354, 362, 540 S.E.2d 388,395 (2000). In juvenile adjudication proceedings, as in termination of parental rights proceedings, “the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence.” *In re Oghenekevebe*, 123 N.C. App. 434,439, 473 S.E.2d 393, 397 (1996). “It is the judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.” *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434,435 (1984).

This Court has noted:

On appeal, this Court reviews whether the district court's findings of fact are supported by clear, cogent and convincing evidence, and whether those findings support the district court's conclusions of law. If the decision is supported by such evidence, the district court's findings are binding on appeal, even if there is evidence to the contrary.

In re J.W., 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109, at *13 (quoting *In re T.C.B.*, 166 N.C. App. 482, 485, 602 S.E.2d 17, 19 (2004)). As discussed below, the trial court in this case properly found that Karen was an abused and neglected child by clear and convincing evidence, and properly admitted Karen's out of court statements as

¹ K.A.'s real name has been changed in order to preserve her confidentiality and in compliance

substantive evidence in support of its findings.

STATEMENT OF THE FACTS

On August 30, 2004, Noah S. and Karen, ages 3 and 5, told Ramona and Angela N., that Appellant, father of Karen, had sexually abused them.(T.p. 32-33). Karen told Ramona N. that her father, “[P]ut his pee-pee in my mouth. . . [a]nd if I didn't do it, the monsters was going to come and get me, and the cops was going to take me from them.” (T. p. 183). Angela N. immediately reported the abuse to the Henderson Police Department; consequently, Vance County Department of Social Services ("DSS") filed a petition alleging abuse and neglect and Karen was placed in nonsecure custody the same day (R. pp. 2-4, 8-9). Both Appellant Father Dennis A. and Kim N., Karen's mother, denied the abuse had occurred. (T. pp. 35,40-41). As part of its investigation into the allegations of abuse, the Henderson Police Department ran a criminal history report on Appellant Father, and learned that he had a criminal record in Florida. (T. p. 43-46, R.pp.34-36). Appellant Father's criminal record revealed that he had pled guilty to felony and misdemeanor charges of sexual abuse involving a minor in 1999, including: lewd and lascivious behavior;

sex offenses against a child (fondling); false imprisonment of a child; and battery. (R. pp. 34-36). Appellant Father was subsequently arrested by the Henderson Police and charged with failure to register as a sex offender and two counts of indecent liberties with a child. (R. pp. 37-38).

On August 31, 2004, the day after Karen and her cousin reported the abuse to their aunts, the DSS investigator, Tamika Trapiel, interviewed Karen at her school (T. pp. 195-96). During the thirty-minute interview, Karen told Ms. Trapiel that her father had put his penis in her mouth, and that it “felt nasty.” (T. pp. 197-99). Ms. Trappiel used anatomical drawings of men and women with and without their clothes on, and Karen drew lines on the drawings and told Ms. Trappeil how to label the particular parts of the body. (T. pp. 201-205). Karen also drew lines on the drawings to illustrate how her father had touched her. (Id.).

On September 1, 2004, two days after Karen first reported being sexually abused, forensic nurse Rhonda Hopkins interviewed and examined Karen at her office in the Maria Parham Medical Center. (R. pp. 44-47). Karen told Ms. Hopkins that her father “wanted to put

his wee-wee. . . he want to sleep with me so I could be his girlfriend.” (R. p. 46). Karen also told Ms. Hopkins that she was in her own home “when her father put his wee-wee on hers” and that Karen’s mother was in the other room “looking at the tv” at the time. (Id.)

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT THE ALLEGATIONS CONTAINED IN THE PETITION WERE PROVEN BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY N.C.G.S. § 7B-807.

N.C.G.S. § 7B-807 provides, in relevant part, "if the court finds that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." (emphasis added). In this case, the trial court properly found the allegations of abuse and neglect were proven by clear and convincing evidence, and stated so on the record:

[T]he Court makes the determination that the allegations in the petition alleging abuse and neglect as to the respondent [D.A.] have been proven by clear and convincing evidence, specifically that the juvenile was abused by the juvenile's parent, committed or encouraged commission of a sexual act upon the juvenile in violation of the criminal laws of this state. Also, specifically as to the respondent, [D.A.], the Court also makes the same determination by clear and convincing evidence, that the juvenile is a neglected juvenile in that the juvenile did not and does not receive proper care, supervision or discipline from the juvenile's parent, in this case the

respondent [D.A.].

