

No. COA06-820

TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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|                   |   |                         |
|-------------------|---|-------------------------|
| IN THE MATTER OF: | ) |                         |
|                   | ) |                         |
| A.M.B.            | ) | FROM MECKLENBURG COUNTY |
|                   | ) |                         |
| A MINOR CHILD     | ) |                         |

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APPELLEE GUARDIAN AD LITEM'S BRIEF

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## STATEMENT OF THE FACTS

Amanda was born on June 13, 2005, to Appellant-Mother, Mrs. T.<sup>1</sup> (Tr. p. 40) Mrs. T. had a history of substance abuse and previous mental health issues. (R. p. 42) Shortly before Amanda's birth, her mother had used marijuana. (Tr. p. 67) Within a month of her birth, her mother had visited a mental health facility and had been diagnosed as having a psychotic disorder by a psychiatrist. (R. p. 43; Tr. p. 69)

The Youth and Family Services Division of the Mecklenburg County Department of Social Services ("YFS") received a referral regarding Amanda shortly after her birth. (Tr. p. 5) YFS social worker Edith Ragsdale met with Mrs. T. and Amanda on August 16, 2005. (Tr. p. 6) During this visit, Ms. Ragsdale became concerned for the child's safety because Mrs. T. made statements regarding suicide. Id. Mrs. T. also admitted "she was not able to take care of her child because she had some rambling thoughts and things going on in her head." (Tr. p. 8) Mrs. T. also said she knew she needed help. (Tr. p. 8). Ms. Ragsdale took Mrs. T. to the Emergency Room of Carolinas Medical Center, Behavioral Health Center (the "Center"). (Tr. p. 6, 62)

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<sup>1</sup> Consistent with the North Carolina Rules of Appellate Procedure and to ensure the privacy of the minor child, the Guardian ad Litem will rely upon "Amanda" as pseudonym for the minor child, A.M.B., and will refer to the parents as Mr. and Mrs. T.

At the Center, Mrs. T. met with Dr. Jennifer Bermudez, a psychiatrist. (Tr. p. 63) Dr. Bermudez performed a clinical interview, observed Mrs. T.'s physical appearance and behavior, and administered certain tests. (Tr. p. 63, 65-66, 74) In particular, Dr. Bermudez performed a global assessment of functioning ("GAF") test and gave Mrs. T. a GAF score of 15 on a scale of 1 to 100. (Tr. p. 74) 1 is considered in imminent danger of death and 100 perfect functionality, with 75 being average. (Tr. p. 74) A score of 15 meant a "very high likelihood of potential danger ... to herself or others." (Tr. p. 74-75) She also suffered from echolalia, or echoing the examiner's words, which is common in schizophrenia. (Tr. p. 80) Mrs. T. admitted she was potentially unable to care for herself. (Tr. p. 66) At the conclusion of this examination, Dr. Bermudez diagnosed Mrs. T. as schizophrenic and suffering from polysubstance dependence, and concluded she presented a danger to herself and others. (Tr. p. 64-65, 67) Dr. Bermudez involuntarily committed Mrs. T. (Tr. p. 64) Dr. Bermudez testified that schizophrenia is not an illness which can be cured but requires life-long treatment. (Tr. p. 69)

At the time, Mrs. T. had been living with her mother, Amanda's grandmother, in Charlotte. (Tr. p. 5) Amanda's father, Mr. T., lived in Tennessee and had not been involved in the child's life since her birth despite being aware Mrs. T. was pregnant since at least March 2005. (R. p. 43) The YFS social worker, Ms. Ragsdale contacted the grandmother, who agreed to care for the child,

and Ms. Ragsdale obtained Mrs. T.'s consent to place the child with the grandmother. (Tr. p. 17) YFS was concerned that as soon as Mrs. T. was able to leave the Center, she may attempt to take Amanda out of the care of her grandmother and move to Tennessee despite Mrs. T. admittedly not being able to care for the child herself. (R. p. 6) Therefore, YFS filed a juvenile petition on August 23, 2005, alleging dependency. (R. p. 5-6)

At the seven day hearing, Mrs. T. was appointed a Guardian ad Litem given her mental health history. (R. p. 10) Mr. T. requested a paternity test which resulted in confirmation that he is Amanda's father. (R. p. 15, 42)

Following the filing of the petition and the seven day hearing, Mrs. T. moved to Tennessee and married Mr. T. (Tr. p. 31; R. p. 43) YFS did not learn of Mrs. T.'s departure from the state until after it occurred. (Tr. p. 31) YFS subsequently learned that Mr. T. had a criminal record. (R. p. 27-28) YFS filed an amended juvenile petition on November 5, 2005, alleging Amanda to be neglected and dependent. (R. p. 30-31)

