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NO. COA05-1532

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

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

Alamance County
Nos. 04 J 137, 138

Appeal by respondents from an order filed 21 February 2005 by Judge Bradley R. Allen, Sr. in Alamance County District Court. Heard in the Court of Appeals 7 June 2006.

Jamie L. Hamlett petitioner-appellee for Alamance County Department of Social Services.

Alexandra S. Gruber for the North Carolina Guardian ad Litem Program.

Richard E. Jester for respondent-appellant-mother.

Peter Wood for respondent-appellant-father.

BRYANT, Judge.

Respondent mother (T.C.¹) and respondent father (R.C.) appeal from a 21 February 2005 disposition order adjudicating H.P. (age 15) to be abused, dependent and neglected, and adjudicating C.C. (age 7) to be dependent and neglected. T.C. is the mother of both children. R.C. is the father of C.C. and the stepfather of H.P.

In the respondents' home, H.P. and C.C. were exposed to verbal altercations and incidents of domestic violence. On one occasion,

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

T.C. threw a knife at R.C. in the presence of the children. On another occasion, R.C. hit H.P. and poured beer in her eyes while in the presence of T.C.

On the evening of 10 July 2004, H.P. reported to the Alamance County Sheriff's Department that her stepfather, R.C., had sexually abused her. R.C. was subsequently arrested and charged with first-degree rape. At the time H.P. reported her stepfather's abuse, C.C., age seven, was also living in the home with respondents.

A social worker visited respondents' home to review the allegations of sexual abuse and to have respondents sign a safety response plan ensuring R.C. would not be left alone with a child while the investigation was pending. Respondents refused to sign a safety plan. The Alamance County Department of Social Services (DSS) removed H.P. and C.C. from respondents' custody because they were exposed to a "substantial risk of sexual abuse."

In January 2005, a four-day hearing was conducted before the Honorable Bradley R. Allen, Sr. to review the DSS petitions regarding the children. H.P. testified her stepfather had been sexually abusing her since she was ten or eleven years old. H.P. testified her stepfather molested her often by touching her "[o]n my butt or on my boobs." H.P. told the trial court her stepfather pulled her shorts down, pushed her down on the couch, and put his finger in her vagina. H.P. also alleged that in "[l]ate December or early January of 2003 or 2004" her stepfather raped her after she had consumed four alcoholic beverages that he provided. H.P.

was lying down in the truck, listening to the radio, when R.C. came to the truck and told her to sit up, and pulled her pants down. H.P. tried to "kick him off me," but he pulled her pants down further. R.C. then penetrated her while she was lying on her stomach and, after five or ten minutes of intercourse, told her if she ever told anybody, he would kill her. H.P. testified she was "scared to tell anybody" about her stepfather's actions. She further testified she did not tell her mother about the abuse because she was scared her mother would not believe her. When respondent mother learned of the abuse, she called H.P. a "rude and lying bitch." H.P. was found to be abused, neglected and dependent and C.C. was found to be neglected and dependent. Respondents appeal.

Respondent mother raises whether the trial court erred in: (I) excluding her from the courtroom during H.P.'s sexual abuse testimony and (II) in finding and concluding C.C. was neglected and dependent. Both respondents raise on appeal whether the trial court erred in: (III) finding and concluding H.P. was abused, neglected and dependent. Respondent stepfather raises on appeal whether the trial court erred in (IV) making findings of fact sixty, seventy and ninety. Lastly, respondents appeal whether the trial court erred in (V) showing a bias toward H.P. during the hearing.

Respondent mother argues the trial court erred in excluding her from the courtroom during H.P.'s sexual abuse testimony. We disagree.

The nature of process due in parental rights termination proceedings turns on a balancing of the 'three distinct factors' specified in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

In re Murphy, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397-98, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992) (citation omitted) (*Eldridge* factors). A parent's right to confront witnesses in an abuse and neglect hearing is protected where the mother is removed from the courtroom during the child's testimony but her counsel remains. *In re Barkley*, 61 N.C. App. 267, 300 S.E.2d 713 (1983).

