

STATEMENT OF THE CASE

Respondent parents voluntarily placed SS with her paternal grandparents on March 31, 2006, not April as stated in Appellant's brief. R. p. 33. The petition was time stamped April 5, 2006; it was signed April 4, 2006. R. pp. 5-8.

The Case was not heard within sixty days as provided in N.C.G.S. §7B-801(c) because of Respondents' request for additional time to prepare, and because Petitioner's counsel was out of state. R. pp. 83-4.

The final Record on Appeal was never received by the Attorney Advocate; references in this Brief have been taken from the final Proposed Record on Appeal but are believed accurately to cite the Record on Appeal.

In all other respects, Appellant's statement of the procedural history of the case appears correct.

STATEMENT OF THE FACTS

[SHS] (child): [S] was born on Tuesday, 28 March, 2006 at Memorial Mission Hospital (MMH). There were no complications noted during her delivery. Ann [S], her paternal grandmother, stayed with [S] and her mother, Jennifer [W], at MMH before and after delivery. Her father, Sean [S], was not able to be present for her birth as he was restricted on house arrest. [S] was discharged from Hospital on Friday, 31 March. MMH staff contacted DSS that day after they confirmed that Mrs. [W] had lost custody of her boys. Later that afternoon DSS Social Workers located [S] at the parents trailer in Candler. [S]'s parents agreed to place her with Ann and Randy, her PGPs. Had Ann [S], the paternal grandmother, not offered herself as

a kinship placement, [S] would have been placed in non secure custody.

[S] is current on all of her medical appointments and procedures. She has a suspected heart murmur that was detected by Dr. Fogelman at Asheville Childrens Medical Center. It is expected that it will go away as [S] ages. She has no other known or suspected conditions. [S] is no longer able to tolerate her mother's milk, and has been switched to formula. [S] had occasional evening colic which has ceased. The slight jaundice on her chest at birth has completely gone away.

[S] is receiving excellent care from her paternal grandparents. The court has sanctioned supervised visits by both parents at the paternal grandparents' home.

R. p. 33.

Just over two years previously, On December 15, 2003, Appellant Mother had abused her 20 month old toddler, ZW, "causing extensive facial bruises and injuries", and went on to physically assault her older toddler, AW, then aged two years, nine months. R. p. 84, ¶11. See *photographs*, R. p. 95.

After the injuries to the two boys, the Buncombe County Department of Social Services (BCDSS or the Department) filed an abuse petition which was tried on March 18, 2004. In that proceeding Appellant Mother maintained that "[AW], the older toddler, caused the injury to [ZW] while she had stepped outside to attend to the family dog." R. p. 84, ¶14. ZW and AW were adjudicated abused and neglected. R. p. 84, ¶12.

Thereafter, Appellant Mother entered an Alford plea to felony and misdemeanor child abuse. R. p. 84, ¶15 ("I'm not

saying I did it and I'm not saying I didn't do it; I'm saying it's in my best interest to plead out." T. p. 223). The two children, ZW and AW, were placed in their biological father's custody in Florida. R. p. 84, ¶9. Separated from her husband and children, Appellant Mother and Respondent Father (also SS) began a relationship in April, 2005. They first lived with his mother. Domestic conflict, and at least one instance of physical fighting involving Appellant kicking Respondent Father, resulted in the paternal grandmother asking them to move into a mobile home she owned about one mile away. R. p. 85, ¶17; T. pp. 170-1.

The Juvenile, SS, was born of this relationship on March 28, 2006. Hospital personnel became aware of Appellant Mother's felony child abuse conviction.

[T]he respondent mother admitted that she did have felony child abuse conviction, and has lost custody of her children, but the charges were not true, that [AW] hit [ZW] and she got blamed, she had fulfilled her court orders and the Department had closed its case. The hospital allowed the respondent mother to leave with the minor child on March 31, 2006. The Department became aware of what had happened the same day the child was removed from the hospital, and the Department scheduled a custody staffing. At that time the respondent mother placed the minor child with the paternal grandmother, and she has remained in this kinship placement and is doing well.