On November 8 and 9, 2005, the trial court held the adjudicatory hearing. (R. p. 42) YFS social workers Ms. Ragsdale and Ms. Melissa Crisafulli, as well as Dr. Bermudez and Mr. and Mrs. T. testified. (Tr. p. 2-3) Following the hearing, the court adjudicated Amanda to be neglected and dependent based upon thirty-three findings of fact. (R. p. 42-45) The court found that Mrs. T. had a history of

psychiatric illness and was involuntarily committed for at least seven days because she was a danger to herself and others. (R. p. 42-43) The court also found Amanda was involuntarily left with the grandmother by Mrs. T. without any agreement that the grandmother would care for the child. (R. p. 44) The court found both Mr. and Mrs. T. had substance abuse issues including that Mrs. T. used marijuana during her pregnancy and had a history of cocaine abuse, and that Mr. T. had a recent criminal history including indecent exposure. Id. Although the parents operate an automobile detailing business in Tennessee (Tr. p. 95; R. p. 43), the court found Mr. T. did not provide any financial support to Mrs. T. while she was pregnant and both parents had not provided any financial support to the grandmother since leaving Amanda behind in North Carolina (R. p. 43-44).

The court held a disposition hearing on December 14, 2005. (R. p. 76) The court's disposition order placed Amanda with the grandmother and allowed supervised visits. (R. p. 76-78)

## ARGUMENT

The best interests of the child is the “polar star” by which the courts should be guided in dependency and neglect cases. In re Montgomery, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984). The trial court, after making thirty-three findings of fact supported by clear and convincing evidence, properly concluded Amanda was dependent and neglected. (R. p. 42-45) In its discretion, the trial court placed Amanda with her grandmother with supervised visits for the parents. (R. p. 77) These decisions are amply supported by the record and should be affirmed.

I. THE TRIAL COURT’S ORDER CONTAINS SUFFICIENT FINDINGS OF FACT TO SUPPORT ITS CONCLUSION OF LAW THAT THE CHILD IS DEPENDENT AND NEGLECTED.

### **A. Standard of Appellate Review.**

Appellate review of a conclusion of law is limited to whether the conclusion is supported by the findings of fact. In re Helms, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). “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.” Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The trial court concluded the child was dependent and neglected based upon thirty-three findings of fact. (R. p. 44)<sup>2</sup> Appellant-Mother has taken exception only to finding of fact 29 (Appellant-Mother's Br. 12), and Appellant-Father has failed to properly take exception to any.<sup>3</sup>

**B. The Trial Court's Conclusion of Dependency is Supported by the Findings of Fact.**

A dependent juvenile is defined as:

A juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9). To conclude a child is dependent, the trial court must address both (1) the ability of the parent to care or supervise the child and (2) the lack of appropriate alternative child care arrangements. In re P.M., 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Appellants argue that the trial court "failed

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<sup>2</sup> Appellants appear to consider the trial court's conclusions to be only based upon findings of fact 29 and 30 because the court prefaces these findings by stating "[t]he Court finds the child [to be dependent or neglected] because . . . ." (Appellant-Mother's Br. 6, 9-12; Appellant Father's Br. 6, 9-12). However, the court also prefaces its conclusions by stating: "Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law"; indicating that the conclusions are based upon all the findings. (R. p. 44)

<sup>3</sup> As noted in Part II.B., Appellant-Father failed to assign error to finding of fact 29 and is therefore barred from challenging this finding on appeal. Appellant-Father assigned error to findings of fact 24, but did not address it in his brief (R. p. 97) and therefore has abandoned this argument. Viar v. N.C. Dep't of Transp., 359 N.C. 400, 401-402, 610 S.E. 2d 360, 361 (2005).

to make findings as to the second prong of dependency.” (Appellant-Mother’s Br. 9; Appellant-Father’s Br. 9)

The trial court found, among other facts, that the child:

had no one to provide for her care other than the grandmother. The mother did not leave the child with the grandmother voluntarily or have any agreement that the grandmother would care for the child. The father had no idea what the child’s circumstances were since he had never been to North Carolina to meet the child or grandmother.

(R. p. 44) (emphasis added) The trial court is not required to use the terms “appropriate alternative child care arrangement” in its findings of fact. See In re K.D., \_\_\_ N.C. App. \_\_\_, \_\_\_, 631 S.E.2d 150, 155 (2006) (neglect finding of parenting skills, domestic violence, anger management and unstable housing issues adequate to meet statute’s requirement of lack of “proper care, supervision, or discipline”); In re P.M., 169 N.C. App. at 428, 610 S.E.2d at 407 (finding that failure to comply with plan established first prong of dependency).