The first *Eldridge* factor stated above (the private interests affected by the proceeding) weighs in favor of the private interests of the respondent mother being in the courtroom for H.P.'s testimony. However, factors two and three outweigh respondent mother's private interests. The trial court found:

14. That prior to the testimony in this case beginning, a motion was made to allow the Respondent Mother to stay in the courtroom during [H.P.'s] testimony. That a prior hearing was held in this matter and it was determined that remote testimony equipment would be brought in for the testimony of [H.P.] so that [H.P.] would not have to testify in the presence of either [respondent].
15. That the equipment has been tested prior to [H.P.] being called to the witness

stand and the equipment is working properly.

16. The equipment has been shown and explained to [respondents].
17. The equipment allows [respondents] to sit in the Judge's Chambers (which is five feet from the courtroom) and watch [H.P.'s] testimony on a television. [H.P.'s] testimony can be heard.
18. At any time [respondents] can signal or talk with their attorneys by hitting a button, which will cause a red light to flash on [respondents'] attorneys' table. The attorneys will tell the court they need to step out and be allowed to do so. There will be no testimony taken while the attorneys step out to talk with clients.

These findings clearly demonstrate a fair process which allowed H.P. to give her testimony outside the presence of respondent mother, while enabling the mother to communicate with her counsel at all times. In addition, the countervailing judicial interests were also met by the trial court providing the least threatening environment in which to receive H.P.'s testimony.

Respondent mother argues the trial court failed to make specific findings as to the harm that would result to H.P. if she testified in the presence of her mother. The trial court clearly found H.P. had no desire to return home and that she had been mentally and physically abused in respondents' home. The trial court also found respondent mother bruised H.P.'s left eye by hitting her and that H.P. delayed disclosing her stepfather's conduct because she was fearful her mother would not believe her disclosure of sexual abuse. Respondent concedes, and the trial

court found, the mother did not believe H.P.'s allegations. See *In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005) (exclusion of the mother from the courtroom upheld while her son testified where the mother was charged with kidnapping and a therapist testified the mother's presence disturbed the child); see also *In re Stradford*, 119 N.C. App. 654, 460 S.E.2d 173, *disc. review denied*, 341 N.C. 650, 462 S.E.2d 525 (1995) (where the children's testimony in the presence of the accused would have been harmful, child testimony by closed circuit television was held sufficient to protect accused's confrontation rights). The trial court found sufficient reasons for H.P. to fear testifying in the presence of her mother. Therefore the trial court did not err in excluding respondent mother from the courtroom during H.P.'s testimony while respondents' counsel remained in the courtroom for the testimony and in constant communication with respondent mother. This assignment of error is overruled.

II & III

Only respondent mother argues the trial court erred in finding and concluding C.C. was neglected and dependent. However, both respondent mother and stepfather argue the trial court erred in finding and concluding H.P. was abused, neglected and dependent. Respondents contend collectively there was insufficient evidence upon which to base the determination of abuse, neglect and dependency. We disagree.

In juvenile adjudication proceedings "the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence."

In re Oghenekevebe, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). "It is that judge's duty to 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) (citation omitted).

North Carolina General Statutes, Section 7B-101(1)(d) provides that a juvenile is "abused" if, among other things, that child's "parent, guardian, custodian or caretaker . . . [c]ommits, 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."² N.C. Gen. Stat. § 7B-101(1)(d) (2005). North Carolina General Statutes, Section 7B-101(15) provides that a juvenile is a "neglected child where she or he: [D]oes not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . ; or who lives in an environment injurious to the juvenile's welfare" N.C. Gen. Stat. § 7B-101(15) (2005). In determining whether a juvenile is a neglected juvenile, "it is relevant whether that juvenile lives in

²N.C. Gen. Stat. § 14-27.2 provides *inter alia*:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse: (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C.G.S. § 14-27.2 (2005).

a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* A child is "dependent" where the juvenile's "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).

