NO. COA05-819

NORTH CAROLINA COURT OF APPEALS

Filed: 2 May 2006

IN THE MATTER OF:
T.H.F. & S.F.,
Minor Children

Johnston County
No. 02 J 97-98

Appeal by respondent Dekeshia Jackson from adjudication and disposition orders entered 22 December 2004 by Judge Albert A. Corbett, Jr. in Johnston County District Court. Heard in the Court of Appeals 25 January 2006.

Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.

Attorney Advocate James D. Johnson, Jr. for appellee Guardian ad Litem.

Katharine Chester for respondent-appellant paternal aunt.

JOHN, Judge.

Respondent Dekeshia Jackson ("respondent") appeals the trial court's 22 December 2004 orders 1) adjudicating T.H. and S.F. ("the children") neglected and dependent, 2) determining, *inter alia*, that it was in the children's best interests to remain in the custody of the Johnston County Department of Social Services ("DSS"), and 3) relieving DSS of any further reasonable efforts toward reunification between the children and respondent, the

children's paternal aunt. For the reasons stated herein, we reverse.

The biological parents of the children are Francine H. ("the mother") and Lamont F. ("the father"). In or around October 2001, DSS received reports the children were residing in an unclean and unsanitary home with the mother who failed to supervise them appropriately. On or about 22 May 2002, the children were removed from the mother's home because of her failure to address those issues. On 5 June 2002, the trial court granted temporary custody of the children to their paternal grandparents ("the grandfather" and "the grandmother"). The latter were appointed legal guardians of the children on or about 19 February 2003 upon adjudication of the children as neglected by their parents.

In March 2004, the grandfather passed away and at some point the grandmother returned the children to the mother in violation of a previous court order. Upon receiving a 13 April 2004 report that the children were residing with the mother, DSS removed them from her home. On 19 April 2004, the children began residing with respondent, respondent's husband, and their two children. Respondent is the paternal aunt of the children.

At a 30 June 2004 review hearing, the trial court determined it was in the children's best interests to be placed with respondent and her husband. The court's order, signed 4 August 2004, and filed 10 August 2004, contained the determination that respondent and her husband "have ensured that the juveniles' needs are being appropriately addressed and [have] placed the juveniles

in a daycare facility." The court further noted no reports had been made to DSS since the children had been living with respondent and that the children were "adjusting well to their environment." Legal custody of the children was placed in respondent and her husband who were accorded authority to make necessary medical, psychological, and educational decisions for the children's care.

In addition, the court's order approved and incorporated a visitation plan under which the mother and father were allowed unsupervised visitation with the children. Visits were to occur at least one day per week and were to last a minimum of two hours and a maximum of eight hours per day. Under the plan, respondent and her husband were to "be aware of where the children are going" and visits were not to take place at the home of the mother.

A permanency planning review hearing was conducted 21 July 2004 followed by a 27 August 2004 order. The trial court found therein that respondent and her husband were

> ensuring that the juveniles' needs are being appropriately addressed in a safe, stable and nurturing environment. [Respondent and her husband] have ensured that the juveniles have been enrolled in daycare and are making sure that their needs are being appropriately addressed.

Notwithstanding, DSS filed 4 October 2004 juvenile petitions alleging the children were neglected and dependent on grounds they were living in an environment injurious to their welfare. According to the petition, respondent violated the court's earlier visitation order by leaving the children unsupervised with the mother and father and subsequently "not returning to get the[]

children." In consequence of the petitions, the trial court issued nonsecure custody orders for the children on the same day.

At the 24 November 2004 adjudication hearing, three persons testified: respondent, the mother, and Qiana Jones ("Jones"), a court intervention services worker with DSS. Testimony presented at the hearing focused upon the dates of 1, 3 and 4 October 2004.

Respondent testified she took the children to a doctor's appointment on Friday, 1 October 2004, lasting from 10:00 a.m. until approximately 12:00 p.m. Because S.F. would have gotten off the school bus at 2:00 p.m., respondent decided not to take him to school after the doctor's appointment and likewise did not return T.H. to daycare.

Respondent further indicated she brought the children to the home of Tracy Joyner ("Joyner"), the children's maternal aunt, for a visit on Sunday, 3 October 2004. Respondent stated her arrangement with Joyner was that the latter would bring the children to respondent's residence following the visit. However, at approximately 9:30 p.m. that evening, Joyner telephoned respondent to inform her the children could not be driven to respondent's home because Joyner was experiencing car problems. Respondent and Joyner agreed the children would spend the night with Joyner. On 4 October 2004, respondent telephoned the mother between 8:00 a.m. and 9:00 a.m. to obtain the telephone number of a potential employer. In that conversation, respondent was not informed the children were with the mother. Respondent first learned of this when telephoned by Jones.