(T. pp. 235-36) (emphasis added). Respondent Father argues that the trial court's failure to include the words "clear and convincing" in the adjudication order is "reversible error." (Appellant's Brief, p. 18). In support of this argument, Respondent Father cites the case of *In the Matter of Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000). *Church*, however, is distinguishable from the case now before this Court.

In *Church*, this Court held that an "affirmative statement" of the proper standard of proof is needed because "without such an affirmative statement . . . the appellate court is unable to determine if the proper standard of proof was utilized;" and because the legislature requires the standard of proof to "be affirmatively stated in the context of . . . abuse, neglect and dependent proceedings." *Church, Id.* at 656, 525 S.E.2d at 480. The Church Court goes on to conclude that a court must "affirmatively state in its order the standard of proof utilized in the termination proceedings." *Id.*

Since *Church*, this Court addressed a case in which the trial court stated the standard of proof on the record, as it did in the case at bar, but the words "clear and convincing" were not included in the

actual order. *See In re J.D.S.*, --- N.C. App. ---, 612 S.E.2d 350 (2005). In *J.D.S.*, this Court wrote that, although the trial court failed to include the “clear and convincing” language in its order: “(1) the evidence manifestly supports the trial court's findings of fact . . . , and (2) the trial court stated on the record that its findings of fact were based on 'clear and convincing' evidence.” *Id.* at 356.

In the instant case, this Court should have no difficulty determining the evidentiary standard applied in this case, because the proper standard is clearly stated in the record. (T. pp. 235-36). Appellee GAL respectfully submits that the statutory mandate of N.C.G.S. § 7B-807 is met where the trial court affirmatively states the clear and convincing standard on the record, regardless of whether the standard is stated in writing in the order itself.

II. THE TRIAL COURT PROPERLY ADMITTED THE CHILD’S OUT OF COURT STATEMENTS UNDER RULE 803(4) OF THE NORTH CAROLINA RULES OF EVIDENCE BECAUSE THESE STATEMENTS FALL SQUARELY WITHIN THE MEDICAL TREATMENT OR DIAGNOSIS EXCEPTION.

Rule 803(4) of the North Carolina Rules of Evidence provides a hearsay exception for: “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general

character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” N.C.G.S. § 8C-1, Rule 803(4) (2006). North Carolina courts apply a two prong analysis to determine if the criteria for a Rule 803(4) hearsay exception are met: "(1) whether the declarant's statements were made for the purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663,667 (2000). Where statements are admitted pursuant to Rule 803(4), the statements are admitted as substantive evidence. *See generally State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). In applying Rule 803(4), North Carolina courts hold that the individual relating the declarant's statements need not be a medical practitioner, nor even an individual involved in the medical profession. *See, e.g., Smith*, 315 N.C. at 84 (citing the commentary to Rule 803(4), "[s]tatements to hospital attendants, ambulance drivers, or even members of the family might be included" in the Rule). As discussed below, the statements of Rhonda Hopkins, Ramona N. and Angela N. are admissible as substantive evidence that Karen is an abused child, and support such a finding by clear and convincing evidence.

A. Rhonda Hopkins' Testimony Relating Out Of Court Statements By Karen Are Admissible As Substantive Evidence Under The Medical Diagnosis And Hearsay Exception Because Ms. Hopkins' Testimony Meets Both Prongs Of The North Carolina Supreme Court's Test In *Hinnant, supra*.

1. The trial court properly admitted Karen's statements to Ms. Hopkins under the first prong of the *Hinnant* analysis.

With respect to the first prong of the inquiry in *Hinnant*, the North Carolina Supreme Court directs courts to consider "all objective circumstances" in determining if a statement is made for purposes of medical diagnosis or treatment. *See id.* at 670. These circumstances include, but are not limited to: the location of the examination; the nature of the questioning; and the individual to whom the declarant was speaking. *See, e.g., Hinnant*, 351 N.C. at 288. Courts consider objective circumstances to determine if the child understood that the statements were being made for "promoting treatment or facilitating diagnosis in preparation for treatment." *Id.* at 286.