R. p. 85, ¶19.

At trial of the current case Appellant refused to describe the circumstances of the abuse in response to counsel's

questions. Even under questioning by the court, while admitting she was the perpetrator, she still claimed to be unable to provide the details of what she did. T. pp. 284-297.

Appellant's statement of facts claims that the trial court found at the adjudication hearing that she had complied with all prior court orders. Review of the trial court's order, however, shows findings of compliance with some court orders, that many issues were not addressed until after commencement of the present case, and that throughout she was hiding her abuse of the boys from therapists and other professional providers. The effectiveness of these services is problematic. R. p. 85, ¶20, R. p. 91, ¶9.

Additional facts will be developed in discussing the findings of fact disputed by Appellant.

ARGUMENT

Issue.

Appellant Mother severely beat [SS]'s two older siblings. She then continuously denied her acts, saying one of her toddlers did it to the other, and entered only an Alford plea to felony child abuse. She left many services uncompleted until DSS opened this new case. She failed to advise psychologists, psychiatrists, her therapist and other treatment providers of the true facts of the incident so she could adequately address

her problems. Indeed she never openly admitted committing the abuse (as opposed to merely "accepting responsibility" for failure to prevent the injuries) until cross examination in the present trial. She lied to hospital personnel about her part in the earlier abuse so they would let her take [SS] home. Since entering her new relationship, she has continued to argue with and physically attack her domestic partner. She "will need extensive mental health treatment, and be highly motivated to change, before she will be able to provide minimally acceptable parenting for the minor child." R. pp. 88-9, ¶33.

Does such a mother have a right to custody and placement of her newborn infant prior to committing some additional act of abuse, or may the court intervene and prevent recurrence of this tragedy?

Abandoned Assignments of Error

The Assignments of Error listed as brought forward in the Appellant's Brief challenge 11 adjudication findings of fact, seven dispositional findings of fact, some unidentified number of adjudication conclusions of law (Assignments of Error 21-26) and four dispositional conclusions of law. Appellant's Brief, 9, 21. In her arguments, however, she only discusses Adjudication Findings 9, 16, 29, 18, 30 and 32. Attempting to address Appellant Mother's actual issues, this Brief will discuss only those findings of fact and issues of law upon which

she has stated reason, argument or authority. Other findings and conclusions listed by Appellant should be considered abandoned. North Carolina Appellate Rule 28(b)(6), In re JJ, JJ, JJ, ___N.C.App.___, ___S.E.2d___, (COA05-1510, 5 Dec 2006). ("While respondent assigned error to several of the trial court's findings and lists them following the title of her first argument section, . . . she does not discuss them in her argument. These assignments of error are presumed abandoned, . . .")

I. THE SEVERE ABUSE OF THE JUVENILE'S OLDER BROTHERS, TOGETHER WITH APPELLANT'S FAILURE TO ADMIT HAVING ABUSED THEM AND HER CONTINUED EXHIBITION OF ANGER AND DOMESTIC VIOLENCE, IS SUFFICIENT CLEAR AND CONVINCING EVIDENCE THAT SS WOULD BE AT SUBSTANTIAL RISK OF NEGLECT IF PLACED IN HER MOTHER'S CUSTODY TO CONSTITUTE NEGLECT.

Standard of Review

In the adjudication of an abuse or neglect petition, ". . . the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." In re Helms, 127 N.C.App. 505, 511; 491 S.E.2d 672, 676 (1997); In re Mclean, 135 N.C.App. 387, 394, 521 S.E.2d 121 (1999).

Appellate review of conclusions of law in adjudication proceedings is limited to whether they are supported by the findings of fact. In re Helms, 127 N.C.App. 505, 511, 491 S.E.2d 672, 676 (2003).

A. A Prior Adjudication Of Abuse, Together With Evidence That The Perpetrator Has Not Addressed and Corrected The Problems That Led To That Abuse, Supports An Adjudication Of Neglect Of A Later Child.

