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NO. COA11-1046
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

In the Matter of:

K.A.

Watauga County
No. 11 J 03

Appeal by Respondent-mother from orders entered 4 April 2011 by Judge Ted McEntire and 2 June 2011 by Judge William A. Leavell, III, in Watauga County District Court. Heard in the Court of Appeals 28 November 2011.

Eggers, Eggers, Eggers & Eggers, by Kimberly M. Eggers and Stacy C. Eggers, IV, for Petitioner-appellee.

GAL Appellate Counsel Pamela Newell, for Guardian Ad Litem.

Assistant Appellate Defender J. Lee Gilliam, for Respondent-appellant.

HUNTER, JR., Robert N., Judge.

Respondent-mother appeals from (1) an order adjudicating her child, Kevin¹, abused, neglected, and dependent as alleged in a juvenile petition and (2) a disposition order awarding custody of Kevin to the Watauga County Department of Social Services

¹ A pseudonym is used to protect the identity of the minor child.

("Petitioner") pursuant to a permanent plan of reunification with Respondent-mother.

I. Factual & Procedural Background

On 26 January 2011, Petitioner filed a juvenile petition alleging Kevin was: (1) an abused juvenile in that his parent "has used or allowed to be used upon the juvenile cruel or grossly inappropriate devices or procedures to modify behavior"; (2) a neglected or seriously neglected juvenile in that he (a) "does not receive proper care, supervision, or discipline" from his parent or guardian or (b) "lives in an environment injurious to [his] welfare"; and (3) a dependent juvenile in that his parent or guardian "is unable to provide for [his] care or supervision and lacks an appropriate alternative child care arrangement." After an adjudication hearing on 15 March 2011, the court made findings of fact indicating that six-year-old Kevin and Respondent-mother moved to Watauga County from Ohio in the summer of 2010. Kevin enrolled in school, and, in response to reports from his teacher that Kevin talked excessively in class, Respondent-mother undertook actions to discipline Kevin for his misbehavior. These actions included: forcing Kevin to stand in a "T-Shape," which entailed holding his arms straight out by his side for up to five minutes at a time; placing duct

tape over his mouth; and/or striking him with a belt, paddle, switch, or other object. Respondent-mother used a stopwatch to measure the time the child held his arms out in the form of a "T." She increased the amount of time during which Kevin held out his arms by increments of thirty seconds when Kevin's behavior failed to improve. Kevin learned to breathe whenever he had duct tape over his mouth by pushing his tongue against the tape and creating an airway through a corner of the tape. When Kevin was taken into Petitioner's custody, he had injuries to his arms and legs that had been inflicted by Respondent-mother and/or her boyfriend.

Based upon the foregoing findings, the court concluded that Kevin was: (1) an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1) in that Respondent-mother "has used or allowed to be used on the minor child cruel and grossly inappropriate procedures to modify the minor child's behavior[;]" (2) a neglected juvenile in that Respondent-mother "has used and allowed to be used inappropriate discipline methods on the minor child and the child has lived in an environment injurious to the child's welfare[;]" and (3) a dependent juvenile in that Respondent-mother "has been unable to provide for the care or supervision of the child and lacks an appropriate child care

arrangement." The court adjudicated Kevin an abused, neglected, and dependent juvenile on 31 March 2011 and set a disposition hearing for 18 April 2011.

In its subsequent disposition order, the court concluded that it is in Kevin's best interest that he remain in Petitioner's custody under a permanent plan of reunification. The court concluded that the plan of reunification is appropriate, in his best interest, and "meets his physical and emotional needs, and is consistent with his health and safety."

II. 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 (2009). In the adjudicatory phase, a trial court is required to determine whether the allegations are proven by clear and convincing evidence, whereas in the disposition stage, the court is required to decide what disposition is in the best interest of the child. *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004). In reviewing an adjudication order, we determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Pittman*, 149 N.C. App. 756,

763-64, 561 S.E.2d 560, 566, *appeal dismissed and disc. review denied*, 356 N.C. 163, 568 S.E.2d 608-09 (2002), *cert. denied*, *Harris-Pittman v. Nash County Dep't of Social Servs.*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). In reviewing a disposition order, this Court evaluates whether the trial court abused its discretion in making its determination of the child's best interest. *In re C.W.*, 182 N.C. App. 214, 218-19, 641 S.E.2d 725, 729 (2007).

III. Analysis

Respondent contends the court erred in concluding that Kevin was an abused, neglected, and dependent juvenile. She argues the court's findings of fact are insufficient to support these conclusions. She also contends the court erred by directing its dispositional order towards punishment of Respondent instead of providing for Kevin's needs and best interest.

