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NO. COA08-776

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2008

IN THE MATTER OF:

H.P.
C.P.
M.P.
He.P.

Henderson County
Nos. 01 J 84-87

Court of Appeals

Appeal by Respondent-father from orders entered 25 April 2008
by Judge David K. Fox in Henderson County District Court. Heard in
the Court of Appeals 3 November 2008.

Slip Opinion

Susan L. Foshers, for Henderson County Department of Social Services, Petitioner-Appellee.

Pamela Newell Williams, for Guardian ad Litem-Appellee.

Robin E. Strickland, for Respondent-Appellant.

ARROWOOD, Judge.

Cecil P. (Respondent-father) appeals from the trial court's adjudication and disposition orders finding the minor children, H.P., C.P., M.P., and He.P. to be neglected juveniles and placing the children in the legal custody of Henderson County Department of Social Services (HCDSS). Angelina P. (Respondent-mother) does not appeal. For the reasons stated herein, we affirm.

Respondent-father and Respondent-mother are the biological parents of H.P. and M.P. (twins) born in 1999, C.P. born in 1998,

and He.P. born in 1997. On 7 March 2008, HCDSS filed a juvenile petition alleging H.P., C.P., M.P., and He.P. were neglected juveniles in that: (1) the juveniles do not receive proper care, supervision, or discipline from the juveniles' parent, guardian, custodian, or caretaker; and (2) the juveniles live in an environment injurious to the juveniles' welfare. Specifically, HCDSS alleged:

HCDSS has a long history with the family. The juveniles were adjudicated dependent juveniles September 2001 in that the parents left the juveniles in the care of a baby sitter and didn't return to collect the juveniles. Parents also had a history of domestic violence. Custody was returned to the parents December 2001.

A second petition was filed November 2005. The juveniles were adjudicated neglected juveniles May 2006 in that the mother was using Oxycontin, the father was using methamphetamine, there was domestic violence between the parents, mother was incarcerated and father was evicted from the home.

On January 3, 2008 the children were returned to the joint custody of the parents with the primary placement being with the mother. This matter was converted to a Chapter 50.

On February 8, 2008 a report was received that the mother was shooting up Oxycontin [sic] on or about 2-7-07 and 2-8-08. The mother was "shooting up" in the bedroom. The juveniles were beating on the bedroom door in an attempt to get in. The juveniles were yelling at the mother stating they knew she was using drugs.

On March 5, 2008 there was a report that belts, needles, and spoons with burn marks have been seen at the home. The father was seen using a lighter under a spoon. The mother has been allowing the father to [come] to the house while he is using illegal substances. It was reported that the father was at the mother's home and would not allow

the juveniles into the bathroom. The father got mad and hit the juvenile [C.P.] leaving a belt mark on his left leg. These bruises were observed by the Social Worker.

During the course of this investigation both the mother and father admitted to the Social Worker that they have been using illegal drugs again.

An order for nonsecure custody was also filed on 7 March 2008 and a nonsecure custody hearing was held on 11 March 2008. The trial court ordered that the children remain in the nonsecure custody of HCDSS. A second nonsecure custody hearing was held on 18 March 2008 and the parents consented to HCDSS maintaining custody of the children.

On 3 April 2008, the trial court held an adjudication hearing, immediately followed by the disposition hearing. By order entered 25 April 2008, the trial court adjudicated the children to be neglected juveniles. Also on 25 April 2008, the trial court entered a dispositional order continuing custody of the children with HCDSS. From these orders, Respondent-father appeals.

I.

Respondent-father first argues that the trial court's adjudication of the juveniles as neglected should be reversed because there was no clear, cogent and convincing evidence that the juveniles were neglected at the time of the filing of the petition.

"In a non-jury neglect 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). "Where, as here, a respondent does not challenge any of the trial court's adjudicatory findings of fact by a properly briefed assignment of error, the findings are deemed to be supported by competent evidence and are binding on appeal." *In re M.A.I.B.K.*, 184 N.C. App. 218, 222, 645 S.E.2d 881, 884 (2007) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). The determination that a child is a neglected or dependent juvenile within the meaning of N.C. Gen. Stat. § 7B-101 is a conclusion of law fully reviewable on appeal. See *Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675.

The Juvenile Code defines a neglected juvenile 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) (2007). "[I]n determining whether a parent has neglected a juvenile, a prior adjudication of neglect involving that parent is a relevant factor to consider, and 'the trial judge [is afforded] some discretion in determining the weight to be given such evidence.'" *In re E.N.S.*, 164 N.C. App. 146, 150, 595 S.E.2d 167, 169 (2004) (quoting *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994)); see also N.C. Gen. Stat. § 7B-101(15).

In the case *sub judice*, the trial court's adjudication of neglect was based on the totality of the circumstances. The court made the following relevant findings:

5. The most recent petition prior to the current petition was filed November 2005. The juveniles were adjudicated neglected juveniles May 2006 the court finding that the mother was using Oxycontin, the father was using methamphetamine, there was domestic violence between the parents, mother was incarcerated and father was evicted from the home.

6. On January 3, 2008 the children were returned to the joint custody of the parents with the primary placement being with the mother. This matter was converted to a Chapter 50.