The General Assembly has defined a neglected juvenile.

(15) Neglected juvenile. - A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare; . . . 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.G.S. §7B-101(15), (Emphasis supplied).

This court has held that an adjudication of abuse or neglect of one child without other evidence does not require or compel the conclusion that another juvenile in the same home is neglected. In re Nicholson, 114 N.C.App. 91, 440 S.E.2d 852 (1994); In re Mclean, 135 N.C.App. 387, 521 S.E.2d 121 (1999); In re Ellis, 135 N.C. App. 338, 520 S.E.2d 119 (1999).

[The statute] does not require the removal of all other children from the home once a child has either died or been subjected to sexual or severe physical abuse. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence.

Nicholson, *supra*, 440 S.E.2d at 854.

Reported cases concluding a juvenile was neglected based on the last sentence in N.C.G.S. §7B-101(15) all have some evidence

of risk of continuing abuse or neglect in addition to the prior adjudication, such as a failure to address the causes of the prior abuse or neglect. For example, In re E.N.S. 164 N.C.App. 146, 545 S.E.2d 167 (2004):

In the case *sub judice*, the trial court's adjudication of neglect was based primarily on events that took place before E.S.' birth, in particular, the circumstances regarding respondent's oldest child being adjudicated neglected and dependent on 27 January 2000. The trial court further found that following that prior adjudication, respondent continued to demonstrate behavior that evidenced she would neglect E.S. [Emphasis supplied].

If the abuse from the earlier case and other evidence presented at trial shows that the child will be placed "in an environment injurious to the juvenile's welfare" (N.C.G.S., §7B-101(15)) or will face a substantial risk of impairment resulting from neglectful conduct (In re Safriet, 112 N.C.App. 747, 752; 436 S.E.2d 898, 901-902 (1993)), then the trial court may exercise the "discretion in determining the weight to be given such evidence" granted by Nicholson, *supra*, and conclude the later child is neglected.

It follows from this principle that the new child need not actually live in the home of the offending parent and be subjected to actual neglect. In a case where the parents immediately placed a newborn child in DSS custody, this Court stated, "Despite the respondent's consent after Amy's birth to allow DSS to assume custody of the child, these findings support

the trial court's conclusions that a substantial risk of impairment existed for Amy, and that Amy was therefore a neglected child as defined by N.C. Gen. Stat. §7B-101(15)." In re AB, ___ N.C. App. ___, ___ S.E.2d ___ (COA05-1584, 3 Oct 2006).

In cases of this sort, 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. In the case before us, the trial court found that the respondent parents intended to live with Tamara in the home of the maternal grandparents where Katelynn died; that her father had been convicted of causing the death of Katelynn; that although her mother had been advised that the death of Katelynn was by non-accidental means, she continued to support the claims of her husband, Tamara's father, that the death of Katelynn was caused by her being shaken as he ran with her to get help; that the parents were not cooperative with the social worker who was investigating the matter; . . .

In re Mclean, 135 N.C.App. 387, 396, 521 S.E.2d 121 (1999).

Recently, In re AK, ___ N.C. App. ___, ___ S.E.2d ___ (COA04-986-2, 1 Aug 2006) has addressed application of this provision. The holding requires evidence in addition to the prior adjudication that the new child will be at risk. "There was no evidence introduced related to the parents' progress or, more particularly, whether one or both of the parents continued to deny the true cause of C.A.K.'s injuries."

This Court then succinctly stated its holding,

Consequently, where the trial court did not accept any formal evidence in addition to its consideration of the prior court orders concerning C.A.K., . . . the trial court could not, on this record, conclude that "the minor child would be at substantial risk of neglect if placed in the custody of the . . . parents at this time."

