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NO. COA06-1673

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

IN RE: M.D.S.T.,  
Minor Child.

Wilkes County  
No. 03 J 163

Appeal by respondent from order entered 18 September 2006 by Judge Edgar B. Gregory in Wilkes County District Court. Heard in the Court of Appeals 9 April 2007.

*Rebekah W. Davis, for respondent-appellant.*

*Paul W. Freeman, Jr., for petitioner-appellee.*

*Tracie M. Jordan, for Guardian ad Litem-appellee.*

ELMORE, Judge.

C.T. (respondent), mother of the minor child M.D.S.T. (M.), appeals from an order adjudicating M. a neglected juvenile and placing him in the custody of the Wilkes County Department of Social Services (DSS).

On 7 November 2003, DSS filed a juvenile petition seeking temporary custody of M. on grounds of neglect. The petition alleged that M. lived in an environment injurious to his welfare, in that respondent had threatened to kill herself and the child on or about 28 October 2003.

On 23 December 2003, the district court adjudicated M. a neglected juvenile, finding that respondent failed to provide him with proper care and supervision and placed him in an environment injurious to his welfare. Citing the testimony of respondent's sister, T.T., the court found that respondent suffered from depression after giving birth to M. and had been unable to bond with him. Before DSS became involved in the case, respondent was living with T.T. and relied upon her and others for M.'s care. The court made additional findings that respondent "was physically and emotionally abused by her mother while [she] was growing up[,]"" that she experienced three miscarriages before giving birth to M., and that she had been raped in 2002. Respondent was also fired from her job in April of 2003, due to absences caused by her pregnancy. The week before DSS received the report of neglect, respondent threatened to give M. to the sister of the child's putative father, who died on 3 November 2003. On the day DSS received the report, respondent "stated to [T.T.] and one other person that it would be better if she and the baby were dead." A doctor and social worker evaluated respondent and determined that she was not subject to involuntary commitment, inasmuch as she did not pose a threat of harm to herself or others. The evaluators noted that T.T. and respondent's mother seemed "more worried about [M.] being placed out of their respective homes than [respondent] harming herself or others."

In its 23 December 2003 disposition, the court vested DSS with legal and physical custody of M., and authorized the child's

placement with T.T. or another suitable care giver. The court ordered respondent to maintain regular visits with M., complete a case plan developed by DSS, attend parenting classes, obtain a psychological evaluation and comply with its treatment recommendations, find full employment within thirty days, and make arrangements through DSS to begin paying child support.

A series of review orders and reports prepared by DSS and the guardian ad litem detailed respondent's cooperation with DSS and her successful completion of the case plan between March and December of 2004. Throughout this period, M. was placed with T.T. and thrived in her care. A report submitted to the court by the guardian ad litem on 15 July 2004 noted that "[T.T.] wants to keep and raise M.[,]" and that "[t]here seems to be a lot of animosity between the sisters." Following a successful trial placement in which respondent demonstrated her ability to care for M., the court returned the child to respondent's custody in an order entered 22 December 2004.

DSS briefly regained non-secure custody of M. on 29 June 2005, after filing a petition accusing respondent of abuse and neglect. However, M. was again returned to respondent's home when DSS voluntarily dismissed the petition on 26 August 2005.

In April of 2006, respondent asked T.T. to keep M. while she completed a week-long orientation for her new job as a certified nursing assistant in Chapel Hill. Respondent was living in Sanford, and T.T. was living in Rock Creek. The week before Easter, T.T. met respondent in Greensboro to pick up M. Although

respondent visited M. at T.T.'s residence, she left the child with T.T. into the summer, claiming she could not locate a sitter to watch M. while she was at work.

In June of 2006, T.T. expressed concern that she would not be able to register M. for extracurricular activities or make emergency medical decisions on his behalf, absent a formal designation as his custodian. With respondent's consent, T.T. asked her attorney to draft a "Custody Agreement" which vested her with "immediate physical custody of M.," authorized her to "obtain any and all medical care for said child," and otherwise to act "*in loco parentis*" without prior court permission. The agreement allowed respondent to visit M. "during such times as the parties mutually agree upon." It further provided that the parties would alternate claiming M. as a dependent on their income tax returns. Respondent and T.T. signed the private "Custody Agreement" before a notary on 5 June 2006. After signing the agreement, respondent continued to visit M. at T.T.'s home on weekends and to telephone him during the week.

