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NO. COA06-1565

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN THE MATTER OF:

A.V. and D.V.,
Minor Children.

Guilford County
Nos. 01 JA 424
01 JA 425

Appeal by respondent from an adjudication and disposition order entered 7 September 2006 by Judge Lawrence C. McSwain in Guilford County District Court. Heard in the Court of Appeals 9 April 2007.

Joyce L. Terres, for Guilford County Department of Social Services, petitioner.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for guardian ad litem.

M. Victoria Jayne for respondent.

BRYANT, Judge.

Respondent-appellant father (respondent) appeals from an adjudication and disposition order entered 7 September 2006. A.V. was adjudicated as abused; A.V. and D.V. were adjudicated as neglected and dependant. The trial court ordered a plan of reunification and a concurrent plan of adoption.

A.V. and D.V. are two children born out of wedlock to the same mother but different fathers. Respondent is the biological father of A.V. By an order filed 6 June 2001, the trial court awarded

custody of both children to respondent after the children were adjudicated as neglected by their mother. On 29 June 2006, the Guilford County Department of Social Services (DSS) filed a petition alleging A.V. was an abused juvenile and both A.V. and D.V. were neglected and dependent juveniles. At the conclusion of the hearing on the petition on 25 August 2006, the trial court found that respondent failed to comply with a directive not to expose A.V. to contact with his brother, and as a result, his brother sexually molested A.V. The trial court further found that when A.V. informed respondent of the incident, respondent failed to report it to DSS or law enforcement. The trial court adjudicated the juveniles as abused, neglected and dependent as alleged in the petition. The trial court awarded custody of the children to DSS under a concurrent plan of reunification and adoption. From this order respondent appeals.

Respondent argues the trial court erred by: (I) denying his motions to dismiss for insufficient evidence; and (II) failing to comply with N.C. Gen. Stat. §§ 7B-903 and 907 in violation of his constitutional rights. For the reasons stated below, we affirm the decision of the trial court.

I

Respondent contends the trial court erred by denying his motions to dismiss the petition at the close of petitioner's evidence and at the close of all the evidence. He also argues the trial court's findings are not supported by clear and convincing

evidence, and the trial court's findings of fact do not support its conclusions of law.

In ruling upon a motion to dismiss a juvenile petition for insufficient evidence, the court determines "whether there is substantial evidence to support the allegations of the petition, viewing the evidence in the light most favorable to petitioner, and giving petitioner the benefit of every reasonable inference to be drawn from the evidence." *In re Cusson*, 43 N.C. App. 333, 335, 258 S.E.2d 858, 860 (1979). 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" N.C. Gen. Stat. § 7B-101(15) (2005). A juvenile may be considered as neglected if the juvenile lives in a home where another juvenile has been subjected to abuse or neglect. *Id.* A juvenile is abused if the juvenile's parent or caretaker, *inter alia*, "[c]ommits, permits, or encourages the commission" of a sexual offense upon the juvenile. N.C. Gen. Stat. § 7B-101(1)(d) (2005). Finally, a juvenile is dependent if the juvenile's parent is unable to provide for the care and supervision of the juvenile. N.C. Gen. Stat. § 7B-101(9) (2005).

The evidence at the hearing shows that a report of sexual abuse of A.V. by respondent's brother was made in January 2005 to petitioner. After meeting with petitioner's officials about this

allegation, respondent agreed not to allow his brother to have any contact with A.V. Notwithstanding this agreement, A.V. had at least three subsequent contacts with respondent's brother. Respondent conceded in his testimony that these contacts occurred. The first occurred when respondent's brother attended a Super Bowl party at respondent's house and A.V. arrived home before the party ended and respondent's brother was present. The second occurred when respondent and A.V. stopped at the house of respondent's mother to deliver something and respondent's brother was present there. The third encounter occurred in June 2006 at a birthday party. Witnessed by D.V., respondent's brother touched A.V.'s breasts at this party. A.V. testified that she told respondent about the incident at the party and respondent stated he would talk to his brother. Respondent also instructed A.V. not to tell anyone about the incident. Respondent conceded that he did not report the incident to DSS or to law enforcement. DSS subsequently received a report of the birthday party incident after A.V. disclosed it to her mother. During a meeting with DSS officials on 28 June 2006, respondent expressed disbelief that his brother inappropriately touched A.V. Respondent also appeared to be ambivalent as to whether the abuse actually occurred.

We hold the foregoing evidence is sufficient to withstand the motions to dismiss. This evidence supports the findings of fact, which in turn support the conclusions of law that A.V. is an abused, neglected and dependent juvenile and that D.V. is a neglected and dependent juvenile. These assignments of error are

overruled.

II

Respondent also contends that the trial court violated his due process and constitutional rights by failing to comply with N.C. Gen. Stat. §§ 7B-903 and 7B-907. He argues the trial court failed to comply with N.C. Gen. Stat. § 7B-903 by failing to consider dispositional alternatives other than placement with DSS. He argues the trial court failed to comply with N.C. Gen. Stat. § 7B-907 by failing to give notice of hearing before ordering a concurrent plan of reunification and adoption.

N.C. Gen. Stat. § 7B-903 provides that in placing a juvenile outside of the home, "the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C. Gen. Stat. § 7B-903(a)(2)(c) (2005). However, placement with the relative is not mandatory if "the court finds that the placement is contrary to the best interests of the juvenile." *Id.* The trial court's best interest determination is reviewable only for abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *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).

With respect to placement of the children, the trial court specifically found, *inter alia*:

that the plan for both children is reunification, with a concurrent plan of adoption.

The Court finds that Ms. Colliar, therapist, has said she is willing to work with all family members; that initially, she indicated that [respondent] was "ambivalent" about the allegations of sex abuse by his brother. This has caused tension in the paternal family.

The Court finds that [D.V.] has been experiencing trouble adjusting to placement. On occasion, [respondent] has assisted the foster parent in talking with [D.V.] to assist him in calming down and processing his anger. [D.V.] began therapy . . . on August 3, 2006, on a weekly basis.

The Court finds that a referral has been made for in-home Family Preservation Services for both parents to address communication, parenting, sexual abuse and other concerns as related to the children and their safety *when returned home to either parent. . . .*

(Emphasis added). The trial court also found that there were pending charges of sex crimes against A.V.'s sexual abuser and that respondent continued to allow the abuser to be in physical contact with A.V. The trial court then concluded "[i]t is in the best interest of the juveniles to remain in the legal custody of [DSS] and contrary to their best interest to be returned to any parent *at this time.*" (Emphasis added). Where the trial court's findings of fact and conclusions reflect the evidence presented at the hearing, including the current efforts of the parents, no abuse of discretion is shown.

N.C. Gen. Stat. § 7B-907 establishes procedures and guidelines for a permanency planning hearing, which is a review hearing conducted within twelve months after entry of an initial order removing custody of a juvenile from a parent. N.C. Gen. Stat. § 7B-907(a) (2005). The express purpose of a permanency planning

hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.* As the present order is an original custody order, respondent's citation of N.C. Gen. Stat. § 7B-907 is inapposite. This assignment of error is overruled.

Affirmed.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).