The parents had no opportunity to show that conditions had changed. In the present case, however, the trial court accepted testimony over three days from 10 witnesses, finding and concluding:

2. That by clear, cogent and convincing evident [sic] the minor child, [SS], is a neglected child pursuant to N.C.G.S. §7B-101(15) in that when the minor child was discharged from the hospital the minor child returned to the home with the respondent mother and the minor child was living in an environment injurious to her welfare due to the high risk of physical abuse, as the respondent mother was convicted of felony and misdemeanor child abuse of siblings of the minor child who regularly lived in the home. The risk of physical abuse is high due to the age of the minor child, the minor child's inability to protect herself or report abuse, the respondent mother's ongoing difficulties with stress and domestic violence, and the respondent father's house arrest. In addition the respondent mother has failed to appropriately participate in services to address her responsibility for the abuse and neglect of her other children until after this petition was filed, and she has continued to deny and minimize her abuse and neglect of her other children until this hearing. The respondent mother will need extensive mental health treatment, and be highly motivated to change, before she will be able to provide minimally acceptable parenting for the minor child.

R. p. 88, ¶2. There is ample clear and convincing evidence in addition to the prior abuse to support the result in this case.

B. All Of The Findings Of Fact Challenged By Appellant Mother In Her First Argument Are Either Supported By Evidence Or Are Not Material To The Outcome Of The Case.

Except for a few points which are not material to the outcome, all of the findings of fact are based on clear and convincing evidence as required by N.C.G.S. §7B-805.

1. Finding of Fact 9:

9. The respondent mother is the mother of two other children, [Z] and [AW]. These children are in the custody of their biological father, and they have no visitation with the respondent mother pursuant to orders from this court, see 03 J 301. The Department entered into evidence the orders in that case, and requested that the court take judicial notice of the entire court file on those children.

The trial court in the earlier case ordered, "That if the minor children are not in therapy, supervised visitation with the respondent mother shall be in the discretion of the respondent father, pursuant to prior Orders of this Court."

Appellant's Appendix, p. 11, ¶7. See also ¶¶5, 6 and 8.

Appellant Mother testified, "I'm able to speak with my children over the phone Monday through Friday between the hours of 6:30 and 8:00 p.m. as Rebecca Knight ordered." T. p. 225. And she at least believes that the boys' father is denying her visitation pursuant to court order. T. pp. 281-4.

Conceding for the sake of argument that Appellant Mother is unable to visit the two older boys because of their father's refusal to permit visitation as provided in the court order

rather than because she was directly denied visitation in the order, Finding 9 contains no material error. "Mrs. Stancil argues that the trial judge did not find the facts as shown by the evidence. The trial judge is not required to find *all* the facts shown by the evidence. [Citation omitted] It is sufficient if enough *material* facts are found to support the judgment. [Citation omitted]." In re Custody of Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1979).

Appellant Mother does not show how a finding in conformity with her position would have any effect on the decision below.

2. Finding of Fact 16:

16. On July 19, 2006, the respondent mother admitted under oath in open court that she took responsibility for the injuries her children suffered, and she had inflicted the injuries sustained by the minor child [Z]. Initially during her testimony the respondent mother only took "responsibility" for the injuries to her children and denied actually causing the injuries, but on cross examination the respondent mother did admit causing the severe injuries to [Z], and she appeared to be genuinely remorseful and emotional about this matter. While the respondent mother finally admitted that she was the one who injured [Z] until this hearing the respondent mother has continued to deny assaulting [Z] to numerous professionals with whom she has been working, and has continued to state that [A] committed these injuries on his younger brother.

R. pp. 84-85. Appellant Mother argues that this finding does not meet the clear and convincing standard because it conflicts with evidence from her notebook journal discussed in Finding of Fact 24, R. p. 86. See R. pp. 96-7. There is, however, no real

conflict as the former addresses her failure to disclose the facts openly to relatives, friends, associates, treatment workers and Department employees (See e.g. T. pp. 50-1, 116-7, 176, 188-9, 223-225, 266-268, 280, 284-297, 308-9, DSS Exhibit 2, R. pp, 98-9), while Finding 24 deals with her private notations which show she knew she was lying to everyone else. Fully to grasp Appellant Mother's duplicity, this testimony (reproduced in the Appendix to this Brief) should be reviewed.

