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NO. COA11-626
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

IN THE MATTER OF:

J.K., B.K., L.K., and A.K.

Cleveland County
Nos. 09-JA-08, 09-JA-09
09-JA-128, and
10-JA-125

Appeal by Respondents from orders filed 22 February 2011 and appeal by Respondent-Mother from order filed 24 February 2011, by Judge Anna F. Foster in District Court, Cleveland County. Heard in the Court of Appeals 26 September 2011.

Charles E. Wilson, Jr., for Cleveland County Department of Social Services, Petitioner-Appellee.

Parker, Poe, Adams & Bernstein LLP, by Kristy L. Smith, for Guardian ad Litem.

Leslie C. Rawls for Respondent-Appellant Mother.

Charlotte Gail Blake for Respondent-Appellant Father.

McGEE, Judge.

Respondent-Mother is the mother of all four juveniles in this case. The father of J.K. and B.K., the two oldest children, is not a party to this appeal. Respondent-Father is the father of L.K. and A.K., the two youngest children.

The Cleveland County Department of Social Services (DSS) filed a juvenile petition on 9 January 2009, alleging that J.K. and B.K., then ages six and one, were abused and neglected juveniles based upon a report that they had been sexually abused by their father, and that sexually explicit photographs had been taken of J.K. and B.K., and electronically transmitted. The trial court placed J.K. and B.K. in the nonsecure custody of DSS. Respondent-Mother subsequently gave birth to L.K., and on 26 June 2009, DSS filed a juvenile petition charging that L.K. was a neglected juvenile. The trial court also placed L.K. in the nonsecure custody of DSS.

All parties entered into a consent order of adjudication on 23 November 2009, in which J.K., B.K., and L.K. were each adjudicated as neglected juveniles. The trial court dismissed the allegation that J.K. and B.K. were abused juveniles. The parties agreed that custody of all the children would remain with DSS. The trial court conducted a dispositional and permanency planning hearing on 23 December 2009 and, on 4 January 2010, filed an order maintaining custody with DSS and establishing a permanent plan of reunification. In the 4 January 2010 order, the trial court found that J.K. and B.K. had been diagnosed with developmental delays.

Respondent-Mother gave birth to her fourth child, A.K., in August 2010. DSS filed a juvenile petition on 9 August 2010, alleging that A.K. was a neglected juvenile, and assumed nonsecure custody of A.K. The trial court filed an order on 22 February 2011, adjudicating A.K. as a neglected juvenile and placing A.K. in the custody of DSS. In its adjudication order, the trial court found that Respondent-Mother did not inform DSS of her pregnancy, concealed her condition, and did not seek prenatal care for A.K. The trial court concluded that further reunification efforts with respect to L.K. and A.K. with their parents would be futile. The trial court relieved DSS of its obligation to make reasonable efforts to return L.K. and A.K. to their parents. Following a permanency planning hearing, the trial court filed an order on 22 February 2011 in which the trial court awarded custody of J.K. and B.K. to their father. The trial court changed the permanent plan for L.K. to adoption. Following a review and permanency planning hearing, the trial court filed an order on 24 February 2011, in which it devised a permanent plan of adoption for A.K.

"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). "The question this Court must

look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007).

Respondent-Mother contends the trial court erred by applying an incorrect standard of proof at A.K.'s adjudicatory hearing. Respondent-Mother argues that the trial court applied a quantum of proof by the "greater weight of the evidence" instead of by "clear and convincing evidence" as mandated by N.C.G.S. § 7B-805. In support of her argument, Respondent-Mother relies upon a statement that the trial court made during a colloquy concerning the permissibility of the trial court's consideration of notes it took during a prior adjudication hearing. Specifically, the trial court stated it could consider those notes because the notes were taken during an adjudication hearing that had a higher burden of proof than the hearing the trial court was presently conducting.

Our review of the record shows that Respondent-Mother has taken the trial court's challenged statement out of context. At the time the trial court made the statement, it was conducting a hearing that combined an adjudication hearing for A.K. with permanency planning review hearings for J.K., B.K., and L.K.

When the trial court made its findings of fact in the written adjudication and disposition order adjudicating A.K. as neglected, it stated it made its findings of fact based upon clear and convincing evidence. We hold this statement is controlling and shows that the trial court did apply the proper standard of proof.