The mother acknowledged in her testimony that, although aware of the trial court's prohibition concerning the children being in her home, she did not inform DSS when the grandmother returned them to that location upon the grandfather's death. Concerning the evening of 3 October 2004, the mother testified she had been at Joyner's residence at the time of a telephone conversation between Joyner and respondent. However, she did not know what arrangements had been made for the children's transportation. According to the mother, Joyner brought the children to her house on 4 October between 8:30 a.m. and 8:45 a.m. because Joyner had to go to work. Although aware of the court order restricting the children from her residence, the mother failed to notify anyone of their presence. She testified she attempted to telephone respondent, but received a "busy signal or [the call] didn't go through." Her plan was to prepare breakfast for the children and then take them to respondent's house. Because there was no food in her refrigerator, she walked to the grocery store and purchased cereal and milk for the children. Thereafter, two social workers from DSS arrived at her residence and removed the children.

Jones testified she had been involved with the children since July 2004. She and another social worker arrived at the mother's residence at approximately 9:30 a.m. on 4 October 2004. At that time, they noted two gentlemen standing outside in the driveway. The mother answered the door and, in response to inquiry by the social workers, acknowledged the children were present in the house. Jones observed beer bottles throughout the residence, some

opened, some not opened, and some half full. The refrigerator was empty, although the mother stated she had purchased cereal for the children that morning. The children were located in an upstairs bedroom and, according to Jones, appeared to be playing hide and seek. The mother stated Joyner, her sister, had dropped the children off that morning because she had to go to work.

Jones further recounted telephoning respondent, asking if she knew the children were in the residence of the mother and father. Respondent replied in the negative. Jones stated respondent, after arriving at DSS, indicated she brought the children to Joyner's home the previous evening on the understanding that Joyner would drive them back later that night. However, according to Jones, respondent also indicated she told Joyner she would pick up the children the afternoon of 4 October 2004. Jones asserted the statements DSS received from Joyner and respondent were inconsistent, but the trial court sustained objections to testimony about what Joyner had told Jones. Although DSS had subpoenaed Joyner and she was present for a period of time, she subsequently left the courtroom and did not return to testify.

In addition, Jones related the mother reported that respondent was supposed to pick up the children at Joyner's house on Sunday night, but failed to do so. However, Jones also testified the mother "had no idea of any arrangements between Ms. Joyner or [respondent] at all for transporting the kids." Jones reported that, as a result of the incident on 4 October 2004, DSS filed juvenile petitions for both children.

Finally, Jones indicated DSS had been comfortable with respondent's ability to care for the children prior to 4 October 2004, and had never had any concerns about the cleanliness of respondent's home. Jones also acknowledged the children were close to respondent and got along well with her children. Finally, Jones conceded respondent demonstrated her concern about the children's education by enrolling them in speech therapy classes.

By order entered 22 December 2004, the trial court ruled that clear, cogent, and convincing evidence established the children were neglected and dependent. In its disposition order of the same date, the court placed legal and physical custody of the children with DSS, relieved DSS of any "further efforts towards reunification" with respondent, and denied respondent visitation with the children. Respondent appeals.

On appeal, respondent presents three arguments. First, respondent maintains the trial court erred in adjudicating the children neglected and dependent. Next, she asserts the court abused its discretion in denying the children any further contact with their relatives, leaving them in the custody of DSS, and ceasing any further reasonable efforts towards reunification with respondent. Lastly, respondent contends the court entered a permanent plan for the children without making the requisite findings of fact. We consider respondent's arguments *ad seriatim.*

In challenging the trial court's adjudication of the children as neglected and dependent, respondent first challenges certain of the trial court's six findings of fact. "The allegations in a

petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). The "clear and convincing" evidence standard "is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (internal quotations and citation omitted). Clear and convincing evidence is evidence which should "fully convince." *Id.* (citations omitted).

Respondent first directs our attention to Finding of Fact No. 3 which provides:

> On or about August 16, 2004, the JCDSS received a report that [respondent] was allowing the children to visit Francine H[] and Lamont F[] in their home. [Respondent] denied to the investigator that she allowed the children to stay in the home of the parents and [respondent] was repeatedly reminded of the prior court order which would not allow the children to be in the home of [Francine H.] and [Lamont F.] The social worker, Ms. Qiana Jones, discussed with [respondent] any misunderstanding about the visitation plan and [respondent] indicated that she understood the visitation plan that was ordered by the court.

Respondent correctly argues this finding simply recites unproven allegations and merely states DSS received a report.

Respondent also cites that portion of Finding of Fact 5 which reads:

> The mother informed the social worker that she had called [respondent] that evening [referring to the evening of 3 October 2004] to pick up the children; however, [respondent] told her that she was on the way, but never showed up.

Respondent contends this finding is unsupported by clear, cogent and convincing evidence. Although the finding essentially is

simply a recitation of testimony as opposed to a factual determination, to the extent the finding may be interpreted to read that respondent in actuality received the call referenced therein and made the statement indicated in the finding, we agree the challenged portion of the finding is unsupported by clear, cogent and convincing evidence.

