NO. COA07-452

NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2007

IN THE MATTER OF:

S.A.J.

Gaston County
No. 06-JA-56

Appeal by respondent-mother from orders entered 5 September 2006 and 3 January 2007 by Judge John K. Greenlee in Gaston County District Court. Heard in the Court of Appeals 20 August 2007.

Jill Y. Sanchez for petitioner-appellee Gaston County Department of Social Services.

Hunton & Williams LLP, by K. Stacie Corbett, for Guardian Ad Litem.

Winifred H. Dillon for respondent-mother.

STROUD, Judge.

Respondent-mother appeals the trial court orders adjudicating her son, S.A.J., neglected, and ceasing reunification efforts. For the reasons discussed herein, we affirm the trial court's orders.

On 7 February 2006, the Gaston County Department of Social Services (DSS) filed a neglect petition alleging that S.A.J. lived in a home in which another juvenile, his brother K.T., had died as a result of abuse or neglect, and in a home in which another juvenile, his sister N.T., had been subjected to abuse or neglect. The petition further alleged respondent-mother pled guilty to the following crimes in the Superior Court of New Jersey in 1998: (1)

aggravated assault in that she "'did attempt to cause, or did purposely, knowingly, or under circumstances manifesting extreme indifference to the value of human life, recklessly cause serious bodily injury to [her daughter] N.T.[;]'" (2) endangering the welfare of children in connection with the death of her son, K.T.; and (3) hindering apprehension in that she "'did hinder her own apprehension by suppressing evidence of the crime of aggravated manslaughter of [her child] K.T.'" The trial court entered a non-secure custody order in which it ordered respondent-mother and S.A.J.'s putative father, Mark J., to surrender custody of S.A.J. so that he could live with his paternal aunt and uncle. When DSS attempted to assume custody of S.A.J., respondent-mother and Mark J. barricaded themselves in their home with S.A.J. and complied with the non-secure order only after the Gastonia Police SWAT team arrived.

On 10 March 2006, DSS filed an amended neglect petition in which it changed the dates alleged for respondent-mother's New Jersey convictions from 1998 to 1984. The amended petition also added allegations regarding Mark J.'s physical and sexual abuse charges in South Carolina and pending charges of "resist delay and obstruct" in North Carolina arising from his refusal to comply with the non-secure custody order.

The trial court subsequently held an adjudication hearing, in which respondent-mother and her attorney were present, and Mark J. was represented by his attorney. By order filed 6 September 2006, the trial court made the following pertinent findings of fact.

3. [Mark J.] is not present today and, upon information and belief, has left the state of North Carolina. [Mark J.] was convicted of assault on a female [Respondent/mother] on July 5, 2006. On July 24, 2006, [Mark J.] violated his probation. [Mark J.] has outstanding charges in the state of South Carolina.

4. Respondent/mother, by and through her Attorney, admitted in open Court this date that the juvenile involved herein is a "Neglected Juvenile" as defined in N.C.G.S. § 7B-101(15) in that the juvenile do[es] not receive proper care, supervision or discipline from [his] parent(s)/guardian/custodian or caretaker and the juvenile lives in an environment injurious to [his] welfare.

5. The foregoing is based on the following facts admitted by Respondent/mother and found by the Court this date:

In September of 2003 the putative father [Mark J.] struck his minor child, M.J., his alleged biological son, M.J. about the back, leg and head with a belt, his fist and a shoe. This juvenile suffered severe bruising to the back and legs and bleeding about the head. These incidents were investigated by the Mecklenburg County Department of Social[] Services. The Mecklenburg County Department of Social Services when this juvenile assumed permanent residence with his mother, [Ms.] McClure, in South Carolina [sic]. The putative father was not this juvenile's legal father and had not established paternity of this juvenile at the time of the aforementioned injuries.

The putative father Mark J. is currently charged with "Indecent exposure" in Summerton, South Carolina. This charge was the result of an incident that occurred on or about the 14th day of April 2005. It is alleged, and Petitioner avers that the putative father, on or about the 14th day of April 2005 was naked in his home with his 2 1/2 year old son, [S.A.J.] , who was naked. On or about the 14th day of April 2005, in the presence of his son, the putative father Mark J. did expose "his fully erect penis" to [Ms.] Blanding.

> The putative father Mark J. is currently charged with a "Lewd act upon a minor under sixteen" in Summerton, South Carolina. This charge was the result of incidents that occurred on or about the 21st day of April 2005. It is alleged, and Petitioner avers, that the putative father [] "did place his hands on [the] buttocks [of the five (5) year old daughter of [Ms.] Blanding and asked the five (5) year old to fondle his penis, and rubbed the area between her legs on his penis to such a degree as to cause pain." It is further alleged, and Petitioner avers, that the putative father Mark J. did grab the buttocks of the eight (8) year old daughter of [Ms.] Blanding with both hands and squeezed in a way that "didn't seem right".
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> At the time of the filing of th[e] [amended petition] both Respondent/mother and the putative father were incarcerated. Both Respondent/mother and the putative father are charged with "Resist, delay and obstruct[ion] of a police officer. These charges were subsequently dismissed with regard to Respondent/mother. These charges occurred when agents of the Department of Social Services and the Gastonia Police Office attempted to assume non-secure custody of the juvenile involved herein. Respondent/mother and the putative father refused to permit the Gastonia Police Officer to execute the "Order for Non-Secure Custody". Respondent/mother and the putative father barricaded themselves in their home with the juvenile. Respondent/mother and putative father did not comply with the "Order for Non-Secure Custody" until confronted by the Gastonia Police SWAT unit and about forty (40) other officers. These actions on the part of Respondent/mother and the putative father endangered the juvenile involved herein.