And even if the private journal entries do conflict with the findings, there is no error. "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." In re Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

3. Finding of Fact 18:

18. There were times when the respondent mother would leave the home and stay away for a while. There were also times when the respondent father would call the paternal grandmother to come to the home, intervene in the situation, and get the respondent mother to leave the premises. When this occurred the respondent mother would leave. According to the paternal grandmother, there has been some domestic violence between the parents of the minor child during the past year, including the respondent mother kicking the respondent father on at least one occasion.

R. p. 85. Appellant Mother's sole complaint apparently is that the trial court has inferred domestic violence here because of

the finding (not contested by Appellant) that the mother kicked the father "on at least one occasion". T. p. 170.

If the trial court did draw such an inference, it was entirely proper. "The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, he alone determines which inferences to draw and which to reject." In re Hughes, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). The trial court heard the evidence, watched the witnesses and had the duty to draw inferences.

In passing, however, the Guardian would note that the testimony of the grandmother was not so limited as Appellant would have this court believe. She testified that her son and Appellant Mother had an unsettled relationship, that Appellant "pushed his buttons". T. pp. 160-1. And she later stated:

- Q. Have you ever seen her hit anybody?
 A. I've seen them arguing and, you know, maybe kicking at each other or something, but to just haul off and hit, I've never witnessed it. No.
 Q. But you have seen them—did you say kick?
 A. Yeah.
 Q. You have seen her kick at him? Could you answer, please?
 A. Yes.
 Q. And have you seen him kick back at her?
 A. No. . . . Usually he was trying to hold her down.

T. pp. 170-1. The facts in Finding 18 were fully supported by testimony and support an inference of domestic violence.

4. Finding of Fact 29:

29. The respondent mother is continuing to engage in denial of her former behavior to employers, friends and other persons with whom she comes into contact.

Appellant's Brief treats this finding along with Finding 16. The discussion in this Brief of that finding, *supra*, fully addresses Appellant's attempts to avoid admitting her acts which continued right up to the final day of the trial.

5. Finding of Fact 30:

30. The mother was involved in high risk behavior of stripping and exotic dancing while pregnant with the minor child.

Appellant Mother does not contest the factual finding here that she was a stripper or exotic dancer; her quarrel appears to be with the inference drawn by the trial court that this was risky behavior. Her statement that such dancing does not "pose a risk to a developing fetus" is a red herring, as the court did not find it posed such a risk. At any rate, the Guardian submits that even if the inference were not correct, this finding had no material influence on the outcome. See cases under Findings 9 and 18, *supra*.

Appellant's complaint that this issue was not pleaded has no merit as no objection below is noted. Rule 15(b) of the North Carolina Rules of Civil Procedure. In re LTR and JMR, ___ N.C. App. ___, ___ S.E.2d ___ (COA06-296, 16 Jan 2007).

6. Finding of Fact 32:

32. The Department made reasonable efforts to prevent taking custody of the minor child, and has facilitated the placement of the minor child in an appropriate kinship placement. The conditions that led to the out of home placement of the minor child continue to exist, and placement of the minor child back with the respondent parents would be detrimental to the best interest of the minor child and her safety and welfare.

Appellant has listed Assignment of Error 19 pertaining to this Finding of Fact under Argument I, but she in fact discusses it under Argument II. For convenience, the Guardian will address it here. The simple answer to Appellant's argument is that not only did the Department make reasonable efforts to prevent taking custody of SS, those efforts were completely successful. With Appellant's consent, the juvenile was placed in the custody of the paternal grandmother and lived in the same home with Respondent Father. The Department never has had custody.

Furthermore, while the Department is required to make reasonable efforts to preserve the family, no statutory provision prevents the court from ordering a permanent placement in the juvenile's best interest even if the Department has failed to exercise reasonable efforts. "A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that

placement is necessary for the protection of the juvenile.”

N.C.G.S. §7B-507(a).