The trial court found Appellants lacked an appropriate alternative child care arrangement--Mrs. T involuntarily left the child with her grandmother without any arrangement whatsoever, and the father had failed to ever provide any care or arrangements for care. Appellants fail to point to any evidence showing the parents made any “arrangement,” let alone an appropriate one for the care of Amanda. Appellants note that the child “remained” with the grandmother after the mother was involuntarily committed to a mental health facility. (Appellant-

Mother's Br. 9; Appellant-Father's Br. 9). None of the evidence suggests any form of arrangement, let alone an appropriate alternative arrangement.

In truth, while YFS made a temporary arrangement for Amanda to stay with the grandmother, absent a court order or power of attorney, the grandmother had no authority to obtain medical attention for the child or otherwise serve as a guardian for her care. Moreover, absent YFS custody, Mrs. T., being admittedly unable to care for the child, could still simply come and take her out of the grandmother's care if she so desired. Under these circumstances, the court properly found Amanda to be dependent because her mother could not care for her, the father had never provided any care for her, and no agreement or arrangement had been made to provide appropriate alternative care. The court's conclusion of law is amply supported by its findings of fact and therefore should be affirmed.

**C. The Trial Court's Conclusion of Neglect is Supported by the Findings of Fact.**

A neglected juvenile is defined as:

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.

N.C. Gen. Stat. § 7B-101(15). To conclude a juvenile is neglected, the court must find neglect within the meaning of § 7B-101(15), and either "the juvenile has

sustained ‘some physical, mental, or emotional impairment’” or there is “‘a substantial risk of such impairment as a consequence’” of the neglect. In re Reyes, 136 N.C. App. 812, 814-15, 526 S.E.2d 499, 501 (2000) (quoting In re Safriet, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). A child may be adjudicated neglected if the trial court finds “a probability of repetition of neglect if the juvenile were returned to her parents.” In re Reyes, 136 N.C. App. at 815, 526 S.E.2d at 501. “The decision of the trial court must of necessity be predictive in nature.” In re McLean, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). The failure to provide care and other physical necessities is the basic concept of neglect. In re Pierce, 67 N.C. App. 257, 263, 312 S.E.2d 900, 904 (1984).

The mother admitted that she could not care for the child given her mental health issues. This problem simply does not go away, as Dr. Bermudez testified, because schizophrenia cannot be “cured”; it is a lifelong illness. Quite simply, a single visit to a mental health center did not establish Mrs. T. could now care for her child. The father had no contact prior to the filing of the petition, and had provided no financial support to the mother or child despite having his own profitable business. Since the child was left with the grandmother in August, 2005, the parents had brought diapers to visits but “neither parent has made any monetary contribution to the grandmother or [YFS] to defray the costs of caring for [the child].” (R. p. 44) Both had a history of substance abuse and neither had

completed a treatment program. Based upon these facts, the child had been neglected and the risk of continuing neglect still existed. See In re Yocum, 158 N.C. App. 198, 580 S.E.2d 399 (neglect where parent “never paid any child support for the minor child and did not send the minor child any gift or other type of acknowledgment on her birthday”), aff’d per curiam, 357 N.C. 568, 597 S.E.2d 674 (2003); In re Bradshaw, 160 N.C. App. 677, 587 S.E.2d 83 (2003) (failure to provide any financial support, no matter how insignificant, and failure to seek personal contact sufficient to support conclusion of neglect); In re Humphrey, 156 N.C. App. 533, 540-41, 577 S.E.2d 421, 427 (2003) (court properly terminated parental rights based upon neglect when evidence showed mother failed to contact child, provide financial support, and any type of affection). Therefore, the trial court properly found Amanda neglected.

## II. THE TRIAL COURT’S FINDING OF FACT THAT APPELLANT FAILED TO MAKE AN APPROPRIATE ALTERNATIVE CHILD CARE ARRANGEMENT IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

### A. Standard of Appellate Review.

In an adjudication, the trial court's findings of fact, “[if] 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) (citing In re Montgomery, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). The trial court must “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). “If different inferences may be drawn from the evidence, the trial judge must determine which inferences shall be drawn and which shall be rejected.” In re Gleisner, 141 N.C.App. 475, 480, 539 S.E.2d 362, 365-66 (2000). Uncontested findings of fact are binding on appeal. Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

**B. The Appellant-Father’s Failure to Assign Error to this Finding of Fact Bars Challenge on Appeal.**

Appellant-Father’s assignment of error challenged the sufficiency of the evidence regarding the trial court’s neglect and dependency conclusions, and only referenced finding of fact 24. (R. p. 97) The failure to assign error to finding of fact 29 makes it binding on appeal and Appellant-Father cannot challenge it. N.C. Dep’t of Crime Control & Pub. Safety v. Greene, 172 N.C. App. 530, 535, 616 S.E.2d 594, 599 (2005). Therefore, Appellant-Father’s challenge to this finding of fact should be dismissed.

