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NO. COA05-1349

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

IN THE MATTER OF:
H.C. and G.C.

Lee County
Nos. 04 J 91-92
01 J 52

Appeal by respondents from orders entered 11 February 2005, 17 June 2005 and 26 August 2005 by Judge George R. Murphy in Lee County District Court. Heard in the Court of Appeals 10 May 2006.

Beverly D. Badsen, P.C., by Beverly D. Badsen, for petitioner-appellee Lee County Department of Social Services.

Elizabeth Myrick Boone for Guardian ad Litem.

The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for respondent-appellant-grandmother.

Janet K. Ledbetter for respondent-appellant grandfather.

BRYANT, Judge.

Respondents (grandmother, C.K.¹ and grandfather, R. K.) appeal from a nonsecure custody order entered 11 February 2005 adjudicating their grandchildren, H.C. and G.C., neglected and dependent and continuing legal and physical custody with Lee County Department of Social Services (DSS-petitioner). Respondents also

¹We use initials throughout the opinion to protect the identity of the juveniles.

appeal from 17 June and 26 August 2005 orders in which the trial court denied respondent's Rule 59 Motion for a New Trial.

H.C. (age 3) and G.C. (age 2) are the biological grandchildren of C.K. and R.K. The grandparents had been the primary caregivers, with the grandmother, a twenty-year licensed nurse practitioner, assuming a majority of the responsibility. The grandparents were married for forty-six years, and their daughter, J.E. is the biological mother of H.C. and G.C. Due to J.E.'s substance abuse problem, she cannot care for her children.

In September 2004, the grandmother was treated for physical exhaustion and H.C. and G.C. went to stay with their biological father in Georgia. Later that month, the grandmother brought H.C. and G.C. back to North Carolina from Georgia and called DSS to say she was leaving her alcoholic husband. The grandmother temporarily moved into a studio apartment with H.C. and G.C. in late October 2004.

On 1 November 2004, DSS received anonymous calls alleging that H.C. and G.C. were being emotionally abused and neglected because they were being called "half-breeds." In response to the referral, DSS visited H.C. and G.C.'s daycare, the grandparents' home and the grandmother's studio apartment on 2 November 2004. H.C. and G.C. appeared to be clean and it was observed that H.C.'s tooth had been knocked out, but her lip was not swollen or bruised. During the visit, the grandmother explained H.C. had lost a tooth and took her to a dentist the next morning. The grandmother denied allegations of having had a nervous breakdown in September and stated her

physical health had greatly improved since then. She also denied allegations that she yelled at H.C. and G.C. The grandfather however, admitted to drinking several beers a day. He stated he not only objected to interracial relationships and "mixed" children, but also that he had a problem with H.C. and G.C. being classified as black. The grandmother was in the process of cleaning out the studio apartment while living there with H.C. and G.C. The social worker, who inspected the apartment within days of the grandmother moving in, stated it was severely cluttered such that there was no clear walking path for the children and because of the physical condition of the apartment felt that the children were at risk of harm. DSS took custody of H.C. and G.C. on 3 November 2004.

At the 23 November 2004 adjudication hearing, respondents' adult daughter testified that during her August 2004 visit to her parent's home, she observed her father drinking heavily and making derogatory remarks to H.C. and G.C. about their biological father. The daughter testified she also observed the grandmother telling the children that their "mother left you" and she "was all they had." At the hearing, the grandmother again denied yelling at H.C. and G.C. and described them as well behaved, normal active children who are not hard to handle. The grandmother expressed a desire to care for the children and to take them home with her.

At the 7 December 2004 hearing, the grandfather testified and admitted to drinking two to seven days a week. However, he also testified that the grandmother takes excellent care of H.C. and

G.C. He denied allegations that the grandmother yelled at the children, stating they were well behaved. He testified that she moved out of their marital residence hoping to resume custody of H.C. and G.C. Based on these facts, the trial court adjudicated the children neglected and dependent with respect to the grandfather and grandmother. The order was entered on 11 February 2005.

