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NO. COA06-1668

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN RE:

S.S.
Minor Child.

Buncombe County
No. 06 JT 120

Appeal by respondent from order entered 21 August 2006 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 9 April 2007.

Charlotte W. Nallan, for Buncombe County Department of Social Services, petitioner-appellee.

Michael N. Tousey for Guardian ad Litem.

Betsy J. Wolfenden for respondent-appellant.

ELMORE, Judge.

Respondent is the mother of S.S., a child born in March, 2006. The Buncombe County Department of Social Services (petitioner) received notification of the child's birth on 31 March 2006, the day respondent and the child were discharged from the hospital. Petitioner had a prior history with respondent, who had lost custody of two older children on the grounds of abuse and neglect. Social workers located the child at the mobile home respondent shared with the child's father (Smith), and removed the child from the home, placing him with the father's mother and stepfather.

On 4 April 2006, petitioner filed a juvenile petition alleging

that the child is a neglected juvenile because she lives in an environment injurious to her welfare. Following an adjudication and disposition hearing, the trial court entered an order on 21 August 2006 adjudicating the child neglected. The court granted full legal permanent guardianship of the child to her paternal grandmother. Respondent filed notice of appeal from this order on 23 August 2006.

The findings of fact to which respondent has not assigned error and disputed in her brief show that on 15 December 2003, respondent assaulted her younger son, aged twenty months at the time, inflicting extensive facial bruises and injuries. She also assaulted her older son, aged two years and nine months at the time, while at the urgent care center treating the injuries to her younger son. On 17 May 2004, respondent entered an *Alford* plea to felony child abuse inflicting serious injury and to misdemeanor child abuse. The criminal court imposed an active sentence of twenty to thirty-three months, suspended the sentence for a period of sixty months, and placed respondent on supervised probation. By orders of the juvenile court, the two older children are in the custody of their biological father, who is not the biological father of S.S., and respondent has no visitation rights to these children.

In April of 2005, respondent began cohabiting with Smith in a home he shared with his mother and stepfather. They subsequently moved into a mobile home co-owned by the child's paternal grandmother about a mile from the paternal grandmother's residence.

After she gave birth to S.S. and petitioner intervened, respondent and Smith voluntarily consented to kinship placement of S.S. with her paternal grandmother. The child has remained in the care of the paternal grandmother since that time. Respondent has supervised visits with the child.

Respondent contends that the court erred by concluding that the child is neglected. She argues that the findings of fact and evidence do not support a conclusion that the child was neglected at the time of the filing of the petition. She further argues that the adjudication of neglect is improperly based solely upon evidence of past neglect or abuse of two other children.

Appellate review of an order concluding that a child is neglected involves determining (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the conclusions of law are supported by the findings of fact. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000). We are "bound by the trial court['s] findings of fact 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) (citations omitted).

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 lives in an environment injurious to the juvenile's welfare" N.C. Gen. Stat. § 7B-101(15) (2005). A relevant consideration

in determining whether a juvenile is neglected is whether the juvenile "lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* The statute "does not require the removal of all other children from the home once a child has . . . been subjected to sexual or severe physical abuse. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

In applying the statutory definition of neglect, "this Court has consistently 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." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citations and quotations omitted). When an allegation of neglect is based upon prior neglect or abuse of another child, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

A case similar to the case at bar is *In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167, *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004), in which the infant child at issue was taken from the mother before the child was discharged from the hospital following his birth. *Id.* at 148, 595 S.E.2d at 168. Although the

child had never spent a minute in the mother's home, this Court upheld the trial court's adjudication of the child as neglected because "the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that E.S. would be at risk if allowed to remain with respondent." *Id.* at 151, 595 S.E.2d at 170.

The findings of fact in the case at bar show that although respondent pled guilty to the criminal charges, she denied harming the children or having any intent to harm them. From the time the children were injured until the present adjudication hearing, respondent continued to claim that the older child injured the younger child. At the adjudication hearing respondent acknowledged for the first time under oath that she personally inflicted the injuries upon the children. Respondent had consistently told professionals who had been working with her that the older child inflicted the injuries. After respondent began cohabiting with Smith, the couple engaged in domestic squabbles and Smith would call the paternal grandmother to intervene and cause respondent to leave the premises. The paternal grandmother observed domestic violence between respondent and Smith. The paternal grandmother saw respondent kick Smith on at least one occasion. Respondent also wrote in a personal journal, and admitted in an entry dated 18 May 2004 that she had battered or committed other violent acts against her partner, her children, her parents, and others. She wrote in this same journal that she "lost control, snapped and

kicked her son when he was beating up his brother and misbehaving.”

The court also found

27. There is a substantial risk of future neglect for the minor child based on the historical facts concerning her other children, [Z] age 20 months, and the toddler, [A] age 32 months when they were removed from her custody. When those minor children were removed from the custody of the respondent mother neither child was capable of protecting himself from the abuse and neglect perpetrated upon them by the respondent mother, and each was abused and neglected. The abuse of [Z] was very severe and could have caused permanent damage.

28. At this time the minor child is, at the age of four months, physically unable to protect herself, unable to report any abuse and unable to flee from any abuse.

29. The respondent mother is continuing to engage in denial of her former behavior to employers, friends and other persons with whom she comes into contact.

In its penultimate finding, the court found in pertinent part with respect to respondent:

33. ... The risk of physical abuse is high due to the age of the minor child, the minor child's inability to protect herself or report abuse, [and] the respondent mother's ongoing difficulties with stress and domestic violence, In addition, the respondent mother has failed to appropriately participate in services to address her responsibility for the abuse and neglect of her other children until after this petition was filed, and she has continued to deny and minimize her abuse and neglect of her other children until this hearing. The respondent mother will need extensive mental health treatment, and be highly motivated to change, before she will be able to provide minimally acceptable parenting for the minor child. . . .

We find ample evidentiary support in the record for these

findings. We hold the findings support the court's conclusion of law that the child is neglected.

Respondent's remaining contention posits that the court erred by awarding permanent guardianship to the paternal grandmother (1) without making findings as to whether petitioner made reasonable efforts to prevent or eliminate removing S.S. from the home, and (2) without holding a permanency planning hearing.

The record does not support the first part of this contention as the court did find, in finding of fact number 32 of the adjudication portion of the order and in finding of fact number 12 of the dispositional portion of the order, that petitioner "made reasonable efforts to prevent taking custody of the child" and "made reasonable efforts to prevent removal of the minor child from the home" Respondent states in her brief that these findings of fact are actually conclusions of law, but does not argue why this was error. Because respondent did not present a legal argument for our review, we do not address this issue. See N.C.R. App. P. 28(b)(6) (2007).

The second part of this contention is not raised by an assignment of error. In none of respondent's thirty-eight assignments of error listed in the record on appeal does she contend that the court erred by awarding permanent guardianship to the paternal grandmother without holding a permanency planning hearing. "The scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not

correspond to a proper assignment of error, the matter is not properly considered by the appellate court." *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994) (citations omitted). As respondent's argument does not correspond to an assignment of error, we decline to address it. *Seay v. Wal-Mart Stores, Inc.*, ___ N.C. App. ___, ___, 637 S.E.2d 299, 304 (2006).

The court's order is affirmed.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).