“In this case, the Order on Review did not place or continue the placement of the children with DSS, nor did it continue placement responsibility with DSS. To the contrary, the order granted custody to the children’s grandparents and specifically released DSS ‘from all duties over the minor children.’ Thus, section 7B-507 was not applicable, . . .”

In re Padgett, 156 N.C.App. 644, 577 S.E.2d 337 (2003). Thus whether or not the Department made reasonable efforts was immaterial, and this finding even if incorrect could not be error.

II. THE TRIAL COURT VIOLATED NO STATUTORY RIGHTS OF APPELLANT MOTHER.

Appellant’s second argument claims that several of Appellant Mother’s statutory rights have been violated. To the extent the gist of these issues can be discerned, they are addressed below individually, roughly in the order presented by Appellant’s Brief.

Standard of Review.

While the concurring opinion in In re LEB, KTB, 169 N.C. App. 375, 610 S.E.2d 424, *disc rev. denied*, 359 N.C. 632, 616 S.E. 2d 538 (2005), a case reviewing whether an order had been issued within in the statutorily prescribed time limit, notes that the court “considered the particular facts of each case”, the case contains no statement that an appellate court reviewing

statutory errors must address the evidence *de novo*. While the appellate court should give findings of fact of the trial court deference, interpretation of statutes of law should be considered *de novo*. "Respondent argues that the trial court applied the incorrect standard at the hearing on her motion. Because this is a question of law, we review it *de novo*." In re JDC, 174 N.C. App. 157, ___ S.E.2d ___ (2005).

A. Voluntary Placement Of A Juvenile Alleged To Be Abused Or Neglected With A Relative Or Friend Chosen By The Parent Is A Salutary Option Sanctioned By Statute And Does Not Deprive The Parent Of Any Statutory Procedural Rights.

Appellant Mother first argues that BCDSS violated her rights by affording her the opportunity to have SS placed with a relative rather than taking the child into custody and placing her in foster care. In numerous provisions, the Juvenile Code directs that whenever possible a child should be placed with a relative or family friend rather than a traumatic foster family or institutional placement. N.C.G.S. §§7B-100(4), 7B-503(a), 7B-505, 7B-506(h)(2), 7B-903(a), and 7B-907(b)(2).

BCDSS has implemented this desirable approach at the administrative level by asking parents to suggest alternatives to foster or institutional care when it deems leaving the child in the home is not a safe option. This procedure was followed in the present case. R. p. 85, ¶19.

Appellant has referenced no support for the assertion that the Department secured the placement by threat. Nor has she indicated any effort by her to repudiate the placement with the child's grandmother. Repudiation would have forced the Department either to return SS to Appellant Mother or to take her into non-secure custody, resulting in return of SS to her or a hearing under N.C.G.S. §7B-506.

Nor did Appellant Mother move the court to return the child to her.

Appellant Mother voluntarily placed the child with the grandmother. Access to a hearing was always available to her.

B. Reunification Efforts May Be Ceased At Any Time And Are Not A Prerequisite To Permanency Decisions.

Appellant next appears to argue that the requirements of N.C.G.S. §7B-507 were not met because the trial court granted permanent guardianship to the paternal grandmother at disposition rather than after a permanency planning hearing. This argument misunderstands the law which allows just such a procedure. "Under North Carolina law, there is no requirement that adjudications of neglect or abuse be made separate from orders ceasing reunification efforts." In re KH, LC, MH, COA05-899 (3 Oct 2006, Unpub.); see In re LTR and JMR, ___ N.C. App. ___, ___ S.E.2d ___ (COA06-296, 15 Jan 2007).

In addition, §7B-507 findings are only required when a child is being placed or continued in the custody or placement responsibility of a county department of social services. N.C.G.S. §7B-507(a) and (b). They are not necessary where a child is being placed with a relative as occurred in the present case. In re Padgett, 156 N.C.App. 644, 577 S.E.2d 337 (2003).

