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NO. COA08-906

NORTH CAROLINA COURT OF APPEALS

Filed: 6 January 2009

IN THE MATTER OF:
N.F.

Buncombe County
No. 07 JA 434

Appeal by respondent-mother from order entered 15 May 2008 by Judge Marvin P. Pope, Jr. in District Court, Buncombe County. Heard in the Court of Appeals 15 December 2008.

J. Suzanne Smith for petitioner-appellee Buncombe County Department of Social Services.

Judy M. Rudolph for respondent-appellant mother.

Michael N. Tousey for guardian ad litem.

WYNN, Judge.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence,"¹ and the trial court's findings of fact must support its conclusions of law. Respondent-mother appeals from an order adjudicating her minor child N.F. abused and neglected. Because competent evidence supports the findings of fact, which support the conclusions that N.F. was abused and neglected, we affirm.

¹ N.C. Gen. Stat. § 7B-805 (2007).

On 15 November 2007, the Buncombe County Department of Social Services ("DSS") filed a juvenile petition alleging that N.F. was an abused and neglected juvenile. The petition related to a report DSS received on 8 November 2007 regarding N.F.'s health. The report alleged that N.F. had Juvenile Rheumatoid Arthritis, was in the hospital, and was at an extremely low weight due to poor nutrition. N.F. was 12 years old and lived with her mother at the time the petition was filed. The biological father of N.F. is unknown.

N.F. was diagnosed with Juvenile Rheumatoid Arthritis in the summer of 2007. N.F. was referred to Rheumatologist Jill Vargo on 8 August 2007. Dr. Vargo testified that N.F.'s symptoms started in June 2007, but the Juvenile Rheumatoid Arthritis was "widespread" by the time she first saw N.F. Dr. Vargo further explained that "[m]ost of her joints were swollen," and "her activities were very restricted." Thereafter, Dr. Vargo began a treatment plan for N.F., prescribing the medications Plaquenil and Prednisone.

N.F. had experienced an eighteen pound weight loss in the summer of 2007. According to N.F.'s pediatrician, Dr. William Bryan, N.F.'s weight went from ninety-one pounds on 25 May 2007 to approximately seventy-three pounds on 8 August 2007. N.F. was admitted to the hospital on 28 August 2007 because of her weight loss and worsening condition. When Dr. Ansley Miller began treating N.F. at the hospital, N.F.'s weight was down to sixty-nine pounds, within the fifth percentile for her age. N.F. had a modest

weight gain while in the hospital and was discharged on 5 September 2007 into her mother's care.

Dr. Miller created a treatment plan with the intent that N.F. would gain more weight and her Juvenile Rheumatoid Arthritis would improve following N.F.'s discharge from the hospital. The plan called for N.F. to: (1) drink three cans per day of the supplement Ensure, and (2) continue taking Prednisone and Plaquenil, as prescribed by Dr. Vargo. Dr. Miller worked with a dietician to create the treatment plan, taking the mother's vegan preferences into consideration.

On 18 September 2007, N.F. went to see her rheumatologist, Dr. Vargo. However, N.F. was late to the appointment so she saw Dr. Vargo's physician's assistant instead. According to the physician's assistant, N.F. was "in a wheelchair and most of her joints were very swollen and painful and she was losing range of motion." At the hearing, Dr. Vargo testified that it was "clear that [N.F.] was going to need stronger medication," so he recommended Methotrexate. However, the mother refused to follow the treatment plan including Methotrexate because she was concerned about the toxicity of the drug.

N.F. was readmitted to the hospital on 7 November 2008 because she had lost weight following her discharge in September. N.F.'s weight was down to sixty-six pounds upon her readmission to the hospital. Dr. Miller testified that she confronted the mother about N.F.'s diet upon readmission. The mother suggested that N.F.'s medications and certain foods, such as gluten and tomatoes,

were making N.F.'s condition worse. Therefore, the mother gave N.F. a natural cleansing diet, which consisted of a vegan diet, excluding gluten and tomatoes. N.F. was later tested for Celiac disease, which is associated with gluten intolerance, and the results were negative.

According to Dr. Miller, N.F.'s condition had worsened since September:

Her arthritis [] had greatly worsened since I had seen her in September. [H]er wrists were swollen. Most notably on that admission, her knee was markedly swollen, [] markedly warm to the touch which is a sign of inflammation. She was not ambulatory and, [] she was also noted to be in diapers at that time.