On 10 August 2006, DSS filed a petition alleging that M. was a neglected juvenile after respondent tried to take the child back from T.T. against T.T.'s will on 9 August 2006. The petition claimed that respondent attempted to forcibly remove the child from T.T.'s home, assaulting T.T. and "caus[ing] minor injury to the child." The court granted non-secure custody of the child to DSS on 10 August 2006, and the child remained in DSS custody after the

seven-day hearing on 14 August 2006. See N.C. Gen. Stat. § 7B-506(a) (2005).

The district court held a hearing on DSS's petition on 28 August and 5 September 2006, receiving testimony from, *inter alia*, the DSS social worker, respondent, and T.T. The court adjudicated M. a neglected juvenile in an order entered 18 September 2006. In its findings of fact, the court reviewed respondent's prior involvement with DSS and the history of M.'s placements with T.T. The court characterized the "Custody Agreement" executed by T.T. and respondent on 5 June 2006, as follows:

. . . [B]ecause [T.T.] had concerns regarding her ability to obtain medical services and other needed services for M., . . . [she] desired that a written Custody Agreement be prepared and executed by herself and [respondent]. . . . Pursuant to the terms of this agreement, [T.T.] was given the immediate physical custody of the child, with the provision that the child was to reside primarily with [T.T.] at her residence . . . . [T.T.] had her attorney, Gregory Luck, prepare this Agreement. The Agreement does not have an ending date.

Based on the participants' conflicting accounts of the incident on 9 August 2006, the court made the following findings of fact:

10. On August 9, 2006, [respondent] came to the residence of her sister without prior notice . . . with the intention of taking M. away with her. [T.T.] refused to allow [respondent] to take M., resulting in [respondent] reaching for the child and an altercation ensuing. During the altercation, M. was removed to an adjoining bedroom. M. received a bruise during the altercation, however, it is not clear how [he] received the bruise but it is apparent that the bruise was not present before the altercation.

11. During this altercation, [respondent] hit her sister, held her around the neck, and threatened to kill her.

12. . . . Tammy, (a friend of the mother's) came close enough to the house so that she could see part of the altercation. At the time that Tammy came close to the home, M. was at the door screaming. The fight between the mother and her sister continued for approximately 30 to 40 minutes. At some point during the altercation, [T.T.] retrieved a baseball bat, however, no one was hit with the bat.

13. The combatants' relatives called law enforcement as a result of this altercation. [T.T.] went to her grandmother's home, which was nearby, and exhibited redness and marks about her body.

14. At some point after the altercation, [respondent] . . . threatened to reveal to [T.T.'s son,] that he was an adopted child when [he] was unaware of this fact.

15. As a result of the altercation, [T.T.] had bruises on her arms, neck, and legs. [Respondent] also had marks.

16. Immediately after the altercation, M. was "all to pieces." However, M. did not require medical attention. . . .

The court further noted that respondent was employed as a third-shift certified nursing assistant and "ha[d] a nice, well furnished home[,]" but that she also "seem[ed] pleased with the care [M.] was receiving from T.T. and did not consider M. to be in danger while in the aunt's care." Based on its findings, the court concluded, *inter alia*:

2. The written "Custody Agreement" could be revoked by [respondent] at any time.

3. . . . [Respondent] created an environment injurious to the child's welfare by trying to forcibly remove him from the aunt's house.

[Respondent] should have resorted to the Court system due to the child not being in imminent danger.

4. It should have been obvious to [respondent] that a fight would break out if she attempted to forcibly remove M. from [T.T's] home.

5. The Petitioner has shown by clear and convincing evidence that [M.] is a neglected juvenile as that term is defined by G.S. §7B-101, in that [respondent] created an environment injurious to the child's welfare at the time that the mother initiated the altercation with her sister.

The court awarded DSS legal and physical custody of M. and granted the department "the authority to place said child, including continuing the child['s] placement with his aunt[.]" Respondent filed timely notice of appeal from the order.

On appeal, respondent challenges the court's conclusion that she created an environment injurious to M.'s welfare, such that he was a neglected juvenile within the meaning of N.C. Gen. Stat. § 7B-101(15). She asserts that the "isolated occurrence" of 9 August 2006, in what had become an emotionally charged custody dispute with her sister, did not meet the statutory definition of neglect. Respondent avers both that the court's findings of fact did not support the adjudication of neglect, and that DSS did not produce clear and convincing evidence of neglect.