The record reflects respondent testified that Joyner was to return the children to respondent's residence following their visit. However, Joyner telephoned respondent at approximately 9:30 p.m. on 3 October 2004, indicating she could not drive the children to respondent's house due to car problems. The mother testified she did not call respondent the night of 3 October 2004 and that, although Joyner telephoned respondent that night, the mother was not a party to their conversation. Finally, Jones testified that respondent related to her, during the course of her investigation, that Joyner had telephoned respondent the night of 3 October 2004 to report car trouble and a consequential inability to return the children at that time. Although Jones testified in substance as set out in the finding, she also reported the mother stated she "had no idea of any arrangements between Ms. Joyner or [respondent] at all for transporting the [children]."

More significantly, respondent contends the trial court's findings of fact do not support the conclusion of law that the children were neglected. Upon careful review, we conclude respondent's assertion has merit.

"'A proper review of a trial court's finding of . . . neglect

entails a determination of (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 (citations omitted), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608, *appeal dismissed*, 356 N.C. 163, 568 S.E.2d 609 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

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) (2005) (emphasis added).

According to our Supreme Court, review of those cases in which "neglect" or a "neglected juvenile" has been properly found "shows that the conduct at issue [in those cases] constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). In the case *sub judice*, DSS alleged the children were neglected on the ground they "live[] in an environment injurious to the juvenile[s'] welfare."

In its order adjudicating neglect, the trial court rendered the following finding of fact:

> 6. The Court finds by clear, cogent and

> convincing evidence that the juveniles are neglected pursuant to NCGS 7b-101(15) in that they were *found* in an environment injurious to their health and welfare and further court orders have been violated which have been enacted to protect the minor children. The Court further finds that the children are dependent pursuant to NCGS 7b-101(9) in that the parents and the custodian were unable to provide prepare *[sic]* care for the juveniles and lacked an alterative *[sic]* care arrangement.

(Emphasis added). Although designated a finding of fact, the foregoing in actuality constitutes a conclusion of law and will be treated as such. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) ("[i]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law . . . .") (internal quotations and citation omitted), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

Read carefully, the trial court's Finding of Fact 6 recites no conclusion consistent with the statutory requirement that the children "live" in an injurious environment, but rather simply states they "were found" in an injurious environment, *i.e.*, the home of the mother and father. Moreover, the court's six findings of fact in their entirety do not support the conclusion that the children "lived" in an injurious environment, and no evidence was presented indicating the children, while residing with respondent, "lived" in an injurious environment. Indeed, Jones' testimony was to the effect that, prior to 4 October 2004, DSS was comfortable with respondent's ability to care for the children and that DSS had never had any concerns about the cleanliness of respondent's home. She also agreed the children were close to respondent and got along

well with her children, and stated that respondent demonstrated concern about the children's education by enrolling them in speech therapy classes.

In short, we hold the trial court erred in concluding the children were neglected by virtue of having been "found" in an injurious environment.

The trial court also based its conclusion of neglect upon a determination that "court orders have been violated which have been enacted to protect the minor children." Leaving aside the issue of whether such determination is encompassed within the statutory definition of neglect, *see* G.S. § 7B-101 (15), we are initially obliged to note the trial court failed to designate respondent as an individual who may have violated the court's orders.

Finding of Fact 1 indicated the grandmother was in violation of a previous court order by returning the children to the mother. No finding or evidence in the record, however, indicated any involvement of respondent in that circumstance.

With respect to violation of the court's orders on 4 October 2004, the evidence is undisputed that Joyner, the children's maternal aunt, brought them to the mother's house. As noted above, no evidence sustains any finding that respondent brought the children to the mother's home or knew the children were there. After learning about the situation, respondent went forthwith to the DSS office in an attempt to rectify the situation. Although arguably negligent in failing to ensure that Joyner did not take the children to the mother's residence, or indeed in failing to

ensure they were in school on 4 October 2004, we are unable to say such conduct constitutes neglect at the level contemplated by the statute. *See In re Stumbo,* 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003)("not every act of negligence on the part of parents or other care givers constitutes 'neglect' under the law and results in a 'neglected juvenile.'")

Respondent also challenges the trial court's conclusion of law that the children were dependent. A dependent juvenile is:

> A juvenile 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).

The trial court's dependency conclusion was based upon the same six findings of fact upon which it concluded the children were neglected. We have determined the trial court erred in its conclusion of neglect. Because respondent did not neglect the children and thus they had a custodian capable of providing for their care, we further hold the trial court erred in concluding the children were dependent. *See In re J.A.G.*, ___ N.C. App. ___, ___, 617 S.E.2d 325, 332 (2005).

Based upon the foregoing, the trial court's adjudication order is reversed. Accordingly, the trial court had no grounds, under the facts and holding herein, to place custody of the children with DSS and the court's dispositional order is likewise reversed. In view of these holdings, it is unnecessary to address respondent's third argument.

Reversed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).