Dr. Miller and Dr. Vargo shared concern about the progression of N.F.'s disease. Dr. Miller opined that the mother interfered with N.F.'s medical treatment, and failed to follow Dr. Vargo's treatment plan and recommendations from the September visit, causing N.F.'s condition to worsen.

DSS proposed a safety assessment to the mother, whereby, *inter alia*, she would have no contact with N.F. during mealtimes, but the mother did not fully comply. Thereafter, DSS filed this petition, and, in a nonsecure custody order dated 15 November 2007, the trial court gave DSS custody of N.F. N.F. was placed in a foster home upon her release from the hospital on 26 November 2007. The trial court subsequently kept custody with DSS in nonsecure custody orders dated 2 December 2007 and 10 January 2008. After N.F.'s release from the hospital on 26 November 2007, her health greatly improved and she gained a substantial amount of weight. N.F.

weighed ninety-two pounds when Dr. Bryan saw her on 14 February 2008. He testified that she seemed happy, was 90% better, and was walking and jumping.

The trial court conducted an adjudicatory and dispositional hearing on 12 March 2008 and entered a written adjudicatory and dispositional order on 15 May 2008. In the adjudicatory portion of the order, the trial court found two grounds to support the conclusion that N.F. was abused and four grounds to support the conclusion that N.F. was neglected. In the dispositional portion of the order, the trial court found that it was in N.F.'s best interest to remain in the custody of DSS. The mother appeals from the 12 March 2008 order arguing: (I) adjudicatory findings of fact 3, 12-17, 19-20, and 22-26 are not supported by clear and convincing evidence; and (II) the findings of fact do not support the conclusions that N.F. was abused and neglected.

I.

We only address challenged findings 19, 20, and 23-26, which we find necessary to support the trial court's conclusions of neglect and abuse. "Allegations of neglect [or abuse] must be proven by clear and convincing evidence. In a non-jury neglect [or 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) (citations omitted). If competent evidence supports the findings, they are

"binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted).

The first challenged finding of fact, number 19, is a summary of Dr. Miller's opinion regarding N.F.'s condition:

Dr. Miller opined, and the court concurs, that a combination of the minor child's weight and [respondent's] refusal to allow medical treatment of [N.F.] will, in time, destroy [N.F.'s] joints causing [N.F.] to not be able to walk; further, it is uncertain whether or not serious permanent damage has already occurred to [N.F.]

The mother argues that finding of fact 19 is not supported by competent evidence because Dr. Miller was not properly tendered or accepted as an expert witness. After DSS elicited Dr. Miller's opinion, the mother objected on the ground that Dr. Miller was not tendered as an expert and the question therefore called for speculation. The trial court overruled the mother's objection, stating "I'll let you cross examine her about that."

We find that the trial court's ruling was an implicit finding that the witness was an expert. See *State v. Wise*, 326 N.C. 421, 430-31, 390 S.E.2d 142, 148 (1990) (finding that a trial court's overruling of counsel's objection to opinion testimony constituted an implicit finding that the witness was an expert). Moreover, our Supreme Court has held that formal tender of an expert witness is not necessary. See *State v. White*, 340 N.C. 264, 293-94, 457 S.E.2d 841, 858 (1995).

In *White*, three nurses gave opinion testimony, but were never formally tendered by the State or accepted by the trial court as experts. The Supreme Court held that the nurses' testimony was

properly admitted as expert testimony and explained that formal tendering is not required:

While the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness' qualification to testify as an expert witness. Such a finding has been held to be implicit in the court's admission of the testimony in question. Defendant must specifically object to the qualifications of an expert witness in order to preserve the objection. In this case, by overruling defendant's objections, the trial court implicitly accepted [three nurses] as expert witnesses. By failing to specifically object to their qualifications at trial, defendant has waived her right to raise that issue on appeal.

Id. (citations omitted).

Moreover, the mother did not specifically object to or cross-examine Dr. Miller about her expert qualifications. *Id.* at 293-94, 457 S.E.2d at 858. Accordingly, we find that finding of fact 19 is supported by clear and convincing evidence.

