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NO. COA09-649

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

IN THE MATTER OF:

J.J.

Guilford County  
No. 08 JA 724

Appeal by respondent from order entered 4 March 2009 by Judge Sherry F. Alloway in Guilford County District Court. Heard in the Court of Appeals 28 September 2009.

*Mercedes O. Chut, for petitioner-appellee Guilford County Department of Social Services.*

*Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for appellee Guardian ad Litem.*

*Patricia Kay Gibbons, for respondent-appellant.*

MARTIN, Chief Judge.

Respondent appeals from an order of the trial court adjudicating her son, J.J., dependent. After careful consideration, we affirm the trial court's order.

Respondent was sixteen years old at the time of the adjudication hearing in January 2009. In addition to J.J., respondent has an older child, A.M., who was born with severe birth defects and medical problems. The Guilford County Department of Social Services ("DSS") took custody of A.M. on 7 January 2008, shortly after he was born. On 31 January 2008, respondent entered

into a case plan with DSS in order to be reunited with A.M. At the time of A.M.'s birth, respondent herself was in custody of DSS, but at some point thereafter returned to the home of her father, Mark J.

On 30 October 2008, DSS received a report that respondent and her sister were not attending school and were breaking into homes and stealing, and that respondent was staying away from home for days at a time. DSS received another report on 2 December 2008 that respondent had given birth to a baby boy at the hospital. DSS suspected that the baby's father was James J., respondent's first cousin and the father of A.M. A.M.'s health problems were attributable at least in part to a genetic disorder owing to the close genetic relationship of respondent and James J. Respondent has denied that James J. is the father of J.J.

On 3 December 2008, DSS organized a meeting with the family and informed them that J.J. could not leave the hospital in respondent's care due to respondent's lack of full compliance with the case plan for A.M. Respondent named potential caretakers, but her father, Mark J., J.J.'s grandfather, would not agree to placement with any of those choices. DSS filed a juvenile petition that day alleging dependency, and was granted nonsecure custody of J.J. The trial court held an initial nonsecure custody hearing on 18 December 2008, at which it ordered DSS to conduct home studies of J.J.'s grandfather. The court authorized continued legal custody with DSS.

The matter came on for adjudication on 26 January 2009. Respondent testified at the hearing regarding her case plan for A.M. She admitted that she had not complied with every requirement in her case plan, and that she had not completed it by the hearing date. Respondent declared that she was trying to comply with all the aspects of her case plan, but admitted that she was not fully compliant from January to December 2008.

With regard to J.J.'s health, respondent testified that she began receiving prenatal care beginning in March 2008. She also prepared for the baby by participating in a parenting skills program, and by buying necessities such as a bed, car seat, clothes, diapers, wipes, and bottles. When asked for alternative placement options, respondent told DSS to consider her father, stepmother, and grandmother. At the time of the hearing, she had a job at Sonic, a restaurant, working approximately twelve hours per week. Respondent admitted that she initially denied being pregnant when asked by a DSS social worker.

DSS foster care social worker Connie Bowman testified extensively about respondent's level of compliance with the case plan for reunification with A.M. Respondent was required to cooperate with DSS, including checking in weekly with the social worker and providing updated contact information, regardless of permanency. Ms. Bowman stated that respondent was in partial compliance, in that there were a few weeks when respondent did not have contact with the DSS social worker, although she did see the DSS worker who supervised her visits with A.M. Respondent was in

compliance with her twice weekly visitation. The case plan also required respondent to attend appointments for parenting evaluations and to follow any recommendations made, including attending parenting classes, cooperating with in-home services, and cooperating with shared parenting with the foster parents. Ms. Bowman testified that respondent missed the last date of the parenting assessment, and did not make arrangements to complete the assessment until six months later. In-home services were referred, but were "closed out" in March 2008 due to the family's failure to comply, and services were set up again on 3 June 2008. Respondent, her father, and her sister did complete "intensive hours" at that time. DSS made a family reunification referral assigning LaShonda Oates as the therapist. Ms. Oates had one appointment with respondent, but was unable to reach respondent for further appointments until respondent contacted her two months later.

Ms. Bowman also testified that respondent was required to take parenting classes, but she only completed three classes in February and March 2008, and none after that time. Ms. Bowman was not aware whether respondent had completed grief counseling to cope with the loss of her mother. Respondent was also required to cooperate with community support services through Behavioral Links, follow the house rules set by her father including staying at home every night unless granted permission to be elsewhere, and obey all laws and school regulations. Ms. Bowman stated that respondent was not at all in compliance with this component of the case plan as she was arrested for breaking and entering although the charges were

ultimately dismissed. Further, a runaway report was made, although respondent did return home thereafter. Ms. Bowman related that respondent was not attending school regularly in June 2008, and that she was suspended for the remainder of the school year. At the time of the hearing, however, respondent was successfully enrolled in Adult Basic Education Class and had been since August 2008.