The trial court made extensive, detailed findings of fact regarding sexual abuse of H.P. by her stepfather. Among these, the trial court found R.C. put his finger in H.P.'s vagina when she was ten or eleven years old; R.C. molested H.P. several times in that he touched her "boobs," butt or vagina and that such molestation was ongoing for several years; and R.C. put his penis in H.P.'s vagina. The trial court made additional findings with respect to corroborative medical evidence presented by Dr. Joseph Pringle that the examination of H.P. showed her vagina area had been "penetrated and there was a V-shaped notching in a cleft in the sidewall at the 12 o'clock position of the vagina which indicates slight tearing of the vagina area and a nodule of scar tissue at the 9 o'clock position" These findings, *inter alia*, constitute clear and convincing evidence to support a determination that H.P. was an abused child pursuant to N.C.G.S. § 7B-101(1).

Respondent stepfather argues that the trial court erred in determining he was guilty of a criminal offense; specifically, those acts contained in the definition of an "abused juvenile" under N.C.G.S. § 7B-101(1). The juvenile statute, while citing the criminal code, does not require a juvenile court to make findings

that such a crime was committed by a criminal standard, but rather, by clear and convincing evidence. See, e.g., *In re Cogdill*, 137 N.C. App. 504, 528 S.E.2d 600 (2000) (conclusion of abused juvenile supported where father perpetrated indecent liberties with a minor when he exposed his genitals to the juvenile supported an inference that he did so "for the purpose of arousing or gratifying sexual desire"). In this case, the trial court made findings of fact which show R.C.'s act of raping his daughter satisfied the elements of first-degree rape under N.C.G.S. § 14-27.2, such that the statutory requirements of N.C.G.S. § 7B-101(1) were met based upon clear and convincing evidence.

Because the trial court found H.P. was an abused child, such a finding supports the trial court's determination that C.C. was a neglected child, since the children lived in the same home. See N.C.G.S. § 7B-101(15); see also *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994) (holding that "evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile" noting the statute "affords the trial judge some discretion in determining the weight to be given such evidence"). With respect to both children, the trial court specifically found that, "the home environment was not safe []; that [respondents] argued quite often and that [respondents have assaulted each other]." The trial court found H.P. was allowed to drink alcoholic beverages in the presence of her mother and respondent has hit and choked her children. C.C. lived in a home where her stepsister was being sexually abused by R.C. and where

domestic violence and juvenile alcohol consumption occurred with respondents' knowledge. These findings constitute clear and convincing evidence to support the trial court's determination that C.C. and H.P. were "neglected" that they did not receive "proper care, supervision, or discipline" from their parents, and that the children lived "in an environment injurious to the [their] welfare." N.C.G.S. § 7B-101(15) (2005).

In this case, the trial court also adjudicated both juveniles to be dependent, pursuant to N.C.G.S. § 7B-101(9). As discussed above, the trial court determined that neither respondent was able to provide a safe environment for the children at the time of the adjudication in this case. The trial court found that T.C. originally assured DSS that she would not leave C.C. alone with R.C., only to leave C.C. alone with him. Because T.C. refused to believe H.P.'s disclosure of sexual abuse and refused to protect C.C. from R.C., this led to DSS's removal of the children from respondents' home. Accordingly, these findings of fact and conclusions of law that the children were dependent are supported by clear and convincing evidence.

Finally, respondents argue the trial court improperly delegated its fact finding duty to DSS and the Guardian ad Litem by "adopting their court reports as dispositional finding of fact #23." We disagree. The trial court made ninety-five findings of fact which detailed the court's credibility determinations of witness testimony, in addition to incorporating the information and recommendations contained in the DSS and GAL reports. The GAL and

DSS reports supplement the trial court's extensive and independent findings of fact. This assignment of error is overruled.