In the instant case, Ms. Hopkins conducted her interview and subsequent physical examination of Karen in her office at the Maria Parham Medical Center. (T. p. 91). Ms. Hopkins introduced herself to Karen, discussed "the rules" regarding truthfulness with Karen and obtained a "truth agreement" from Karen. (T. pp. 91, 94), (R. p. 45). After the interview, Ms. Hopkins conducted a physical examination of

Karen, including a genital exam using labial separation and traction techniques. (T. p. 44). Appellant Father correctly states that the focus of the first prong of the *Hinnant* analysis "seeks to determine the child's purpose in making the statement, not the interviewer's purpose in conducting the interview. (Appellant's Brief, p. 23). However, Appellant does not factually address any of the circumstances surrounding Ms. Hopkins's interview of Karen, nor does he appear to dispute that Karen understood the purpose of Ms. Hopkins's interview and examination were for diagnosis and treatment.

2. Karen's statements to Ms. Hopkins were reasonably pertinent to Karen's diagnosis and treatment and, therefore, meet the second prong of the *Hinnant* inquiry.

As discussed above, the first part of the *Hinnant* analysis looks at out of court statements from the speaker's perspective. The second prong of the *Hinnant* analysis is viewed from the perspective of the individual receiving the statements, and focuses on whether those statements were reasonably pertinent to medical diagnosis and treatment. *See Hinnant, supra*. In this case, Ms. Hopkins used Karen's statements to determine what treatment options were appropriate to Karen's case and, as such, these statements meet the second prong of *Hinnant*.

North Carolina courts acknowledge that part of the treatment plan of an abused child involves the identification of the abuser and, where the abuser resides in the same home as the child, removal of the child from the home. *See State v. Aguallo*, 318 N.C. 590, 597, 350 S.E.2d 76, 80 (1986); *State v. Lewis*, --- N.C. App. ---, 616 S.E.2d 1, 6 (2005). The *Aguallo* Court wrote:

First, a proper diagnosis of a child's psychological problems resulting from sexual abuse or rape will often depend on the identity of the abuser. Second, information that a child sexual abuser is a member of the patient's household is reasonably pertinent to a course of treatment that includes removing the child from the home.

Aguallo, 318 N.C. at 597 (emphasis added). The fact that a medical caregiver "never treated the child is not determinative of whether his examination qualifies under Rule 803(4)." *In the Matter of Lucas*, 94 N.C. App. 442, 449, 380 S.E.2d 563, 567 (1989). (citing *U.S. v. Iron Thunder*, 714 F.2d 765, 773 (8th Cir. 1983)). Similarly, this Court has recognized that examinations of children in cases of abuse can be made for testimonial purposes, as well as for the purpose of diagnosis and treatment, without running afoul of Rule 803(4). *See Lucas*, 94 N.C. App. at 449. In this case, Rhonda Hopkins' examination of Karen was conducted, at least in part, to determine the proper course of treatment for Karen following her disclosure of sexual abuse. Ms.

Hopkins, in her report, gives specific recommendations for Child Protective Services and law enforcement regarding Karen's placement. Ms. Hopkins writes: "It is recommended the Child Protective Services investigate the home environment to ensure the safety and well-being of the child. It is recommended that [Karen] have no unsupervised contact with the accused, Dennis A., until CPS and Law Enforcement can conduct a thorough investigation." (R. pp. 44-45). Ms. Hopkins did not refer Karen for physical or psychological treatment because she did not observe any physical or psychological symptoms requiring such a referral. (T. p. 97, R. p. 44). Appellant Father makes much of the fact that Ms. Hopkins testified that she did not provide a "medical diagnosis." (Appellant's Brief, p. 22). This argument fails for several reasons.