Under N.C. Gen. Stat. § 7B-805, the petitioner has the burden of proving the existence of neglect by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2005). On appeal, this Court is bound by the district court's findings of fact if they are "supported by clear and convincing competent evidence[.]" *In re*

*Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997), or if "no exception is taken" to an individual finding by the appellant, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Therefore, our task in reviewing an adjudication of neglect is to determine (1) whether the findings properly contested by respondent are supported by clear and convincing evidence, and (2) whether the findings of fact support the conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (internal quotation marks and citation omitted). A determination that a child is a neglected juvenile under N.C. Gen. Stat. § 7B-101(15) is a conclusion of law. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citations omitted).

The Juvenile Code defines a neglected juvenile, in pertinent part, as:

[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare . . . .

N.C. Gen. Stat. § 7B-101(15) (2005). Moreover, to support an adjudication of neglect, our courts have "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.'" *Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258 (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (additional citations omitted)); see also *Powers v. Powers*, 130 N.C. App. 37, 43, 502 S.E.2d 398, 402, *disc. review denied*, 349 N.C. 530, 526 S.E.2d 180 (1998) (upholding adjudication of neglect based on



findings that the respondent "has driven an automobile while impaired due to alcohol and while her minor children were passengers, that she becomes intoxicated at home to the point of literally falling down and becoming unable to care for her younger children, and that her drinking has contributed to the emotional problems from which the older children suffer"). Our Supreme Court recognized that "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.'" *Stumbo*, 357 N.C. at 283, 582 S.E.2d at 258. Rather, we must assess on "a case-by-case basis" the actual risk to the child's welfare created by the parent's conduct. *In re L.T.R.*, \_\_\_ N.C. App. \_\_, \_\_, 639 S.E.2d 122, 127 (2007) (citing *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)). "[T]he determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

While we do not condone respondent's actions after she was denied access to her son on 9 August 2006, we hold that the incident described in the district court's findings of fact was insufficient to render M. a neglected juvenile within the definition of N.C. Gen. Stat. § 7B-101(15). The evidence showed that M. was present during the initial part of the altercation, that he was crying and upset, and that he sustained "a small bruise on his back" before being taken to a bedroom by T.T.'s nine-year-old son, Zane. Although the sisters escalated their dispute into

a protracted "wrestling match," these actions occurred after M. had been taken out of harm's way. As found by the trial court, both respondent and T.T. received marks and bruises during the episode but were not seriously injured. We note that T.T.'s partner, Candy Caldwell, testified that she and T.T. went shopping after T.T.'s altercation with respondent.

Without question, the exposure of a child to violent behavior can constitute neglect. However, we do not believe that the fight between respondent and T.T. on 9 August 2006, standing alone, was of sufficient gravity to show that M. "live[d] in an environment injurious to [his] welfare" or was otherwise neglected. This is not a case involving an intentional act of violence toward the child or of a home environment permeated with domestic violence or other hazardous activity. See *In re T.M.*, \_\_ N.C. App. \_\_, \_\_, 638 S.E.2d 236, 241 (2006) (upholding adjudication of neglect where findings showed the juvenile's "exposure to an environment of violence, including respondent's prior abusive relationship with the first boyfriend, respondent's inability to abide by the safety agreements designed to insulate her child from domestic abuse, physical abuse by [the second boyfriend] and respondent, [and] DSS' observations of bruising on [the juvenile]"); *In re K.D.*, \_\_ N.C. App. \_\_, \_\_, 631 S.E.2d 150, 155 (2006) (upholding adjudication of neglect based on respondent-mother's "struggles with parenting skills, domestic violence, and anger management, as well as her unstable housing situation"); *Helms*, 127 N.C. App. at 512, 491 S.E.2d at 676 (upholding adjudication of neglect where the

respondent-mother, *inter alia*, "placed [the child] at substantial risk through repeated exposure to violent individuals" and an environment that "involved drugs, violence, and attempted sexual assault"). Moreover, the fact that the court authorized M.'s continued placement with T.T. reflects that respondent acted responsibly in placing the child with her sister when she was unable to find appropriate child care closer to her own residence. We further note the lack of any evidence or finding that respondent was unprepared to resume physical custody of the child when she sought to take him back from T.T.. Inasmuch as the court relied solely on the 9 August 2006 incident in adjudicating M. a neglected juvenile, we vacate the order.

In light of our holding, we need not address respondent's challenges to the court's individual findings of fact or to its disposition.

Vacated.

Judges BRYANT and CALABRIA concur.

Report per 30(e).