Based on these findings of fact, the trial court concluded S.A.J. was a neglected juvenile. The Guardians *ad litem* requested that the matter be continued for disposition because respondent-mother's psychological evaluation had not been received. The trial court continued physical and legal custody with DSS, ordered supervised

weekly visits for respondent-mother, and set the dispositional hearing for 19 September 2006.

The dispositional hearing was continued until 5 December 2006. After conducting the dispositional hearing, the trial court entered its dispositional order, in which it made the following findings of fact:

> 5. The juvenile involved herein has suffered physical injuries at the hands of Respondent/father, Mark J.
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> 6. Following the placement of the juvenile in the custody of the Department, Respondent/mother and Respondent/father remained together until May of 2006 when Respondent/mother was the victim of a domestic violence assault by Respondent/father. At that time Respondent/mother applied for and obtained a Domestic Violence Protective Order and has not resumed her relationship with Respondent/father.
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> 7. Respondent/father was convicted of Assault on a Female, with regard to Respondent/mother, on July 5, 2006. Respondent/father's probation was revoked on July 24, 2006 due to his absconding. Respondent/father has not been in contact with his probation officer since July 5, 2006 and his whereabouts are unknown.
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> 8. Since leaving Respondent/father in May of 2006 Respondent/mother has completed parenting classes and a domestic violence survivors group.
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> 9. On April 2, 1984 Respondent/mother entered a plea of guilty to, and was convicted of, Aggravated Assault, Endangering the Welfare of a Child and Hindering Apprehension in the Superior Court of Camden County, New Jersey. As a result of the conviction for Aggravated Assault Respondent/mother received a term of incarceration of ten (10) years [minimum of five (5) years for parole eligibility]. As a result of her conviction for Endangering the Welfare of a Child

> Respondent/mother received a term of incarceration of five (5) years. As a result of Respondent/mother's conviction for Hindering Apprehension she revived a term of incarceration of five years incarceration. The five (5) year sentences were to run concurrently with the ten (10) [y]ear sentence.
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> 10. Respondent/mother's conviction for Aggravated Assault was due [] to severe injuries she caused to her two (2) year old child [N.T.]. This child was admitted to the hospital with an injured leg, broken collar bone, a prior broken leg and a healing fracture of the wrist. These injuries were non-accidental.
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> 11. Respondent/mother's conviction for Endangering the Welfare of a child was as a result of her disposal of the dead body of her three (3) year old child [K.T.] in a trash bag and leaving the body to be picked up by trash collectors. The body of this child was never found and therefore a cause of death could never be determined.
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> 12. Respondent/mother's conviction for Hindering Apprehension was due to her suppressing evidence of the crime of aggravated manslaughter upon her child [K.T.] by "covering up" for her boyfriend.
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> 13. Respondent/mother has admitted, and the Court finds, that Respondent/mother was protecting her boyfriend with regard to the death and circumstances surrounding the death of [K.T.].
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> 14. Respondent/mother has a history of over twenty (20) year[s] of being a victim of domestic violence and of exposing her children to the dangers surrounding domestic violence.

The trial court made further findings pursuant to N.C. Gen. Stat. § 7B-507 (a) and (b). The trial court ordered physical and legal custody remain with DSS and the cessation of reasonable efforts

towards reunification on the part of DSS. Respondent-mother appeals.

N.C. Gen. Stat. § 7B-802 requires an adjudicatory hearing to determine the existence or nonexistence of the conditions alleged in a petition. N.C. Gen. Stat. § 7B-802 (2006). Section 7B-802 further mandates that "[i]n the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law." N.C. Gen. Stat. § 7B-802. In an adjudicatory hearing to determine abuse, neglect, or dependency, the petitioner must prove the allegations "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2006).

I. Absence of Putative Father

Respondent-mother contends the trial court lacked authority to enter the 5 September 2006 order of adjudication because respondent-father was not present at the hearing and did not consent or admit the allegations. Respondent-mother seems to be arguing that the adjudication order was a consent order to which one party did not consent. In support, she cites *In re J.R.*, 163 N.C. App. 201, 592 S.E.2d 746 (2004) (entry of order adjudicated child as neglected based upon the consent of father's attorney, where neither mother nor her counsel was present, and mother appealed) and *In re Shaw*, 152 N.C. App. 126, 566 S.E.2d 744 (2002) (adjudication of neglect and disposition granting custody to mother based upon mother's stipulation only, without hearing evidence, where father was not present or represented by counsel).

