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NO. COA06-197-2

NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2007

IN THE MATTER OF:
A.J.M.,
A Minor Child.

Alamance County
No. 99 J 89

Appeal by respondent-father from order entered 9 June 2005 by Judge G. Wayne Abernathy in Alamance County District Court. Originally heard in the Court of Appeals on 17 October 2006. An opinion affirming the order of the trial court was filed on 5 December 2006. Respondent's Petition for Rehearing was granted on 17 January 2007. This opinion supersedes the previous opinion filed on 5 December 2006.

Court of Appeals

Slip Opinion

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

Mercedes O. Chut for respondent-father appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Alison R. Bost, for Guardian ad Litem appellee.

McCULLOUGH, Judge.

Wallace Lee Hightower, Jr. ("respondent") appeals a juvenile adjudication and disposition finding and concluding that A.J.M. is an abused and neglected juvenile and vesting custody of A.J.M. in the Alamance County Department of Social Services ("DSS"). In March 2005, DSS filed a juvenile petition alleging that A.J.M. was a

neglected and abused child and obtained custody by non-secure custody order on 7 March 2005. DSS subsequently filed an amended petition realleging that juvenile was abused and neglected in that respondent has "committed, permitted, or encouraged the commission of a sex or pornography offense with or upon the juvenile in violation of the criminal law" and further that A.J.M. "lives in an environment injurious to [her] welfare."

On 4, 5 and 12 May 2005, hearings were held on the petitions as to whether A.J.M. was a neglected and abused juvenile. On 9 June 2005, the trial court entered a juvenile adjudication and disposition finding and concluding that A.J.M. was an abused and neglected juvenile and removing A.J.M. from the custody of respondent. Respondent appeals.

Respondent contends on appeal that the district court erred in making certain findings of fact where there was insufficient evidence to support those findings. We disagree.

"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 role of this Court in reviewing an initial adjudication of neglect and abuse is to determine "(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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a non-jury neglect [and abuse] adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are

deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

The gravamen of respondent's argument on appeal is that the district court erred in finding the testimony of the juvenile, A.J.M., to be credible and sufficient to warrant findings of fact indicating sexual abuse by respondent.

A.J.M. testified that respondent would enter her room at night, pull down her pants and slightly penetrate her vagina with his penis. A.J.M. further testified that he would enter her room when he believed that she was asleep and then leave when she turned over. A.J.M. testified that respondent had been putting "his pee in her pee" since she was five years old. It was further adduced at the hearing that A.J.M. had accused respondent of sexually molesting her before, but recanted. A.J.M. testified that she recanted her story that time because respondent started to cry, and therefore she forgave him. A.J.M.'s testimony at trial was consistent with all previous accounts made by her to her mother, doctors and police officers regarding sexual molestation by respondent.

It is the trial 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). "If different inferences may be drawn from the evidence, the trial judge must determine which

inferences shall be drawn and which shall be rejected." *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365-66.

A review of the record reveals that the trial judge determined, after inquiry with A.J.M., that she was competent to testify and that she understood that she was required to tell the truth. Moreover, he weighed the credibility of the witnesses and determined what inferences should be drawn from the testimony. In addition, Dr. Emily Storch, an expert in the field of child psychology and forensic examiner in the field of child sexual abuse, testified that A.J.M. exhibited characteristics consistent with victims of child sexual abuse.

After thorough review of the record and transcript, the findings of fact challenged by respondent are supported by clear and convincing evidence, even though other evidence was presented that would support findings to the contrary. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002).

Respondent further contends that the court erred in concluding that A.J.M. was neglected and abused. We disagree.

The court adjudicated A.J.M. abused and neglected. N.C. Gen. Stat. § 7B-101 defines an abused juvenile as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker: . . . (d) Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: . . . sexual act by a custodian, as provided in G.S. 14-27.7[.]" N.C. Gen. Stat. § 7B-101(1)(d) (2005). N.C. Gen. Stat. § 14-27.7 sets forth as a crime vaginal intercourse or sexual act

with a minor by a person in the minor's home who has assumed the parental position of the minor. N.C. Gen. Stat. § 14-27.7(a) (2005). As stated *supra*, the court's conclusion that A.J.M. was abused will be upheld where the findings of fact support such a conclusion. *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365.

Where this Court has determined, and a review of the record reveals, that there was clear, cogent and convincing evidence to support the findings of fact that respondent sexually abused A.J.M. by placing his penis inside her vagina on multiple occasions while A.J.M. was living under the care of respondent, it therefore follows that the findings of fact support the trial court's conclusion that A.J.M. was an abused juvenile under the terms of N.C. Gen. Stat. § 7B-101(1)(d).

Further, 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). The findings of fact regarding sexual abuse by the father certainly support the conclusion clearly and convincingly that A.J.M. lived in an environment injurious to her welfare and we find no error in such a conclusion.

Respondent further asserts that contradictions in the adjudication and disposition order show that the trial court erred.

Even *assuming arguendo*, that the court made erroneous findings and contradictions, when ample other findings of fact support an adjudication of abuse and neglect, erroneous findings unnecessary to the determination do not constitute reversible error. See *In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993) (where no evidence supported a particular finding, inclusion of this finding in the order was immaterial and not prejudicial because even “[i]f the erroneous finding [was] deleted, there remain[ed] an abundance of clear, cogent, and convincing evidence to support a finding of neglect.”

Therefore, this assignment of error is overruled.

Finally, respondent contends that the district court erred in concluding that removing A.J.M from respondent’s home was in her best interest. We disagree.

We first note that respondent cites no authority for his argument on appeal, and therefore the error is deemed waived. See N.C. R. App. P. 28(b)(6) (2005). However, even if respondent had properly preserved this argument for appeal by complying with the Rules of Appellate Procedure, there is no error.

Once the trial court adjudicates a child neglected, the court moves to the dispositional stage and solely considers the best interests of the child. *Pittman*, 149 N.C. App. at 766, 561 S.E.2d at 567. We review the trial court's disposition under an abuse of discretion standard. *Id.*

Here, the trial court concluded in its discretion that it was in the best interest of A.J.M. to remove custody of her from

respondent and vest her custody in DSS. The court based its conclusion on the findings that A.J.M. is in need of more adequate care and supervision, that she is doing fairly well in her foster home, and that she did not want to return to respondent's home. We hold that based on these findings, the trial court could reasonably conclude that termination of respondent's parental rights was in the best interest of the child.

Therefore, this assignment of error is overruled.

Accordingly, the juvenile adjudication and disposition order is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).