7. On or about February 8, 2008 a rubber tube, spoon, needle and controlled substance were found in the home with the juveniles. According to one parent the other brought the items into the home. According to the other parent the items were already in the home.

8. The juveniles are aware of their parent's drug use.

9. The mother admitted to using a controlled substance one time since the juveniles had been returned that being with the father on or about February 8, 2008 and the substance being Oxycontin.

10. The father refused to take a drug test.

11. The father admitted to Officer Chris Causby of the Henderson County Sheriff's Department that he had in fact used a controlled substance on or about February 8, 2008. In the Officer's opinion the father was impaired.

12. The father admitted that since 2008 he had used Percocet and Marijuana.

13. The father used a belt on the juvenile C during a time when the juvenile was visiting

with the father; said belt inflicting injury on the juvenile.

14. The parents' actions show a criminal fecklessness. They can't resist using controlled substances. They are not a healthy influence on each other.

15. While parents argue this was a one time occurrence the Court looks at the totality of the circumstances including the recent prior court involvement with this family.

16. That the Court finds that conditions which led to the removal of the juvenile from the juvenile's home still yet exist.

"In cases of this sort, 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). Here, the trial court carefully considered and assessed the evidence regarding the past adjudication of neglect and the likelihood of the neglect continuing in the future. Therefore, we hold that the findings of fact taken in their entirety are sufficient to support the conclusion that the minor children were neglected juveniles as defined by N.C. Gen. Stat. § 7B-101(15). Accordingly, this assignment of error is overruled.

II.

Respondent-father next argues that the trial court abused its discretion and erred when it denied his motion to dismiss.

The standard for a motion to dismiss in a nonjury trial is set forth in N.C. Gen. Stat. § 1A-1, Rule 41(b). "When a Rule 41(b) motion is made in a nonjury trial, the judge becomes both the judge

and jury, and he must consider and weigh all competent evidence before him." *In re Becker*, 111 N.C. App. 85, 92, 431 S.E.2d 820, 825 (1993). "Dismissal under Rule 41(b) is within the discretion of the trial court." *Jones v. Stone*, 52 N.C. App. 502, 506, 279 S.E.2d 13, 15 (1981).

Here, the trial court was presented with clear and convincing evidence showing that HCDSS had a long history with the family; the children were previously adjudicated neglected due to the parents drug use and issues of domestic violence between the parents; the children had only been returned to their parents' custody for two months at the time the petition was filed; and the children were in an environment of continuing substance abuse. Accordingly, we conclude that the trial court did not abuse its discretion in denying the motion to dismiss and overrule this assignment of error.

III.

Respondent-father next argues that the trial court erred by overruling his objections to irrelevant testimony. Specifically, Respondent-father contends it was error for the trial court to overrule his objections to testimony regarding HCDSS's prior involvement with the family and his failure to take a drug test subsequent to the filing of the petition.

As we stated above, the trial court must assess whether there is a substantial risk of future neglect based on the prior history of the case. Therefore, the testimony regarding HCDSS's prior involvement with the family was relevant. Likewise, testimony

about Respondent-father's failure to take a drug test was relevant to assessing the risk of future neglect.

Respondent-father further argues that the trial court erred by allowing testimony regarding the number of tickets he had received for driving while license revoked.

This Court has stated that in a nonjury trial or hearing, "it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976) (citation omitted). "[Respondent-father] bears the burden of showing that the trial court relied on the incompetent evidence in making its findings." *In re H.L.A.D.*, 184 N.C. App. 381, 395, 646 S.E.2d 425, 435 (2007), *aff'd*, 362 N.C. 170, 655 S.E.2d 712 (2008) (citation omitted). Here, Respondent-father has failed to meet this burden. There is no showing that the trial court relied on evidence of Respondent-father's driving record in making its findings of fact. Based on the foregoing, we overrule this assignment of error.

IV.

Lastly, Respondent-father argues that the trial court abused its discretion by entering a dispositional order not supported by the evidence. Specifically, Respondent-father contends that there was no evidence that the juveniles would not be safe in their own home; therefore, the trial court erred when it ordered the juveniles placed in the custody of HCDSS. We disagree.

After adjudication, the trial court proceeds with a dispositional hearing. "The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile." N.C. Gen. Stat. § 7B-901 (2007). The trial court shall find the disposition that is in the best interest of the juvenile and one dispositional alternative is placing the juvenile in the custody of the department of social services. N.C. Gen. Stat. § 7B-903 (2007).

Here, we have found that the trial court properly concluded the children were neglected juveniles. The trial court having adjudicated the juveniles neglected, proceeded with the dispositional hearing and HCDSS and the guardian ad litem submitted court reports. The report submitted by HCDSS indicated that the children told their school counselor about finding drug paraphernalia and feeling unsafe at their mother's home due to their father coming around and their mother's boyfriend. Additionally, the children stated to their school counselor that their mother gave them Nyquil at night to put them to sleep so that they would not hear her having sex with her boyfriend. Further, the guardian ad litem report indicates the children expressed that they did not want to live with their parents if they continued to use drugs. The children also indicated that they did not feel safe at home. Accordingly, we conclude that the trial court did not err in entering the dispositional order. The trial court's orders are affirmed.

Affirmed.

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Judges HUNTER and GEER concur.

Report per Rule 30(e).