First, the hearsay exception contained in Rule 803(4) of the North Carolina Rules of Evidence is phrased in the disjunctive: "Statements made for purpose of medical diagnosis and treatment." N.C. Rule Evid. 803(4). There is no requirement in the statute that the statement or statements be made for both treatment and diagnosis in order to fall within the exception. Secondly, as discussed above, Ms. Hopkins elicited Karen's statements in order to determine the proper

treatment for the child. Forensic nurses such as Rhonda Hopkins are often employed to assess the physical and mental status of individuals claiming sexual abuse for purposes of determining treatment needs. *See State v. Massey*, --- N.C. App. ---, 621 S.E. 2d 633 (2005). The North Carolina Nurse Practice Act, N.C.G.S. § 890-171.20, provides that the practice of nursing by a registered nurse includes, among other things: "Assessing the patient's physical and mental health, including the patient's reaction to illness and treatment regimens"; and "collaborating with other health care providers in determining the appropriate health care for a patient." *Id.* The Nurse Practice Act specifically prohibits nurses from making a "medical" diagnosis. *See id.* For these reasons, the trial court properly admitted Ms. Hopkins's testimony relating Karen's statements under the North Carolina Rules of Evidence. As such, Karen's statements regarding the sexual abuse she suffered at the hands of her father are admissible as evidence of Karen's status as an abused child.

B. Appellant Has Waived His Right To Assert The Inadmissibility Of Karen's Statements To Any Witness Other Than Rhonda Hopkins Because He Has Offered Neither Argument Nor Authority Regarding The Inadmissibility Of Those Statements.

In his brief, Appellant Father argues that the trial court "committed reversible error by allowing inadmissible hearsay . . . and relying on

such inadmissible hearsay to adjudicate the child abused and neglected." (Appellant's Brief, p. 19). Although Appellant argues that Angela N., Ramona N., Detective Stancil, Rhonda Hopkins and Tamika Trappiel related the child's "inadmissible" statements in court, the only testimony Appellant legally attacks is that of the pediatric nurse, Rhonda Hopkins. In fact, violation of the prohibition against "medical" diagnoses is a Class 1 misdemeanor. *See* N.C.G.S. § 890-171.45. By failing to address the inadmissibility of any other hearsay statements, Appellant has conceded admissibility of all but Ms. Hopkins's testimony relating Karen's out of court statements. *See State v. Bright*, 320 N.C. 491, 497, 358 S.E.2d498, 501 (1987) (holding that, where "[d]efendant offers neither argument nor authority to support [the] contention. . . that the trial judge erred" in admitting hearsay testimony, defendant "waived her exception to this ruling."). *See also* N.C.R. App. P. 28(b). For this reason, this Court should refuse to address the issue of inadmissibility of hearsay testimony by any witness other than Rhonda Hopkins.

C. Even If This Court Determines That Appellant Father Has Not Waived His Right To Challenge The Admissibility Of Angela N. And Ramona N.'s Testimony That Testimony Relating Karen's Out Of Court Statements Is Admissible Under The Medical Treatment And Diagnosis Exception Of Rule 803(4).

As discussed above, statements made to non-medical personnel and even family members may be admissible under the medical treatment and diagnosis exception found in Rule 803(4). *See Smith*, 315 N.C. at 77. In *Smith*, the North Carolina Supreme Court admitted out of court statements made by two young girls to their grandmother that their mother's boyfriend had sexually abused them. *See id.* Defendant argued that statements made to the girls' grandmother should not be admitted as substantive evidence because the grandmother did not hold a license to practice medicine or psychology, "and could not, therefore, provide medical diagnosis or treatment." *Smith*, 315 N.C. at 84. The *Smith* Court, in rejecting the Defendant's argument, cited the commentary to N.C.G.S. § 8C-1, Rule 803(4) that, "Statements to hospital attendants, ambulance drivers, or even members of the family might be included" in the 803(4) exception. The Court wrote:

While here, Gloria and Janell did not specifically request medical attention, we recognize that young children cannot independently seek out medical attention, but must rely on their caretakers to do so. Their statements to Mrs. Davis immediately resulted in their receiving medical treatment and diagnosis. We hold, therefore, that Mrs. Davis' testimony regarding her conversations with Gloria and Janell resulting in their being examined, diagnosed, and treated at New Hanover Memorial Hospital. . . was properly admitted as

substantive evidence pursuant to the Rule 803(4) hearsay exception.

Id., at 84-85 (emphasis added). In the case now before this Court, the direct result of Karen's statements to her aunts was that DSS was notified and appropriate treatment was provided to Karen. For these reasons, Karen's out of court statements to her aunts are admissible as substantive evidence of abuse.