First, we note that respondent-mother did not appeal from the order of adjudication entered on 5 September 2006, and she has not assigned error to this order in any respect, even though the findings of the adjudication order were incorporated into the dispositional order. In addition, as the record contains no transcript from the adjudicatory hearing, we are unable to determine if the order was based solely upon respondent-mother's admissions or if other testimony was received by the court. The order states that the findings of fact were based on "clear, cogent and convincing evidence, *and* the admission of the parties." (Emphasis added.) "It is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983). "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) (quoted in *McKyer v. McKyer*, ___ N.C. App. ___, 642 S.E.2d 527, 532 (2007)). Since we have no transcript from the adjudicatory hearing, we "presume the findings at bar are supported by competent evidence." *Davis v. Durham Mental Health*, 165 N.C. App. 100, 112, 598 S.E.2d 237, 245 (2004).

On its face, the order of adjudication was not a consent order entered without an adjudicatory hearing, and we have nothing in the record to indicate otherwise. We note that James Bowman, attorney for Mark J., appeared for the adjudicatory hearing and that the adjudicatory order contains a finding of fact regarding Mark J.'s

absence from court. The adjudicatory order contains extensive findings of fact regarding the neglect of S.A.J., and respondent-mother has not assigned error to any part of the adjudicatory order. The findings of the adjudicatory order were incorporated into the dispositional order in finding of fact No. 3, to which respondent-mother also has not assigned error. Since the trail court's findings of fact are not assigned as error, we presume they are correct. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998).

We also note that at the dispositional hearing, Mark J. was again represented by his attorney, Mr. Bowman, who informed the court that "someone purporting to be [Mark J.] contacted [Mr. Bowman] prior to this hearing and indicated that he desired custody of the juvenile, S.A.J., to be returned to Respondent/mother." The dispositional order also contains a finding of fact, to which respondent-mother did not assign error, as to Mark J.'s probation revocation and his absconding. Mark J. did not file a notice of appeal from the dispositional order. Respondent-mother's argument that the trial court lacked authority to enter the adjudication order in Mark J's absence is therefore without merit.

II. Cessation of Reunification Efforts

Respondent-mother also contends the trial court erred in finding and concluding that further reunification efforts would be futile and that ceasing reunification efforts was appropriate. She argues these rulings are not supported by adequate conclusions of law, adequate findings of fact, or credible evidence.

The trial court may "order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, and whether the findings of fact support the trial court's conclusions. *Id.* at 477-78, 581 S.E.2d at 137; N.C. Gen. Stat. § 7B-507 (2006); N.C. Gen. Stat. § 7B-903 (2006); N.C. Gen. Stat. § 7B-905 (2006).

When a trial court ceases reunification efforts with a parent, it is required to make findings of fact pursuant to N.C. Gen. Stat. § 7B-907(b). *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003); N.C. Gen. Stat. § 7B-907(b) (2006). A trial court may cease reunification efforts upon making a finding that further efforts "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" N.C. Gen. Stat. § 7B-507(b)(1) (2006). The court may also cease reunification efforts upon making a finding that a "court of competent jurisdiction has determined that: the parent . . . has committed a felony assault resulting in serious bodily injury to the child or another child[.]" N.C. Gen. Stat. § 7B-507(b)(4) (2006).

To support its conclusion that reunification efforts be ceased, the trial court found:

> 19. Pursuant to N.C.G.S. § 7B-507(b)(1), efforts to eliminate the need for placement of the juvenile would "clearly be futile or would be inconsistent with the juvenile's health safety, and [the] need for a safe, permanent home within a reasonable period of time."
> 20. Pursuant to N.C.G.S. § 7B-507(b)(4), "A court of competent jurisdiction [in Camden County[,] New Jersey] has determined that [Respondent/mother] . . . has committed a felony assault resulting in serious bodily injury to . . . another child of [Respondent/mother's]."

The trial court may support its decision to cease reunification efforts with only one factor. Although respondent did assign error to finding No. 20, she did not argue any legal basis for this assignment of error in her brief, and the record contains extensive evidence of her prior felony assault conviction for causing serious bodily injury to another child, including the 1984 Judgment of Conviction and Order for Commitment and Statement of Reasons for Sentence from the State of New Jersey for the County of Camden, which show that respondent-mother "pleaded to a charge of aggravated assault upon one of her children, N.T[.]" Thus the evidence fully supports finding No. 20. Respondent-mother also challenges the sufficiency of the evidence to support finding of fact No. 19. Upon review of the entire record, we find that there is extensive evidence to support this finding as well, and note that the trial court found many facts, which were not assigned as error, which would indicate the futility of continuing efforts at reunification. Respondent-mother notes her evidence which indicates her improvement in various areas since the inception of the case, but we cannot find that the trial court abused its

discretion by finding that respondent-mother's pattern of behavior which had been continuing in excess of 20 years outweighs any recent progress. We therefore conclude the trial court's finding that reunification would be futile to be supported by the evidence.

We therefore conclude that both findings of fact No. 19 and No. 20 are supported by the evidence and that either one of these two findings would support the trial court's conclusion that ceasing reunification was appropriate. Accordingly, the trial court's orders are affirmed.

Affirmed.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).