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NO. COA11-401
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

IN THE MATTER OF:

C.C. Durham County
 No. 10 J 50

Appeal by Respondent-Father from adjudication and disposition orders entered 14 December 2010 by Judge Ann McKown in District Court, Durham County. Heard in the Court of Appeals 26 September 2011.

Bettyna Belly, Assistant County Attorney, for Durham County Department of Social Services, Petitioner-Appellee.

Pamela Newell for Guardian ad Litem.

Leslie C. Rawls for Respondent-Appellant Father.

McGEE, Judge.

Respondent-Father (Respondent) appeals from adjudication and disposition orders adjudicating his son, C.C., a neglected juvenile, and continuing legal custody with C.C.'s maternal great aunt and uncle (the aunt and uncle). We affirm the trial court's orders.

Respondent and the mother were married shortly after C.C. was born in 2001. The parents separated in 2003 and C.C. lived with his mother. The Durham County Department of Social Services (DSS) received a report in December 2009 that the mother was using heroin in the presence of C.C. The investigative social worker could not locate the mother and C.C. until January 2010. After meeting with DSS, the mother and C.C. moved in with the aunt and uncle.

DSS filed a juvenile petition on 4 March 2010, alleging that C.C. was a neglected juvenile. DSS alleged that the mother admitted using heroin in front of C.C.; and that prior to moving in with the aunt and uncle, the mother had unstable housing and C.C.'s school attendance was irregular. As to Respondent, DSS alleged that Respondent saw C.C. for the first time in ten months around 25 February 2010, and that he agreed to allow C.C. to remain in the temporary custody of the aunt and uncle. The trial court entered a nonsecure custody order placing C.C. with the aunt and uncle.

The trial court held adjudication and dispositional hearings in July and August 2010. By order filed 14 December 2010, the trial court adjudicated C.C. a neglected juvenile. In its dispositional order, the trial court concluded that both

parents' actions were inconsistent with their constitutional right to parent; that it was in C.C.'s best interests that he remain with the aunt and uncle; and that it was contrary to C.C.'s best interests to return to the home of either parent at that time. The trial court ordered continued custody of C.C. with the aunt and uncle and continued Respondent's unsupervised overnight weekend visitation. Respondent appeals.

I.

Respondent contends the trial court erred in adjudicating C.C. a neglected juvenile. We disagree.

"The allegations in a petition alleging abuse, neglect, or dependency must be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2009). The role of this Court in reviewing an initial adjudication of neglect and abuse is to 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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury neglect [and dependency] 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)
(citations omitted).

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) (2009). "This Court has . . . 'required that there 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" in order to adjudicate a juvenile neglected.'" *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676 (emphasis in original).

In the present case, the trial court made the following relevant findings:

15. The mother described a history of "physical altercations" with [Respondent]. The Court finds by clear and convincing evidence that there were three (3) incidents where [C.C.] was present to witness domestic violence between his parents.

. . . .

17. The Lamp Shop incident took place in 2004 after the parties separated; [Respondent] came to the mother's place of employment and where she was with the minor child, [C.C.]; [Respondent] threw iced tea on the mother, grabbed her hair, pushed her to the floor and slammed her head into the floor. The mother was able to get help from 3rd parties outside the store because of her screams; the mother received serious bruising on her face, head and side.

. . . .

19. The second incident of assault happened in February 2004; the mother was picking up [C.C.] from [Respondent's] home after a visit; mother requested that her uncle accompany her because of her fear of [Respondent]. When the mother picked [C.C.] up from [Respondent's] house, [Respondent] followed yelling obscenities. The mother, her uncle and [C.C.] were inside the vehicle when [Respondent] punched the windshield to the extent that it cracked. [C.C.] was present during this incident.

20. The last incident occurred in January 2009 when the mother dropped [C.C.] off at [Respondent's] house. On this occasion, [Respondent] initially refused to return [C.C.] to the mother. The next day [Respondent] called the mother and told her she could pick [C.C.] up. The mother went to pick [C.C.] up; [Respondent] put [C.C.] in the vehicle and then stood extremely close to the mother. [Respondent] was pushing in her chest and he was spitting in her face with his talk. In fear, the mother laser-tassed [Respondent]. On January 26, 2009, the mother represented herself and pled guilty to assaulting [Respondent]. Judgment was continued by the court. The mother did not receive a final conviction.