On 21 February 2005, the grandmother filed notice of appeal and later that same day, the grandfather filed a motion for a new trial, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. Attached to the motion was an affidavit written by his eldest daughter stating: "[C.K. and R.K.] take care of [my] 14 year old daughter every afternoon after school . . . I visit my parents often and have never seen them hit, switch, spank, pull hair or cuss any of their grandchildren. I have never seen black eyes on [my children] or any of the grandchildren in my parents care or any sexual abuse."

On 22 March 2005 the trial court declined to hear the grandfather's motion for a new trial for lack of jurisdiction. On 9 August 2005, the trial court denied the grandfather's motion for a new trial. The orders were entered 17 June and 26 August 2005, respectively. From these orders, in addition to the 11 February 2005 order adjudicating H.C. and G.C. neglected and dependent, respondents appeal.

Respondent grandmother raises the following issue on appeal: whether the trial court erred in (I) failing to enter the

adjudication and disposition order within thirty days of the 7 December 2004 termination hearing. Respondent grandmother and grandfather both raise on appeal: whether the trial court erred in (II) denying respondent grandfather's Rule 59 motion for a new trial; and (III) adjudicating H.C. and G.C. neglected and dependent.

I

Respondent grandmother argues the trial court erred in failing to enter the adjudication and disposition order within thirty days of the 7 December 2004 termination hearing. We disagree.²

North Carolina General Statutes, Section 7B-807(b) requires that an adjudication order "shall be in writing and shall contain appropriate findings of fact and conclusions of law. . . . [E]ntered no later than 30 days following the completion of the hearing." N.C. Gen. Stat. § 7B-807(b) (2005). However, reversing orders absent a showing of prejudice and "simply because they were untimely filed would only aid in further delaying a determination regarding [] custody because juvenile petitions would have to be re-filed and new hearings conducted." *In re E.N.S.*, 164 N.C. App. 146, 153, 595 S.E.2d 167, 172 (trial court's failure to file child

²Respondents argue in their brief and petitioners respond regarding the 30-day statutory requirement for entry of order using N.C. Gen. Stat. § 7B-1109(e). N.C.G.S. § 7B-1109(e) applies to termination of parental rights cases and is not applicable here. Therefore, we decline to address this issue pursuant to N.C.G.S. § 7B-1109(e). However, assuming *arguendo* the parties meant to reference N.C. Gen. Stat. § 7B-807(b) (timely filing of adjudication orders) and given the substantial similarity between the filing requirements of §§ 7B-1109(e) and 7B-807(b), we will review this issue pursuant to N.C.G.S. § 7B-807(b).

neglect adjudication and disposition orders within thirty days as required under G.S. 7B-807(b) was not grounds for reversal because the mother could not show how she was prejudiced by the late filing), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

In the case *sub judice*, the adjudication hearing was held on 7 December 2004. The adjudication order was entered on 11 February 2005, thirty-four days after the orders should have been entered pursuant to N.C.G.S. § 7B-807(b). Respondent grandmother alleges that the thirty-four day delay in filing the order has "extended the time she has been away from the children." However, absent specific evidence to support her argument and the *de minimis* violation, we hold the time delay in filing the adjudication and disposition order did not prejudice respondent grandmother. This assignment of error is overruled.

II

Respondents argue the trial court abused its discretion when it denied respondent grandfather's Rule 59 motion for a new trial. We disagree.