**C. The Evidence Supports the Court’s Finding of Fact that Appellants Failed to Make an Appropriate Alternative Child Care Arrangement.**

The trial court’s finding of fact 29 stated:

The Court finds [Amanda] was dependent as to both parents as of 23 August 2005 because she had no one to provide for her care other than the grandmother. The mother did not leave the child with the grandmother voluntarily or have any agreement that the grandmother would care for the child. The father had no idea what the child's circumstances were since he had never been to North Carolina to meet the child or grandmother.

(R. p. 44) Appellants argue that the finding that “[t]he mother did not leave the child with the grandmother voluntarily or have any agreement that the grandmother would care for the child” is “unsupported by the testimony at trial.” (Appellant-Mother’s Br. 13; Appellant-Father’s Br. 13)

The YFS social worker, Ms. Ragsdale arranged for placement of Amanda directly with the grandmother after the mother was committed. (Tr. p. 17) Ms. Ragsdale also obtained the mother’s consent to this placement. Id. Amanda’s care was arranged by YFS, not either of the parents.

In their briefs, Appellants first point to the testimony of the social worker that the grandmother was willing to care for the child when the social worker contacted her after the mother had been involuntarily committed. Id. This testimony neither suggests the mother voluntarily left the child with the grandmother or that the mother had any agreement with her. The uncontradicted testimony showed the mother was involuntarily committed and had no agreement as to the child’s care. YFS arranged for the child to stay with the grandmother.

Appellants also point to the mother's consenting to placement by YFS of the child with the grandmother. (Appellant-Mother's Br. 13; Appellant-Father's Br. 13) Again, however, this testimony does not contradict the fact that the child was left with the grandmother involuntarily as a result of Mrs. T's commitment into the Center and that YFS made these arrangements. Therefore, the court's finding of fact is supported by clear and convincing evidence and should be affirmed.

### III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING PHYSICAL PLACEMENT WITH THE GRANDMOTHER AND SUPERVISED VISITS BY APPELLANT.

#### A. Standard of Appellate Review.

A trial court's disposition is reviewed for an abuse of discretion. In re Yokum, 158 N.C. App. 198, 206, 580 S.E. 2d 399, 403, aff'd per curiam, 357 N.C. 568, 597 S.E. 2d 674 (2003). An abuse of discretion occurs "when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." In re J.B., 172 N.C. App. 747, 751, 616 S.E. 2d 385, 387, (citation omitted), aff'd, 360 N.C. 165, 622 S.E.2d 495 (2005).

#### B. The Trial Court Properly Exercised Its Discretion in Placing the Child with the Grandmother and Allowing Supervised Visits.

The trial court found Amanda to be neglected and dependent. The parents had untreated substance abuse issues, the mother was suffering from serious mental health issues, the father had a criminal history, and that neither parent had

provided financial support for the child. The court decided that placement should remain with the grandmother, and the parents should have supervised visitation.

Appellants counter that there was “no finding that the parents had acted threateningly toward their child,” the parents were making visits, Mrs. T. was “managing her medication” and had “undergone an evaluation”, and conclude by challenging that “[t]here is no finding as to why supervised visitation was required.” (Appellant-Mother’s Br. 15; Appellant-Father’s Br. 15)

The trial court ordered supervised visitation until the problems that led to Amanda’s adjudication as neglected and dependent “be resolved to achieve reunification.” (R. p. 76) Particularly, the court wanted the parents to address the mental health issues, establish a stable home for Amanda, and stable employment to provide for her support and care. Id. To that end, the court adopted the Family Services Agreement (R. p. 77), which required the parents to address the mental health issues (R. p. 64). The court also ordered a home study to be performed of the parent’s home in Tennessee and for production of the lease for the home, as well as bank records for their business. (R. p. 78) All of these requirements were designed to ensure the parents maintained a safe home in Tennessee. Requiring supervised visits in the interim until their mental and physical conditions stabilized is not in any way arbitrary. Therefore, the court did not abuse its discretion.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted, this 25th day of September, 2006.

s/Eric M.D. Zion (electronically submitted)

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

s/Eric M.D. Zion (electronically submitted)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served on all counsel of record by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows, this 25th day of September, 2006:

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