21. The evidence is conflicting as to the extent of [Respondent's] visitation[] subsequent to the parties['] separation in February 2003 or 2004. The parties are in agreement that [Respondent] had frequent contact with a week on/week off visitation schedule for two months after their separation; thereafter, [Respondent] visited as he stated "when the mother brought the child to him." However, there would be months when [Respondent] had no contact with [C.C.]. The mother has been the primary caretaker since the date of separation.

22. The mother has a history of addiction and admits heroin abuse and addiction. The mother admits using heroin when [C.C.] was in the home with her. By her own admission, the mother continues to be in need of substance abuse treatment for a heroin addiction.

. . . .

24. During the 10 months immediately [preceding] the filing of the petition in the matter, [Respondent] ha[d] no contact with [C.C.].

25. The mother may have been moving from home to home and was unstable in her living arrangements during that 10 month period, but [Respondent] knew other family members through whom he could contact the mother and [C.C.]. [Respondent] did not make sufficient efforts to locate and protect [C.C.].

. . . .

35. At the time of the filing of the underlying petition, [C.C.] had been absent from school for 14 days and late 40 times

from August 2009 until January 2010. A few of the absences and tardiness were excused. The mother had an active truancy case in Durham County regarding [C.C.'s] school attendance; the attendance improved after the filing of the underlying petition.

36. [Respondent] attended one school meeting and was put on notice about [C.C.'s] poor attendance and behavior when [C.C.] was in kindergarten. [Respondent] did not take any steps to intervene on behalf of [C.C.].

Although Respondent does not specifically challenge findings of fact 24 and 25, Respondent argues that the trial court erred in concluding that C.C. was a neglected juvenile because Respondent failed to contact C.C. for ten months. Respondent asserts that his inability to contact C.C. was due to the "Mother intentionally and successfully thwart[ing] the Father's visitation." We disagree.

Respondent testified that he did not see C.C. from January 2009 until December 2009 because he was unable to find the mother. He further testified that he tried to find C.C. by leaving messages on the mother's cell phone and on the maternal grandmother's phone. Respondent admitted, however, that he did not call the police and that he knew the aunt and uncle. The maternal grandmother testified that Respondent contacted her in 2009, but it had been approximately "five months since [Respondent] tried to call [C.C.]." Finally, when the aunt was

asked if she believed that Respondent could have found C.C. during the ten months Respondent had no contact with him, she answered, "Yes, most definitely." We conclude that the trial court's finding that Respondent could have contacted C.C. within the ten-month period, but failed to do so, is supported by clear, cogent, and convincing evidence.

Respondent does not challenge findings of fact 15, 17, 19 and 20, but argues that the trial court erred in concluding that C.C. was a neglected juvenile because the domestic violence acts are "historical." Respondent, however, cites *In re D.B.J.*, 197 N.C. App. 752, 678 S.E.2d 778 (2009), and concedes that "this Court has held that exposing [a] child to drug use and domestic violence can support neglect" and that "past actions may be relevant to adjudication." *See id.* at 755-56, 678 S.E.2d at 781 (holding that the trial court's findings that the child's parents engaged in acts of domestic violence in the child's presence, and that the mother had abused alcohol and/or controlled substances supported the trial court's conclusion that the child was neglected). Respondent's argument regarding consideration of past domestic violence acts is without merit.

Accordingly, we conclude that the trial court's findings, which show a history of domestic violence between Respondent and

the mother in front of C.C., the mother's use of illegal drugs in front of C.C., C.C.'s school attendance problem, and Respondent's inability to maintain contact with C.C., all support the trial court's conclusion that C.C. was a neglected juvenile in that he "d[id] not receive proper care, supervision from his parents and . . . live[d] in an environment injurious to [C.C.'s] welfare."

II.