Respondent-Mother contends that the trial court erred by adjudicating A.K. as a neglected juvenile based upon a mistaken belief that it was required to do so because Respondent-Mother's other three children were neglected juveniles and were in DSS custody. Respondent-Mother relies upon a statement made by the trial court during the hearing in which the court declared that "if there are other children in care, . . . that's neglect by virtue of case law definition" and "there is case law adequate to find that [A.K. is] a neglected juvenile just based on the fact that other children are in care."

Upon examination of the record and review of the law, it appears Respondent-Mother has misconstrued the trial court's statement. A trial court is permitted to consider the prior neglect of other children in the home when determining whether a child is neglected. See *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999); N.C. Gen. Stat. § 7B-101(15) (2009).

Nothing in the trial court's statement indicates the trial court believed it was required to adjudicate A.K. as neglected based solely upon the fact that her siblings were neglected and removed from the home. Otherwise, the trial court would not have offered, as it did, Respondent-Mother's counsel the opportunity to argue that the trial court should not adjudicate A.K. as neglected. Such a position would be inconsistent with a belief that the trial court was required to adjudicate A.K. as neglected merely because her siblings had been adjudicated as neglected and had been removed from the home. However, the trial court's findings show that the adjudication of A.K. as neglected was based upon Respondent-Mother's attempted concealment of her pregnancy with A.K. and her resultant failure to seek prenatal medical care, not just upon the fact that A.K.'s siblings had been removed from the home.

Respondent-Mother also challenges the trial court's conclusions of law that A.K. was a neglected juvenile, that it was in the best interests of all four children for reunification efforts with Respondent-Mother to cease, and to change the permanent plan for L.K. and A.K. to adoption, arguing that the conclusions of law are unsupported by the findings of fact and evidence. By his only argument, Respondent-Father also

challenges the trial court's disposition with respect to A.K. Respondent-Father joins with Respondent-Mother in contesting the finding that ceasing reunification efforts with A.K. was in A.K.'s best interests.

In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

(1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2009). "Reasonable efforts" when a trial court determines a child is not to be returned home "means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile." N.C. Gen. Stat. § 7B-101(18) (2009). A "trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). "This Court reviews

an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (citations omitted).

Respondent-Mother argues that the trial court based these conclusions of law upon findings of fact that Respondent-Mother was incapable of parenting alone and would need assistance. Respondent-Mother argues that these findings of fact are not supported by evidence but are based upon speculation. Respondent-Father disputes the trial court's finding of fact that DSS had made reasonable efforts to reunify A.K. with her parents. Respondent-Father argues DSS did not make diligent efforts at reunification.

The trial court's findings of fact are binding upon this Court "where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984). Findings of fact are also binding if they

are not challenged on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The trial court found that, since the filing of the petitions, DSS had made reasonable efforts to reunite the juveniles with their parents, and that these efforts included providing supervised visitation, referrals for psychological evaluations for each parent, parenting education, and medical evaluations and treatment for the juveniles. Respondent-Mother does not contest this finding concerning the efforts made by DSS and Respondent-Father contests it only as it applies to A.K., contending DSS had not provided the same services in A.K.'s specific case. Respondent-Father, however, does not contest the trial court's finding that the evidence in the cases concerning the three older children and their parents was specifically relevant to the disposition as to A.K.

Respondents do not challenge the trial court's findings of fact that: (1) they have been inconsistent in attending the juveniles' speech therapy or medical appointments, having missed at least seventeen appointments for L.K. at a rehabilitation clinic; (2) Respondents, even after completing parental classes, have failed to demonstrate appropriate parenting skills; (3) Respondent-Father is very controlling of Respondent-Mother; (4)

Respondent-Father's behavior created a significant risk to the safety of the children; (5) Respondent-Father has failed to acknowledge any responsibility for the children being and remaining in foster care; (6) Respondents have moved several times during the pendency of this case; (7) Respondent-Mother has not been able to properly administer medications to her special needs children; and (8) Respondents have demonstrated poor decision-making by, *inter alia*: failing to notify DSS of changes of residence, attempting to conceal Respondent-Mother's pregnancy with A.K., failing to seek prenatal care, making unsupported accusations of abuse by the father of J.K. and B.K. and the foster parents, and calling an ambulance to transport the children to a hospital when they exhibited only marks on their skin consistent with a skin rash.

In summary, these findings of the trial court reflect that, over a course of two years, Respondents have not significantly improved their parental skills or remedied the factors which led to the removal of the children from the home. We hold the findings support the trial court's conclusions of law that A.K. was a neglected juvenile, that reunification efforts for all the children would be futile, and that the permanent plan for L.K. and A.K. should be adoption.

We affirm the orders of the trial court.

Affirmed.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).