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NO. COA06-820

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

IN THE MATTER OF:

A.M.B.,
A MINOR CHILD.

Mecklenburg County
No. 05 J 830

Appeal by Respondents from orders entered 12 December 2005 and 11 January 2006 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 8 February 2007.

Mary McCullers Reece for Respondent-Appellant Mother.

M. Victoria Jayne for Respondent-Appellant Father.

Alan B. Edmonds for Petitioner-Appellee Mecklenburg County Department of Social Services.

Hunton & Williams LLP, by Eric M.D. Zion, for Guardian ad Litem-Appellee.

STEPHENS, Judge.

Respondents appeal from an order adjudicating minor child A.M.B. neglected and dependent. Respondents also appeal from a dispositional order retaining legal custody of A.M.B. with the Youth and Family Services Division of the Mecklenburg County Department of Social Services ("YFS"), placing A.M.B. with her maternal grandmother, and mandating supervised visitation between A.M.B. and Respondents. For the reasons set forth below, we affirm the orders of the trial court.

Shortly after A.M.B. was born in June 2005, YFS opened a case file on the child upon being notified that Respondent-Mother ("the mother") was having difficulty remembering when to feed her. At that time, A.M.B. and the mother were living in the home of A.M.B.'s maternal grandmother ("the grandmother"). Respondent-Father ("the father") was living in Tennessee, was unaware that he was, in fact, A.M.B.'s father, and had provided no support to the mother. During a home visit on 16 August 2005, the mother told a YFS social worker that she "needed some help," had suicidal thoughts, and that she was not able to care for A.M.B. Concerned, the social worker brought the mother to the Carolinas Medical Center Behavioral Health Emergency Room ("the Behavioral Health Center") for an evaluation. The psychiatrist on duty ("the psychiatrist") diagnosed the mother as paranoid schizophrenic, considered her a danger to herself and/or others, and involuntarily admitted her on 17 August 2005.

After learning that the mother had been involuntarily admitted, the YFS social worker contacted the grandmother who agreed to provide care for A.M.B. The mother consented to the social worker's arrangement. On 23 August 2005, while the mother was still involuntarily committed, YFS filed a juvenile petition alleging dependence in that A.M.B. had "no parent, custodian, or guardian willing or able to provide her with placement and assistance." The petition specifically alleged that the mother had been admitted to and remained in the care of the Behavioral Health Center. That same day, the court entered a nonsecure custody order

placing A.M.B. in the legal and physical custody of YFS on the grounds that A.M.B.'s "parent, guardian, or custodian . . . failed to provide, or is unable to provide, adequate supervision or protection[.]" YFS continued A.M.B.'s placement with the grandmother. On 30 August 2005, the mother was released from the Behavioral Health Center, and a seven day hearing was held pursuant to N.C. Gen. Stat. § 7B-506. At this hearing, the mother and the father consented to the court's nonsecure custody order, a paternity test was ordered at the father's request, and adjudication was ultimately scheduled for 8 November 2005.

In September 2005, the mother moved to Tennessee and married the father, leaving A.M.B. with the grandmother. On 1 November 2005, YFS filed an amended juvenile petition reasserting its allegation of dependence and alleging neglect in that A.M.B. had been "abandoned by her mother, does not receive proper care, supervision or discipline from either of her parents, and would be in an environment injurious to her health if placed with the parents." The petition specifically alleged that the father "has a disturbing criminal record" and that "[t]he mother has effectively abandoned her child because it is difficult to work with her on case plan issues and for YFS and the Court to monitor the treatment of her psychiatric illness since she now lives in Antioch, Tennessee."

The evidence at the adjudication hearing tended to show that the mother had a history of substance abuse and mental health issues. The mother testified that she had been previously

diagnosed with substance abuse dependence and that she had been previously hospitalized in a psychiatric hospital. Additionally, she testified that she contracted Hepatitis C from intravenous drug use. The psychiatrist testified that "there was a well-documented history of [the mother] having used multiple substances in the past: alcohol, intravenous drugs, cocaine, and cannabis[,]” and that the mother admitted "to using cannabis just before the birth of [A.M.B.]” The psychiatrist also testified that the mother had been urged to begin treatment for schizophrenia in July 2005.

The evidence also tended to show that neither parent had provided any financial support for A.M.B.'s care. The mother testified that she was unemployed from the fall of 2004 until she moved to Tennessee in September 2005. A YFS social worker testified that she was unaware of anything the mother or the father had given to either YFS or the grandmother to help support A.M.B., despite the mother's testimony that they were "doing quite well" in Tennessee with their car washing and detailing business. When asked why he had not provided any support to A.M.B., the father testified that he "[doesn't] send out blank checks."

Finally, the evidence tended to show that the father had a criminal record and a history of substance abuse. The father testified that he had tested positive for cocaine approximately one and a half years before the hearing, and that he had been convicted of criminal trespass and of unlawful possession of a controlled substance without a prescription.