With regard to A.M.'s medical care, respondent did attend some medical appointments. However, on one occasion, respondent did not give the required three-day notice that she needed transportation for a medical appointment and consequently missed the appointment. Respondent did not comply with DNA testing that was court-ordered in A.M.'s case as she failed to attend any of the three appointments scheduled for her. Although J.J.'s medical issues were not as severe as A.M.'s, he showed a few similar symptoms, and the results from genetic disorder tests were still pending at the time of the hearing.

Finally, Ms. Bowman stated that when she became respondent's social worker in November 2008, she strongly suspected that respondent was pregnant, even though respondent denied this fact. J.J. was born in early December. Although respondent stated she had had prenatal care, Ms. Bowman was unable to confirm that.

Darrell Cheeley became involved in the case as the family assessment worker for DSS. His testimony was consistent with Ms. Bowman's. He also testified that, upon receipt of the report that respondent was missing school and engaging in criminal conduct, DSS

tried to conduct an investigation but Mark J.'s unwillingness to cooperate prevented its efforts. Mark J. would not allow DSS into the home and did not return phone calls. Finally, Mr. Cheeley was allowed into the house, but both Mark J. and respondent denied any wrongdoing, and Mark J. repeatedly told Mr. Cheeley to contact his lawyer. Mr. Cheeley only saw one room of the house at the visit so he was unable to assess whether the living environment would be suitable to raise a child.

After J.J. was born, DSS called a Team Decision Meeting with respondent and her father. The hospital needed to discharge the baby in twenty-four hours, but DSS had concerns about both respondent and Mark J. based on their lack of cooperation in A.M.'s case. In a prior adjudication in A.M.'s case, the trial court found that Mark J. was not an appropriate placement for the older child due to lack of cooperation, and because he had not signed or discussed a service agreement with DSS. Further, respondent was not in compliance with her case plan for reunification with A.M. Mark J. refused to listen to DSS when they explained that J.J. could not leave the hospital with either of them due to these reasons. Respondent suggested two possible alternatives for placement, but Mark J. would not agree to either. Respondent named her stepmother, Mark J.'s wife, who was willing to be considered as an option. However, Mark J. and his wife were separated, and Mark J. would not agree to placing J.J. with her. The other possibility, respondent's grandmother, declined to be considered for placement. Mark J. was argumentative and wanted to know why

the baby could not be placed with him. He indicated that the baby would either be placed with him or in foster care. DSS concluded that no appropriate alternative childcare arrangement was available, and filed a juvenile petition seeking custody of J.J.

At the close of the testimony in the adjudication phase, the trial court took judicial notice of the court file in A.M.'s case over respondent's objection, and reviewed *In re A.M.*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 596 (2008) (unpublished), in which this Court affirmed the trial court's adjudication of A.M. as a dependent child. After hearing arguments, the trial court determined that J.J. is a dependent child.

DSS submitted a report for disposition indicating that they had completed a home study of Mark J.'s home but did not recommend placement in his home. DSS expressed concern that Mark J. had not been cooperative in the past, having actually obstructed investigations by not allowing DSS workers into his home or allowing them to speak to his daughter. The report stated that he did not appear to understand that he would be primarily responsible for J.J. and would have to supervise respondent's contact with the child, and DSS had doubts about whether he would abide by guidelines or rules established by the agency. The court ordered that custody of the child remain with DSS, and gave DSS responsibility for placement. The court ordered respondent to enter into a case plan for J.J. and abide by its terms, and allowed respondent supervised visitation twice a week. From the order entered, respondent appeals.

Respondent first argues that the trial court erred by taking judicial notice of the underlying court file in A.M.'s case, over respondent's objection. She contends the trial court based its decision to find J.J. dependent on prior proceedings related to A.M., and that the court's use of the prior proceedings violates the North Carolina Rules of Evidence. She also asserts that the trial court erred by citing verbatim a finding of fact from the order adjudicating A.M. dependent, which found that Mark J., J.J.'s grandfather, was not an appropriate placement. We do not agree that the trial court committed reversible error.

When the trial court is sitting as fact finder, the court is presumed to disregard "any incompetent evidence unless it affirmatively appears that [the trial court] was influenced thereby." *In re L.C., I.C., L.C.*, 181 N.C. App. 278, 284, 638 S.E.2d 638, 642 (quoting *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977)), *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007). Respondent has the burden of showing the trial court's reliance on the incompetent evidence when making its findings. *Id.* We do not find that respondent has shown the trial court relied on incompetent evidence in this case.

Respondent specifically objects to the trial court's use of Finding of Fact 12 from the adjudication order in A.M.'s case. In the instant case, the trial court found in the adjudication portion of the order that the grandfather was an inappropriate placement option for A.M. due to his lack of cooperation in several instances



with DSS, and thus found that DSS's decision not to place J.J. with the grandfather was appropriate.

While this finding does refer to the adjudication in the prior case, the trial court uses it to explain how DSS arrived at its decision not to place J.J. with the maternal grandfather when it conducted its Team Decision Meeting. One of the factors DSS relied on was the finding in the prior case that Mark J. was not an appropriate placement for A.M. The trial court determined that DSS's reliance on that factor, along with the other factors, in deciding not to place the child with Mark J. was appropriate. The trial court did not use the finding from the prior case in substitution for its own judgment in this case, and the trial court's referral to the earlier case in Finding of Fact 12 was not in error.