IV

Respondent stepfather argues the trial court erred in making findings of fact sixty, seventy and ninety:

- 60. The statements during this testimony were that [H.P.] has been molested for 2½ years and raped in January of 2004 by her stepfather, [R.C.].
. . .
- 70. The Respondent Mother also denied that [R.C.] broke her arm during an argument; that [H.P.] testified that her mother has related in her presence that [R.C.] broke her arm.
. . .
- 90. From the evidence, the [c]ourt finds that [R.C.] has committed first[-]degree rape, first[-]degree sexual offense and indecent liberties.

"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, 781 (1991) (citation omitted). Respondent stepfather's brief assigns error to only findings of fact numbers sixty, seventy and ninety. The numerous unchallenged findings of fact are binding on appeal. See *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). In the present case, H.P. testified in detail about the sexual abuse and neglectful environment she lived in with her mother and stepfather. Respondents challenge the trial court's findings of fact based on its belief in H.P.'s testimony. Determining the credibility of witnesses, the weight to be given

their testimony and the reasonable inference to be drawn therefrom is the responsibility of the trial court. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968); *Whisnant*, 71 N.C. App. 439, 322 S.E.2d 434. As the trier of fact, the trial court may believe or disbelieve the testimony of any witness. *In re Whichard*, 8 N.C. App. 154, 160, 174 S.E.2d 281, 285 (1970). In addition to H.P.'s testimony, H.P. told consistent accounts of being sexually abused to friends, law enforcement, medical professionals, and the trial court. As testified by the forensic interviewer, H.P.'s "disclosure of sexual abuse by her stepfather includes idiosyncratic detail, contextual embedding, distressed emotional tone related to the reactions of others and she presented with affect consistent with having experienced a negative or traumatic event as described." H.P.'s child medical evaluation revealed she had been penetrated and the physical evidence was consistent with and corroborated the history disclosed to her doctor. Respondent stepfather's brief assigns error to these findings because he contends they are "sloppy and legally inadequate. They simply restate what witnesses said at trial." This medical evaluation testimony supports the trial court's numerous detailed findings of fact supporting H.P.'s disclosure of sexual abuse, which were not assigned as error by respondent stepfather. Finding of fact ninety is equally supported by the trial court's extensive findings, see discussion in *Issues II & III, supra*. This assignment of error is overruled.

Respondents argue the trial court erred in showing a bias toward H.P. during the hearing. Respondents allege the trial court had "made up his mind" prior to the conclusion of the hearing that H.P. "was telling the truth." Further they allege the trial court was not an "impartial finder of the facts" and that the trial court "left the bounds of judicial conduct and took sides," yet respondents fail to support such allegations with evidence as to the alleged judicial bias.

This Court has previously held that the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially. *State v. Scott*, 343 N.C. 313, 325, 471 S.E.2d 605, 612 (1996) (quoting *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987)). Thus, the standard is whether grounds for disqualification actually exist.

Lange v. Lange, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (internal quotation marks omitted). The party moving for recusal must objectively demonstrate grounds for disqualification actually exist. *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 778, 525 S.E.2d 826, 828 (2000). "The moving party, supported by affidavits, may meet his burden by presenting 'substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.'" *Id.* (citations omitted).

In this case, respondents argue the trial court failed to conduct witness examinations in a manner deemed fair and that

respondents' parental rights were not protected. However, respondents have not met their burden of proof. Respondents have not produced affidavits to show that grounds for disqualification of the trial court actually exist. Consequently, there is a lack of objective and substantial evidence the trial court displayed personal bias, prejudice or interest such that judicial recusal was warranted. See *Lange* at 649, 588 S.E.2d at 880 (holding it was error for a trial court judge to determine that recusal was appropriate based on "inferred perception and not the facts as they were found to exist"). This assignment of error is overruled.

Affirmed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).