The trial court judge adjudicated A.M.B. neglected and dependent, and scheduled a dispositional hearing for 14 December 2005. In its dispositional order after the hearing, the court found that A.M.B.'s return to her parents was contrary to her best interests, ordered that A.M.B. remain in the legal custody of YFS and the physical custody of the grandmother, and required supervised visitation between the parents and A.M.B. Respondents appeal from both orders.¹

I.

We first address Respondent-Mother's second assignment of error, by which she argues, in part, that finding of fact number twenty-nine of the trial court's adjudicatory order is not supported by the evidence.

In adjudications involving juveniles, a trial court's findings of fact should be upheld on appeal only if they are supported by clear, cogent, and convincing evidence. *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982). Clear, cogent, and convincing evidence is "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal

¹ We note that the record filed in this case repeatedly violates Rule 3 of the Rules of Appellate Procedure. Specifically, the juvenile's name, address, social security number, and date of birth all appear in the record. "A court may, . . . on its own initiative . . . , impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with [the] appellate rules." N.C. R. App. P. 25(b). While we do not choose to impose sanctions in this instance, we point out this violation because of the compelling need to protect the identity of minor children in these proceedings.

cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984) (citation omitted). If a finding "is supported by such evidence, the district court's findings are binding on appeal even if there is evidence to the contrary." *In re A.D.L.*, 169 N.C. App. 701, 710, 612 S.E.2d 639, 645 (citation omitted), *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re L.A.B.*, __ N.C. App. __, __, 631 S.E.2d 61, 64 (2006) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

At the outset, we note that finding of fact number twenty-nine represents a mixed finding of fact and conclusion of law. The court's statement that "A.M.[B.] was dependent" is a conclusion of law and will be discussed below at **II.A.** As it pertains to the mother, the disputed factual finding is as follows:

29. The Court finds A.M.[B.] . . . as of 23 August 2005 . . . had no one to provide for her care other than the grandmother. The mother did not leave the child with the grandmother voluntarily or have any agreement that the grandmother would care for the child. . . .

The mother argues that this finding was not supported by the evidence presented at the adjudicatory hearing. We disagree. A YFS social worker testified that she brought the mother to the Behavioral Health Center after the mother expressed "suicidal thoughts" and told the social worker that "she was not able to take care of [A.M.B.]" In unchallenged finding number fourteen, the

court found that A.M.B. "was left in the care of [the] grandmother." The psychiatrist testified that the mother was "admitted [] involuntarily" to the Behavioral Health Center because the psychiatrist felt the mother "was a danger to herself and potentially other people[.]" The psychiatrist testified further that the mother's "insight was so poor that she was potentially unable to care for herself." The social worker testified that the mother "consent[ed]" to A.M.B.'s "placement" with the grandmother. The psychiatrist also testified that the grandmother "was caring for [A.M.B.]" after the mother was involuntarily admitted. The social worker testified that the father "was living in Tennessee" when the mother was admitted.

This testimony provides clear, cogent, and convincing evidence in support of the court's finding. A.M.B. was left in the grandmother's care and the grandmother was the only person providing care. The mother, having been involuntarily admitted to a hospital for psychiatric care, did not leave A.M.B. in the grandmother's care "voluntarily." The social worker, not the mother, made the agreement with the grandmother to provide for A.M.B.'s care. Accordingly, the mother's assignment of error on this point is without merit and is overruled.

Though the father's brief echoes the mother's argument regarding finding of fact number twenty-nine, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" N.C. R. App. P. 10(a). As the record indicates that the father did not assign error to

finding of fact number twenty-nine, his argument on this issue is dismissed.

II.

Turning next to Respondents' first assignment of error, Respondents argue that the trial court erred in adjudicating A.M.B. neglected and dependent in that this conclusion of law was not supported by the findings of fact.

"The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, __ N.C. App. __, __, 628 S.E.2d 387, 389 (2006) (citation and internal quotation marks omitted). In reviewing a conclusion of law, the test is whether the conclusion is supported by the findings of fact. *In re Helms*, 127 N.C. App. 505, 491 S.E.2d 672 (1997) (citation omitted). "[T]he trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *Id.*

A. DEPENDENT

N.C. Gen. Stat. § 7B-101(9) defines a dependent juvenile as

[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). To adjudicate dependency, a trial court "must address both (1) the parent[s'] ability to provide care or supervision, and (2) the availability to the

parent[s] of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). In the case at bar, Respondents challenge the finding of dependency only insofar as the trial court failed to address the second prong of the dependency analysis: "availability to the parents of alternative child care arrangements."

Finding of fact number twenty-nine states, in part:

29. . . . [A.M.B.] had no one to provide for her care other than the grandmother. The mother did not leave the child with the grandmother voluntarily or have any agreement that the grandmother would care for the child. . . .

As we have determined that this finding is supported by clear and convincing evidence, and as no other findings relate to this issue, the question becomes whether finding number twenty-nine supports the conclusion that A.M.B. was dependent in that the mother lacked an alternative child care arrangement. We find that it does.

We disagree with Respondents' contention that the mother "made" the arrangement with the grandmother. In our analysis of the sufficiency of the evidence to support the finding, we noted that the social worker testified that the mother "consent[ed]" to A.M.B.'s "placement" with the grandmother. YFS, not the mother, made the arrangement with the grandmother to provide for A.M.B.'s care. As such, the court's conclusion that A.M.B. was dependent is supported by its findings.