The 2003 version of N.C. Gen. Stat. § 7B-1003, which was in effect at the time of the trial court's decision³, states:

³Effective 1 October 2005, N.C.G.S. § 7B-1003 was changed:

Pending disposition of an appeal of an order entered under Article 11 of this Chapter where the petition for termination of parental rights was not filed as a motion in a juvenile matter initiated under Article 4 of this Chapter, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

Pending disposition of an appeal, the return of the juvenile to the custody of the [custodian] . . . with or without conditions, may issue unless the court orders otherwise. . . . For compelling reasons, which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C.G.S. § 7B-1003 (2003). A trial court's ruling on a Rule 59 motion is reviewable only for an abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 516 S.E.2d 858 (1999). "[O]nce a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*." *R.P.R. & Assocs. V. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346, 570 S.E.2d 510, 513 (2002), *disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003); see N.C. Gen. Stat. § 1-294 (2005). Only if a party appeals a non-appealable interlocutory order, may the trial court properly proceed with the case. *Id.* at 347, 570 S.E.2d at 514. Adjudication and disposition orders are final, appealable orders and this exception does not apply to those cases. N.C. Gen. Stat. § 7B-1001(3) and (4) (2005).

In the case *sub judice*, the grandmother filed her notice of appeal of the nonsecure custody order conferring jurisdiction on this Court. This was done before the grandfather filed his Rule 59 motion, even though both filings occurred on 21 February 2005. At the 22 March 2005 Rule 59 hearing, the trial denied the motion for lack of jurisdiction. On 9 August 2005, the trial court held a

N.C.G.S. § 7B-1003 (2005).

rehearing of the grandfather's motion for a new trial and decided that since the grandmother's appeal had not been dismissed by this Court, the trial court was divested of jurisdiction to hear the motion and issued an order denying the motion pending the appeal process.

Respondents' rely on *In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), for the proposition that the jurisdiction of the trial court continues notwithstanding a pending appeal. See *R.T.W.*, 359 N.C. at 547, 614 S.E.2d at 494 (holding a trial court does retain jurisdiction to enter an order terminating parental rights while appeal is pending in the same case). The Juvenile Code requires that review "of a final order of the court in a juvenile matter shall be made directly to the Court of Appeals." N.C. Gen. Stat. § 7B-1001 (2003). A final order includes any order modifying custodial rights. N.C. Gen. Stat. § 7B-1001(4) (2003). Thus, pending disposition of such an appeal, the trial court's authority over the juvenile is statutorily limited to entry of "a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." N.C. Gen. Stat. § 7B-1003 (2003). In the instant case, however, respondent filed a motion for a new trial while grandmother's custody appeal was pending. Neither the holding in *R.T.W.* nor the 2003 version of N.C.G.S. § 7B-1003 allows the trial court to continue to exercise jurisdiction to hear motions for a new trial after a custody order has been appealed to this Court. N.C.G.S. § 7B-1003 (2003). Consequently, the trial court properly

denied respondent grandfather's motion for a new trial. This assignment of error is overruled.

III

Respondents argue the trial court erred in adjudicating H.C. and G.C. neglected and dependent as there was a lack of clear and convincing evidence of neglect and dependency. 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 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 the law.

N.C. Gen. Stat. § 7B-101(15) (2005).

"When an appellant asserts that an adjudication order of the trial court is unsupported by the evidence, the appellate court examines the evidence to determine whether there exists clear, cogent and convincing evidence to support the findings." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Clear and convincing evidence should be evidence which will "fully convince." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001). The petitioner bears the burden of showing neglect and dependency by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2005). While the determination of neglect is a fact specific inquiry, "not every act of negligence" results in a "neglected juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (an anonymous call reporting an unsupervised, naked, two-year-old in her driveway, standing alone, does not constitute

neglect). A parent's conduct in a neglect determination must be viewed on a case-by-case basis considering the totality of the evidence. *Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 86 (2001), *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002).

The grandmother was H.C. and G.C.'s primary caretaker since their birth. The grandmother separated and relocated from the abusive and alcoholic grandfather, her husband of forty-six years, to provide a more conducive child rearing environment for H.C. and G.C. After making such a significant lifestyle change, DSS appeared within days of grandmother's relocation to a studio apartment and reported that it was severely cluttered with boxes such that there was no clear walking path. Other than H.C.'s tooth being knocked out after falling in the grandmother's new apartment, the record contains no evidence of an "environment injurious to the juveniles' welfare" as stated in the trial court's order.