Definitions set out in the Juvenile Code "are given a precise and understandable meaning by the normative standards imposed upon parents by our society[.]" *In re Biggers*, 50 N.C. App. 332, 341, 274 S.E.2d 236, 241 (1981). One such definition is that of an abused juvenile found at N.C. Gen. Stat. § 7B-

101(1), which defines an abused juvenile as one whose parent, custodian, or guardian:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; rape of a child by an adult offender, as provided in G.S. 14-27.2A; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; sexual offense with a child by an adult offender, as provided in G.S. 14-27.4A; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree

sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1;

e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

N.C. Gen. Stat. § 7B-101(1) (2009). In construing N.C. Gen. Stat. § 7B-101(1) as a whole, our Supreme Court has stated that a juvenile is abused "when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm." *In re M.G.*, 363 N.C. 570, 573, 681 S.E.2d 290, 292 (2009). The Court stated that the harm may be physical, emotional, or some combination thereof and cited N.C. Gen. Stat. § 7B-101(1)(c) as an example of combined physical and emotional harm. *Id.*

As a general principle, a parent's conduct resulting in the filing of a juvenile petition "must be viewed on a case-by-case basis considering the totality of the evidence." *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007). The issue

in this case is whether the disciplinary methods used by Respondent-mother were "cruel or grossly inappropriate" as alleged in the petition and determined by the court.

The court's findings at bar reflect that the court saw photographic evidence of scratches on Kevin's arms and legs which resulted from Respondent-mother's disciplinary measures and that the injuries to his arm and body which were present when he was taken into custody remained for several days thereafter. The findings further reveal that Kevin "gained an appreciation for the risk of death" when the duct tape was placed over his mouth and he was forced to create an airway by which to breathe through his mouth. The court also observed that Respondent-mother reported in writing to Kevin's teacher she had disciplined Kevin for misbehaving in school by requiring him to write his "ABC's" and his numbers but that Respondent-mother failed to mention she had also imposed "T-shape" punishment, leading the court to make the following finding of fact:

The concealment of the punishments that she actually used on the minor child, and the fact that she wrote that she had used other, more appropriate, punishments indicate to the Court that Respondent mother was deceptive about what type of punishments she was actually implementing on the minor child and that such punishments were cruel, and

grossly inappropriate for the minor child, particularly given his age and social development.

The court's findings also take note of two admissions by Respondent-mother: (1) that when she and her boyfriend administered the punishments, Kevin's face would be flushed and he would cry; and (2) that it would be very painful to stand with one's arms raised in the shape of a "T" for up to five minutes.

In sum, the court's findings show that Kevin sustained both physical and emotional injury as a result of Respondent-mother's disciplinary measures and that Respondent-mother knew the disciplinary measures were cruel and grossly inappropriate as demonstrated by her concealing them from Kevin's teacher. We conclude the court's findings of fact support the conclusion of law and the adjudication of Kevin as an abused juvenile.

Although we have upheld the adjudication of abuse, we also consider the two adjudications of neglected and dependent juvenile because of their possible impact upon further proceedings or future adjudications in this matter. *See In re E.C.*, 174 N.C. App. 517, 525, 621 S.E.2d 647, 653 (2005). A neglected juvenile is defined as one

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) (2009). "In general, treatment of a child which falls below the normative standards imposed upon parents by our society is considered neglectful." *In re Thompson*, 64 N.C. App. 95, 99, 306 S.E.2d 792, 794 (1983). "[T]here [must] be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline.'" *Matter of Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). The court's findings in the case at bar show that Respondent-mother began whipping Kevin with a belt beginning when he was four-years-old. On occasion, while Kevin was in the "T-shape" formation, she placed duct tape over his mouth and hit him with objects including a belt, a paddle, and switches, which at times have left scratch marks. The Court saw photographic evidence of these scratches, which remained for several days after they were inflicted. The Court found Kevin "gained an appreciation for the risk of death from use of these procedures upon

him[. . . .]" We hold these findings support the court's conclusion that Kevin was neglected.

We next address the court's adjudication of Kevin as a dependent juvenile. A juvenile is dependent if his "parent, guardian, or custodian is unable to provide for the care or supervision [of the juvenile] and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2009). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the [trial] court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

We have carefully scrutinized the court's findings of fact related to adjudication and we are unable to locate a finding as to the first prong, i.e., that Respondent-mother is unable to provide for the care or supervision of the juvenile. None of the court's findings of fact indicate that Respondent-mother lacks the ability to provide care or supervision for Kevin. A

juvenile who has a parent who is capable of providing care or supervision is not a dependent juvenile, and a court errs when it adjudicates the juvenile as such. *In re J.A.G.*, 172 N.C. App. 708, 716, 617 S.E.2d 325, 332 (2005).

We therefore reverse the adjudication that Kevin is a dependent juvenile. The adjudications of Kevin as abused and neglected still stand and are sufficient to support the continued removal of Kevin from the home. *See E.C.*, 174 N.C. App. at 525, 621 S.E.2d at 653 (A single adjudication that a juvenile is either abused or neglected or dependent, standing alone, is sufficient to support the removal of a child from the home.).

Respondent-mother lastly challenges the dispositional order. She first argues that the order should be vacated because it is based upon unlawful adjudications that Kevin was an abused, neglected, and dependent juvenile. Given that we have upheld the lawfulness of the adjudications of abuse and neglect, we dismiss this argument. Respondent-mother alternatively argues that the order should be set aside because it was improperly used to punish her instead of being based upon a consideration of Kevin's needs and best interest. We find

nothing in the dispositional order to support Respondent-mother's assertion.

We affirm the adjudications that Kevin was an abused and neglected juvenile, and reverse the adjudication that Kevin was a dependent juvenile. We affirm the dispositional order.

The orders are

Reversed in part and affirmed in part; affirmed.

Judges STEELMAN and GEER concur.

Report per Rule 30(e).