B. NEGLECTED

N.C. Gen. Stat. § 7B-101(15) defines a "neglected juvenile," in pertinent part, 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). To adjudicate neglect, the trial court must first determine that the statutory definition applies. If a court finds neglect within the statutory definition, the court must then look to see if there is "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 internal quotation marks omitted). Respondents argue that the findings of fact do not support the conclusion that A.M.B. was neglected within the statutory meaning.

"Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *L.A.B.*, __ N.C. App. at __, 631 S.E.2d at 64 (quoting *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731). In its adjudicatory order, the trial court made thirty-three findings of fact. The following findings are unchallenged by Respondents, are therefore presumed competent, and are binding on appeal:

4. [The mother] has a history of psychiatric illness and substance abuse.

. . . .

9. . . . While [the mother] was pregnant, [the father] provided her with no financial support

10. [The father] has provided no support for A.M.[B.] since her birth.

. . . .

12. . . . [During the social worker's home visit on 16 August 2005, the mother made] statements regarding suicide

13. . . . [The psychiatrist] believed the mother was a danger to herself and/or others

. . . .

19. In late September 2005, [the mother] moved to Tennessee with [the father]. . . .

. . . .

23. [The father] has recently started a mobile car washing and detailing business. He says he has netted \$1500 the two months he has been in business. He and [the mother] pay his father \$150 per week to rent the upstairs of [his] house.

24. [The father] has a history of being arrested in Davidson County, Tennessee. Since November 2003, he has been arrested for possession of a controlled substance, criminal trespass, and indecent exposure. He pled guilty to possession of a narcotic without a prescription and criminal trespass.²

25. [The mother] has a history of substance abuse. She admitted using marijuana while pregnant and has a history of cocaine abuse.

26. [The father] admitted he had cocaine issues. He entered a 7 day detoxification program, but has had no further treatment.

² Though the father assigned error to this finding, he failed to present argument regarding the finding in his brief. Thus, we deem his assignment of error abandoned. N.C. R. App. P. 28.

27. . . . [N]either parent has made any monetary contribution to the grandmother or YFS to defray the costs of caring for A.M.[B.]

. . . .

30. . . . [N]either parent has provided any support to the grandmother to defray her expenses in providing for the child.

. . . .

32. Continuation of the child in her own home or return to her parents' home is contrary to her best interest.

These unchallenged findings support the trial court's conclusion that A.M.B. was neglected within the meaning of the statute in that A.M.B. has not "receive[d] proper care, supervision, or discipline from [her] . . . parent[s]."

Respondents also argue that there was "no finding" that A.M.B. was either hurt or threatened with hurt by Respondents' neglect, and that A.M.B.'s environment was not, in fact, threatening her welfare. "Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (citation omitted). Here, though there was no finding that A.M.B. was impaired or at a substantial risk of impairment, all of the evidence supports at least a finding that A.M.B. was at a substantial risk of impairment.

As discussed above, the trial court's unchallenged findings are binding on appeal. The trial court found that the mother "has a history of psychiatric illness," "substance abuse," and "cocaine

abuse." The trial court found that the mother "admitted using marijuana while pregnant." The mother testified that she had contracted Hepatitis C through intravenous drug use. The psychiatrist testified that the mother was diagnosed paranoid schizophrenic and that she had been a danger to herself and/or others in the recent past. The trial court found that the father had "cocaine issues," and that he had a recent criminal history. This evidence supports the conclusion that A.M.B. was at a substantial risk of impairment and was therefore neglected. Accordingly, this assignment of error is overruled.

III.

In their final assignment of error, Respondents argue that the district court abused its discretion in retaining legal custody of A.M.B. with YFS, placing A.M.B. with the grandmother, and ordering supervised visitation between A.M.B. and Respondents. A trial court's dispositional order is reviewed for an "abuse of discretion." *In re Yokum*, 158 N.C. App. 198, 206, 580 S.E.2d 399, 404, *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003). A trial court abuses its discretion when its "ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations and internal quotation marks omitted).

The court found that A.M.B.'s "return to her parents is contrary to her best interest" and ordered supervised visitation until the issues that led to the adjudication of neglect and dependency were resolved. Specifically, the court wanted the

parents to "address mental health issues, show stability in housing and employment, and show the ability to provide a safe home for [A.M.B.]" In fact, the mother had serious mental health issues, the father had a criminal history, both parents had untreated substance abuse problems, and both parents had failed to support A.M.B. The court ordered the father to present bank records for his business and a copy of his lease agreement as some evidence of stability. Despite the court's concern regarding the mental health issues, "[t]he father objected to having to undergo a mental health evaluation." The court's measures were implemented to make sure the parents could "care for [A.M.B.] if she were placed with them" and were in no way arbitrary. The court did not abuse its discretion in maintaining legal custody of A.M.B. with YFS and physical custody with the grandmother, or in ordering supervised visits with Respondents. Respondents' final assignment of error is overruled, and the orders of the trial court are

AFFIRMED.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).