The standard of appellate review of a trial court's conclusions of law is limited to whether the court's conclusions are supported by the findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). "When a trial court is required to make findings of fact, it must make the findings specially. The trial court may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted).

In the disposition order, the trial court concluded that DSS "was precluded from making reasonable efforts to prevent and/or eliminate the need for the juveniles' [out of home] placement." However, there is no finding to indicate what DSS' reasonable efforts were in this case. N.C. Gen. Stat. § 7B-507(b) (2005)⁴. From the time DSS removed the children from respondent grandmother's custody and placed them in foster care, the record does not reflect reasonable efforts by DSS to reunify the children with their grandmother; rather the opposite appears true. See *In re Everett*, 161 N.C. App. 475, 480, 588 S.E.2d 579, 583 (2003) ("[T]he record reveals that DSS never pursued reunification efforts with respondent, or properly evaluated [respondent's] parenting capabilities. Therefore, the record would not support a finding that reunification was futile under N.C. Gen. Stat. § 7B-507(b) (1).").

The trial court's order incorporated by reference the 7 December 2004 DSS court report stating although the grandmother has

⁴N.C. Gen. Stat. § 7B-507(b) (2005) (emphasis added) states:

In any order placing a juvenile in the custody or placement responsibility of a county department of social services . . . 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[.]

"secured an appropriate home environment" and "continues to reside separate from [her husband]", DSS stated H.C. and G.C.'s risk of harm had not decreased. At the time of the seven-day hearing, the grandmother had moved out of the cluttered studio apartment into another home and the social worker testified that it was clean, uncluttered and had separate bedrooms for H.C. and G.C. The grandmother testified that she experienced occasional back and knee pain, but at the time of the hearing did not have physical limitations preventing her care for her grandchildren. In addition to meeting the daily needs of H.C. and G.C., she read to them and indicated that they are well behaved. At the time the children were taken into DSS custody, testimony from the social worker indicated they appeared healthy, well fed and clean. See *Stumbo* at 283, 582 S.E.2d at 258 ("In order to adjudicate a juvenile neglected, [our] courts have additionally 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.") (citations omitted) (internal quotation marks omitted). Clearly, the conditions that initially led to the removal of H.C. and G.C. had been corrected by the grandmother at the time of the hearing, such that she was no longer living with the grandfather and she had no physical limitations to caring for her grandchildren. We find no clear and convincing evidence to support the trial court's conclusion of neglect as to the grandmother.

A dependent juvenile is defined as one who is:

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) (2005). "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).

Here, the adjudication hearing occurred only one month after DSS filed the petition for abuse, neglect and dependency. At that time, the grandmother's health had greatly improved from her medical condition of September 2004. By the time of the hearing, the grandmother testified that she did not feel like her health would interfere or keep her from caring for H.C. and G.C. There was no testimony that challenged the grandmother's physical ability to care for H.C. and G.C. The grandmother testified she was able and capable of caring for H.C. and G.C. and had since moved to a suitable uncluttered home environment. The trial court concluded "[n]o clear, cogent or convincing evidence has been presented . . . [of any] serious emotional damage" to the grandchildren. Based on the absence of evidence of abuse or a lack of care on the grandmother's part, petitioner failed to meet its burden and the trial court erred in adjudicating H.C. and G.C. neglected and dependent. We therefore reverse the trial court's judgment as to the grandmother.

With respect to the grandfather, who lives in a separate residence from the grandmother, we note the trial court's findings regarding his alcoholism and his lack of assistance in rearing H.C. and G.C., *inter alia*, support its conclusions as to neglect and dependency. The trial court did not err in adjudicating the children neglected and dependent as to the grandfather.

Affirmed as to the denial of the new trial motion and adjudication of neglect and dependency as to grandfather.

Reversed as to the adjudication of neglect and dependency as to the grandmother.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).