Next, the mother challenges finding of fact 20, which summarizes Dr. Vargo's testimony regarding the mother's interference with N.F.'s treatment:

[The mother] has consistently intervened during [N.F.'s] treatment plan as developed by Dr. Vargo, and that the intervention was inappropriate and potentially life-threatening for [N.F.]. [Dr. Vargo] had difficulty in getting [the mother] to come back for appointments; [the mother] was a no-show for two appointments and arrived too late for the appointments three times. [N.F.] saw the physician's assistant two times because [the mother] was so late in getting [N.F.] to the appointments. The concerns Dr. Vargo had were that in addition to serious permanent joint

damage, if [N.F.] continues to lose weight at her current rate, [N.F.] could develop a serious, life threatening heart condition in the next six months. Dr. Vargo stated that there are alternative medical treatments for JRA; however, these treatments require injections and [the mother] refused to explore these options.

The mother's only complaint is that the portion of the finding that states respondent "has consistently intervened during [N.F.'s] treatment plan as developed by Dr. Vargo" is inaccurate. However, we find sufficient evidence in the record to support the trial court's finding that the mother interfered with Dr. Vargo's treatment.

Most importantly, Dr. Vargo testified that, as of 18 September 2007, a stronger medication like Methotrexate was necessary to improve N.F.'s worsening condition. Nonetheless, the mother gave Dr. Vargo's physician's assistant "a lot of resistance" when the physician's assistant attempted to discuss the use of Methotrexate. When asked if the mother was "willing to follow through" on a treatment including Methotrexate, Dr. Vargo answered "[s]he was not." Moreover, Dr. Vargo testified that the mother missed, rescheduled, and arrived late to appointments. We find that the mother's failure to maintain scheduled checkups and resistance to Dr. Vargo's recommendations supports the inference that the mother was unwilling to cooperate with N.F.'s treatment plan. Accordingly, we conclude that finding of fact 20 is supported by competent evidence.

In findings of fact 23 and 24, the trial court summarizes the mother's beliefs and preferences regarding N.F.'s treatment, medications, diet, and medical providers:

23. [The mother] testified in this hearing, and it was apparent to the court that [the mother] has unusual, strongly held beliefs. [The mother] testified that she had refused to allow [N.F.] to be treated with conventional medication as that medication could cause the death of the child; therefore, she was being a good mother by protecting her child from this dangerous medication. [The mother] testified that [N.F.] needed to cleanse the body of toxins by eating only certain foods, and that she was doing what was in the best interest of [N.F.] [The mother] refused to state whether or not she would allow [N.F.] to be treated as recommended by the physicians if [N.F.] was shown not to have [celiac disease] and her dietary program was not successful.

24. Instead, [the mother] testified that she wanted [N.F.] seen by a natural/integrative medicine doctor as she wanted to find another doctor that would relieve her child's pain in another way. When questioned as to what she would do if the natural/integrative medicine doctor decided that [N.F.] needed to take Methotrexate, [the mother] would not agree to allow [N.F.] to be given Methotrexate, and when pressed, stated she would "make the decision then."

The mother specifically objects to the statement that N.F. "[n]eeded to cleanse the body of toxins by eating only certain foods, and that she was doing what was in the best interest of the child" because the mother denied giving N.F. a cleansing diet. The mother points to her testimony at the hearing that N.F. "did it anyway on her own because she won't eat too much anyway."

Although the mother denied putting N.F. on a cleansing diet, the evidence was sufficient for the trial court to draw the

contrary inference. The mother admitted giving N.F. a vegan and gluten-free diet and to avoiding nightshade vegetables, such as tomatoes and eggplant. Dr. Miller testified that the mother "felt that a natural cleansing diet would best treat her child, which stated from mom was a --- a vegan diet and a gluten-free diet." Where evidence is conflicting, it is the duty of the trial judge to determine the weight and credibility to be given to evidence, including which inferences to draw and which to reject. *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985).

The mother also argues that the trial court's findings regarding her preference for integrative medicine are unsupported by the evidence. However, the mother testified that she wished to have N.F. seen by an integrative medicine physician. At the hearing, the mother was asked whether she would follow the alternative medicine doctor's treatment plan even if it called for keeping N.F. on medications to treat Juvenile Rheumatoid Arthritis, including Methotrexate. The mother answered "[a]t that time, I could not make a determination." Accordingly, we conclude that findings of fact 23 and 24 are supported by clear and convincing evidence.

Next, the mother challenges finding of fact 26, which states:

When [N.F.] was first admitted to the hospital, [the mother] remained with [N.F.] in her hospital room, and [the mother] demanded only a few types of vegetarian foods be provided for [N.F.] During that time [N.F.] would not eat much of anything, and she was not gaining weight. When [DSS] took custody of [N.F.] and barred [the mother] from the hospital due to [the mother's] interference with the treatment, [N.F.] began eating all of

her food and asking for more. [N.F.] gained a significant amount of weight at the hospital, and she has continued to gain weight thereafter. [N.F.] now not only walks but runs and jumps.