Respondent next contends the trial court erred in finding and concluding that he "acted inconsistently with his parental rights[.]" Respondent specifically challenges findings of fact 32 and 33 in the adjudication order and findings of fact 16 and 17 of the disposition order, which are worded similarly. Findings of fact 32 and 33 in the adjudication order state:

32. Each . . . parent has acted inconsistent with his/her parental rights. Due to the mother's drug addiction, she failed to provide proper care or supervision of [C.C.].

33. [Respondent] acted inconsistent with his parental rights by creating an environment injurious to [C.C.'s] welfare with his domestic violence against the mother and during which [C.C.] was present. Also, [Respondent] acted inconsistent by failing to shoulder responsibility for [C.C.] and by failing to take sufficient and timely steps to protect [C.C.] from his mother[.]

These findings include the statement that Respondent "acted inconsistent with his rights by creating an environment injurious to [C.C.'s] welfare" for varying reasons. As Respondent points out, although the statement is included in the trial court's findings of fact, it is actually a conclusion of law, and will be evaluated as such. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. In fact, in conclusion of law number 3, in both the adjudication and disposition orders, the trial court concluded that, "[b]oth respondent parents acted inconsistent with their constitutional right to parent." Respondent also challenges these conclusions of law. Thus, the issue before this Court is the extent, if any, to which these conclusions are supported by the trial court's findings of fact.

The conclusion, erroneously labeled as a finding of fact, that Respondent "acted inconsistent with his parental rights by creating an environment injurious to [C.C.'s] welfare" is supported by findings of fact 15, 16, 17, 18, 19 and 20 in the adjudication order and finding of fact 15 in the disposition order. These findings of fact show that Respondent and the mother engaged in two separate domestic violence incidents in 2004 when C.C. was present, and one act of domestic violence in 2009 when C.C. was present. Further, these findings are

supported by testimony from the mother and Respondent.

Next, the conclusion that Respondent acted inconsistently with his right to parent "by failing to shoulder responsibility for [C.C.] and by failing to take sufficient and timely steps to protect [C.C.] from his mother" is supported by findings of fact 24 and 25 in the adjudication order and similarly worded findings of fact 12 and 13 in the disposition order. These findings show that Respondent did not have any contact with C.C. for a ten-month period and that Respondent knew other family members through whom he could contact the mother and C.C., but he did not do so. Further, these findings are supported by testimony from Respondent, C.C.'s maternal grandmother, and the aunt. Because this conclusion of law is supported by findings of fact, Respondent's argument is without merit.

III.

In his next two arguments, Respondent challenges the trial court's disposition order. Respondent first argues that the trial court erred in concluding that it was contrary to C.C.'s best interests not to return C.C. to Respondent.

At the disposition stage in abuse, dependency, and neglect proceedings, the "facts found by the trial court are binding absent a showing of an abuse of discretion." *In re Dexter*, 147

N.C. App. 110, 114, 553 S.E.2d 922, 924-25 (2001) (citation omitted). A trial court may be reversed for abuse of discretion only upon a showing that the court's ruling is "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the case before us, the trial court found as fact that Respondent had been convicted of driving while impaired in 2000 and 2008, had a history of domestic violence with the mother, and did not take timely steps to protect C.C. These findings support the trial court's conclusion that it would be contrary to the best interests of C.C. to return him to the home of Respondent.

Respondent also argues the trial court abused its discretion by continuing custody of C.C. with the aunt and uncle. N.C. Gen. Stat. § 7B-903 specifies the "alternatives [that] shall be available to any court exercising jurisdiction" and further provides that "the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-903(a) (2009). "In the case of any juvenile who needs more adequate care or supervision or who needs placement, the court

may . . . [p]lace the juvenile in the custody of the department of social services in the county of the juvenile's residence[.]"
N.C. Gen. Stat. § 7B-903(a)(2)c.

In the present case, the trial court found that C.C. had been in the home of the aunt and uncle since the end of January 2010; that DSS approved the home study of the aunt and uncle; that C.C.'s basic needs were being adequately met by the aunt and uncle; and that C.C. has attended school regularly while in the care of the aunt and uncle. Based upon these findings, we hold that the trial court's decision to continue custody of C.C. with the aunt and uncle was not manifestly unsupported by reason.

Accordingly, we affirm the trial court's adjudication and disposition orders.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).