Finally, even if reasonable efforts were not made, the trial court had authority to place SS permanently if circumstances required, as they did. "A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile." N.C.G.S. §7B-507(a). N.C.G.S. §7B-900, relied upon by Appellant, is not to the contrary. It requires first working with the family in the home only "if possible". See In re BI, (COA05-488, 20 Dec 2005, Unpub).

C. A Juvenile Court Can Place A Child In Permanent Guardianship Without Holding A Permanency Planning Hearing Under N.C.G.S. §7B-907 If The Trial Court Makes The Findings Required By §7B-907(b).

In the dispositional order, the trial court awarded "full legal permanent guardianship" of SS to her paternal grandmother. R. p. 93, ¶1.

N.C.G.S. §7B-600(a) provides for such a disposition, "In any case. . .when the court finds it would be in the best interests of the juvenile, the court may appoint a guardian of the person for the juvenile." (Such a disposition is also authorized by N.C.G.S. §7B-903(a)(2)b. Sub-section (b) of §7B-600 goes on to provide for a permanent guardianship "where the court has determined that the appointment of a relative or other suitable person as guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile," This is exactly what occurred in the present case.

The first finding required by N.C.G.S. §7B-907(b)(1) is, "Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;" The trial court found with regard to Appellant,

It is not likely that reunification of the minor child with the respondent mother is possible within six months, or within any time frame in the future, as the respondent mother has severe and significant mental health issues that she must address before any child could be safe in her care, and the respondent mother has only started to participate in these services, and due to the fact that the minor child would continue to be at high risk for abuse or neglect at least until the minor child is able to protect herself and report abuse.

The second finding relating to guardianship, required by §7B-907(b)(2), reads,

Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
. . . .

The trial court found, "[T]he best plan to achieve a safe, permanent home for the minor child within a reasonable period of time is guardianship with a relative, the paternal grandmother." R. p. 92, ¶11. And the court also specified rights and responsibilities of the parents: the parents will have liberal visitation rights and can live in the same home with SS if the guardian permits, and they are ordered to pay support. R. p. 93, ¶¶ 2-6.

The order appealed from specifically complies with the requirements of N.C.G.S. §7B-600 and §7B-907(b).

Appellant Mother, however, implies a right to a "permanency planning" hearing. However, §7B-600(b) does not require a §7B-907 permanency planning hearing, rather it requires the Court to make the same findings it would make were the decision being made a hearing so designated. In re EC, 174 N.C. App. 517, ___ S.E.2d ___ (COA05-218, 15 Nov 2005). As already shown, those findings were made.

Placement of SS in the guardianship of her paternal grandmother did not violate the requirements of the statute.

D. The Procedures Set Forth In Chapter 7B, The Juvenile Code, Followed In The Present Case, Comply With Due Process.

Appellant claims that the procedural rights provided in the Juvenile Code are founded on Constitutional Due Process. At least as far as terminating parental rights, her assertion is undeniable. Lassiter v. Department of Social Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), *reh den* (US) 69 L. Ed. 2d 1023, 102 S. Ct. 889. However, as the preceding discussions show, the trial court followed statutory procedures.

Without more, therefore, it is difficult to discern how asserting constitutional issues adds anything to Appellant's statutory argument. She makes no claim that any statutory provision violates the state or federal Constitution. In fact, our Supreme Court has held that the procedures in the juvenile code protect parents' due process rights. Matter of Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984). If her statutory rights have not been violated, she has not shown how some constitutional right has been.

CONCLUSION

The General Assembly has determined that abuse or neglect by caretakers is relevant evidence in a later case involving the

same caretakers. Based on exceptional abuse to her older two boys, together with failure to admit her acts or take effective steps to deal with her anger and violence, the trial court appropriately determined that placement with her would create unacceptable risk for her new baby. The trial court's placement of the infant in guardianship of her grandmother with liberal visitation should be affirmed.

Respectfully submitted, this the ___ day of February, 2007.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing APPELLEE BRIEF upon all parties to this cause by hand delivery or by depositing a copy hereof in a post paid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney or attorneys for said parties as listed below.

This the __ day of February, 2007.

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