All of the facts contained in finding 26 are supported by clear and convincing evidence from the adjudication hearing. Specifically, however, the mother objects to the inference the trial court apparently drew between her vegan preferences, her being barred from the hospital, and N.F.'s weight gain. But again, it is within the province of the trial court to draw reasonable inferences from the evidence. *Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Therefore, we reject the mother's argument and conclude that finding of fact 26, including any reasonable inferences therein, is supported by clear and convincing evidence.

Finally, the mother argues that finding of fact 25 is actually a conclusion of law. Finding of fact 25 says "[t]he court has concluded that [the mother's] beliefs caused significant damage to [N.F.'s] health, and could have caused [N.F.'s] death." "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties." *Hughes*, 74 N.C. App. at 759-60, 330 S.E.2d at 219. We are permitted to consider an improperly classified finding of fact as a conclusion of law. See *In re T.H.T.*, 185 N.C. App. 337, 345, 648 S.E.2d 519, 524 (2007) (determining that an improperly classified finding of fact could be considered with the challenged conclusions of law). Thus, considering finding of fact 25 as a challenged conclusion of law, we conclude that it is supported by sufficient findings of

fact. For example, we have already concluded above that finding of fact 23 is supported by competent evidence. Within finding of fact 23, the trial court found that the mother's beliefs caused her to reject conventional medications recommended for N.F., and to restrict N.F.'s diet to a small number of food choices, resulting in malnourishment. These facts support the conclusion that "[the mother's] beliefs caused significant damage to [N.F.'s] health, and could have caused [N.F.'s] death." Accordingly, the mother's assignments of error to the trial court's findings of fact are overruled.

II.

Next, the mother argues that the trial court erred by concluding that N.F. was an abused and neglected juvenile. In its adjudication order, the trial court concluded that N.F. was abused on the grounds that the mother (1) has inflicted, or allowed to be inflicted, on N.F. a serious physical injury by other than accidental means; and (2) has created, or allowed to be created, a substantial risk of serious physical injury to N.F. by other than accidental means. The trial court also concluded that N.F. was neglected on the following grounds: (1) that N.F. does not receive proper care, supervision, or discipline from the mother; (2) that N.F. is not provided the necessary medical care; (3) that N.F. is not provided the necessary remedial care; and (4) that N.F. lives in an environment injurious to her welfare due to the mother's failure to allow N.F. to have treatment for her life-threatening condition.

After careful review, we affirm the trial court's conclusions that N.F. was abused and neglected. Our conclusion is based on the uncontested findings of fact and the findings affirmed above, which establish, *inter alia*: (1) Dr. Miller believed that the mother's beliefs inhibited N.F. from maintaining a healthy weight and caused N.F. to develop a fear of certain foods; (2) Dr. Miller and Dr. Vargo both believed that N.F.'s worsening condition and the mother's resistance to recommended medical treatment would, in time, cause N.F. irreversible injury; (3) the mother refused to fully comply with a safety plan proposed by DSS; (4) after the mother was barred from the hospital and DSS took custody of N.F., she began eating and gaining weight; and (5) after N.F. was released from the hospital on 26 November 2007, she had a significant weight gain, no longer used a wheelchair, and could walk, run, and jump.

These findings of fact support the conclusion that the mother created or allowed to be created a substantial risk of serious physical injury to N.F. by other than accidental means. See N.C. Gen. Stat. § 7B-101(1) (2007); see also *In re Greene*, 152 N.C. App. 410, 417, 568 S.E.2d 634, 638-39 (2002) (concluding that a juvenile was abused where the mother fabricated medical problems, putting her daughter at a substantial risk of being overmedicated and physically injured). These findings of fact also support the conclusion that N.F. does not receive proper care, supervision, or discipline from the mother. See N.C. Gen. Stat. § 7B-101(15); see also *T.H.T.*, 185 N.C. App. at 345-46, 648 S.E.2d at 525 (juvenile's

non-accidental injuries supported the conclusions that the juvenile did not receive proper care, supervision, or discipline, and that the juvenile was abused).

In conclusion, we hold that clear and convincing evidence supports the challenged findings of fact, which in turn support the conclusions that N.F. was abused and neglected.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).