III. THE TRIAL COURT PROPERLY COMPLIED WITH THE STATUTORY REQUIREMENTS OF N.C.G.S. §7B-507 WHEN IT ORDERED THAT REUNIFICATION EFFORTS WITH APPELLANT FATHER CEASE.

Appellant argues that the trial court erred in failing to make the specific findings required to order cessation of reunification efforts pursuant to N.C.G.S. § 7B-507(b). No such findings are required in cases of sexual abuse.

A trial court may order the cessation of reunification efforts with a parent without holding a permanency planning hearing in cases where the court finds that the parent "has subjected the child to aggravated circumstances as defined in G.S. 7B-101." N.C.G.S. § 7B-101. N.C.G.S. § 7B-101(2) defines aggravated circumstances as, "Any circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious

consequences, including, but not limited to, . . . sexual abuse." *Id.* In this case, the trial court found by clear and convincing evidence that Karen was sexually abused by her father. (R. pp. 57-59). This finding is sufficient for the trial court to order reunification efforts with Appellant Father cease.

CONCLUSION

This is the case of a small child, Karen, who, at five years-old, was sexually abused by her father, the Appellant. (R. pp. 57-59). Although Karen's parents deny that the abuse occurred, neither parent was able to offer any reason why Karen would not be truthful about the abuse, and neither Respondent at the adjudication hearing offered evidence that Karen's story of abuse was inconsistent or changed in its core detail. (T. pp.39-41).

There is clear and convincing evidence in the record now before this Court to support the trial court's conclusions of law that Karen is an abused and neglected child. The trial court's adjudication order was based upon Karen's statements to her aunts that she had been sexually abused, and their observations of Karen demonstrating the abuse through the use of dolls. (R. p. 57). The trial court also based its findings of fact upon the forensic nurse's evaluation and physical

examination of Karen, as well as the written report the nurse submitted. (R. p. 57-58, 44-47). Additional evidence supporting the trial court's conclusion that Karen had been sexually abused included the criminal record report of Karen's father, as well as the fact that Karen's mother was aware of Appellant's criminal record involving sexual activity with a minor. (R. p. 58). Although Appellant argues that Karen's out of court statements are inadmissible hearsay, those statements are admissible under Rule 803(4) of the North Carolina Rules of Evidence. As discussed above, Karen's statements to both of her aunts, as well as the forensic nurse, are admissible as substantive evidence of abuse. Coupled with written reports and statements of the witnesses, as well as Karen's drawings, there was clear and convincing evidence for the trial court to hold that Karen was an abused and neglected child.

Based upon the trial court's adjudication of abuse, the trial court appropriately ordered that reunification efforts with the Appellant Father cease. Ceasing reunification efforts with a parent at disposition is in accord with the North Carolina Juvenile Code in cases of sexual abuse. For these reasons, we ask this Court to affirm the trial court's order adjudicating Karen a neglected and abused child, as well as the

dispositional order ceasing reunification efforts with Appellant Father.

Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321
Attorney for Appellee Guardian ad Litem

CERTIFICATION OF COMPLIANCE OF WORD COUNT

The undersigned attorney certifies that the foregoing brief in the above-entitled action, in accordance with Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure, contains 3,858 words, which is less than the word count limit of 8,750 for briefs using Times New Roman proportional type (excluding cover, index, table of authorities, certificate of service, certification of compliance). The undersigned relies on the word count reported by Microsoft Word Processing software.

This the 20th day of February, 2006.

Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321
Attorney for Appellee Guardian ad Litem

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing APPELLEE'S BRIEF was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

Steven B. DeCillis
804 South Garnett St.
Henderson, NC 27536

Carolyn Yancey
P.O. Box 3178
Henderson, NC 27536

Janet K. Ledbetter
P.O. Box 1108
Hillsborough, NC 27278

This 21st day of February, 2006.

Alexandra S. Gruber
North Carolina State Bar No.: 33425
North Carolina Guardian ad Litem Program
100 E. Six Forks Road
P.O. Box 2448
Raleigh, NC 27602
Telephone: (919) 571-4799
Facsimile: (919) 788-5321