From our review of the remaining findings of fact, it appears the only other finding that may have relied on information from A.M.'s court file is adjudicatory Finding of Fact 16, which lists the medical problems faced by A.M. and the treatment for those problems. Even so, the relevant information contained in that finding was testified to by social worker Bowman at the hearing in the instant case. Therefore, we do not find that the trial court erred in making Finding of Fact 16 by utilizing information from A.M.'s court file.

After reviewing the record, transcript, and the order carefully, we find that the remaining findings of fact were based on testimony taken at the 26 January 2009 hearing, and that it does

not appear that any of the findings are improperly based on anything but that testimony. Moreover, nothing in the record indicates that the trial court failed to conduct the independent determination required when it took judicial notice of the court file in A.M.'s case. See *In re J.W., K.W.*, 173 N.C. App. 450, 456, 619 S.E.2d 534, 540 (2005), *aff'd per curiam*, 360 N.C. 361, 625 S.E.2d 780 (2006). We are therefore unable to say the trial court committed reversible error in taking judicial notice of the court file in A.M.'s case.

By respondent's second argument, she contends the trial court erred in making findings of fact in its adjudication order that were not supported by clear and convincing evidence. We are not persuaded by respondent's argument.

"[F]indings 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). In an adjudication hearing, "the allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2007). In an appeal from an adjudication order, this Court reviews the evidence to determine whether such evidence exists to support the findings of fact. *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). Likewise, "[a]ll dispositional orders of the trial court after abuse, neglect, and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Weiler*, 158

N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). Finally, the trial court, when sitting as factfinder, must weigh the evidence and determine which inferences to draw and which to reject. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984).

Respondent challenges Findings of Fact 7, 9-15, and 19. These findings focus on the minor child's status as a dependent juvenile due to respondent's noncompliance with her case plan for her older child, respondent's denial of her second pregnancy, the grandfather's unwillingness to cooperate with DSS on several occasions, and his rejection of the two placement alternatives suggested by respondent. Finding of Fact 19 refers to the reasonable efforts made by DSS, such as the Team Decision Meeting, to prevent filing the adjudication petition and assumption of custody. Upon reviewing the record, we conclude that there was competent evidence to support these findings of fact.

Testimony taken from DSS workers Bowman and Cheeley, along with testimony from respondent herself, sufficiently supports each challenged finding. Respondent appears to argue that the testimony from the two DSS workers does not support the findings because both became involved in the case in late 2008 and could only have known of the previous events by reviewing the case file. However, Ms. Bowman testified that she was familiar with the case file, and no objections were made to either Bowman's or Cheeley's testimony about events prior to their personal involvement in the case. Respondent further contends the court placed too much emphasis on A.M.'s case plan and implications from that case plan for

respondent's ability to parent J.J. However, DSS presented evidence that it had concerns about respondent's ability to parent because of her non-compliance with the plan and her dishonesty regarding the second pregnancy, as well as concerns about Mark J. and his lack of cooperation with the agency in the past. We conclude that the trial court's findings of fact are supported by competent evidence.

Finally, in regard to the adjudicatory findings of fact, respondent asserts that there was a suitable placement alternative with respondent's father because he cooperated with DSS by allowing a home visit in November 2008, and because he improved his cooperation in the two months leading up to the adjudication hearing. However, in this assignment of error, respondent asks us to reweigh the evidence heard by the trial court. The weighing of the evidence is the province of the trial court. *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435. Thus, we will only consider, as above, whether there was competent evidence to support the trial court's finding of fact. We find that there was. According to Mr. Cheeley's testimony, Mark J. allowed DSS to visit the home briefly for an investigation, but did not grant DSS access to the entire house. Rather, he instructed DSS to contact his lawyer, and he denied any wrongdoing by himself or the respondent in relation to respondent's breaking and entering, stealing, and leaving home for periods of time. Further, Mark J. was argumentative with DSS at the Team Decision Meeting, and he refused to consider any placement options other than himself. We find that

the trial court's findings are amply supported by the evidence, and, as a result, respondent's assignments of error on this issue are overruled.

Next, respondent contends the trial court erred in making dispositional findings of fact that are not supported by clear and convincing evidence. The disposition phase is for the trial court and the parties "to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." N.C. Gen. Stat. § 7B-900 (2007).

Respondent contends that Findings of Fact 7, 9, and 10 are unsupported by the evidence. Finding of Fact 7 refers to respondent's non-compliance with the case plan and Mark J.'s argumentative nature with DSS. Finding of Fact 9 addresses the reasonable efforts made by DSS to achieve reunification. Finally, Finding of Fact 10, while more properly deemed a conclusion of law that is fully supported by the trial court's findings of fact, finds that it is in the best interest of the minor child to remain in the custody of DSS.

In regard to Finding of Fact 7, respondent again asserts that the trial court erred in using information concerning respondent's noncompliance with A.M.'s case plan, Mark J.'s argumentativeness and non-cooperation concerning the investigation into delinquent acts of respondent, and his uncooperativeness regarding A.M. in order to find that his home was not suitable for J.J. We refer to our discussion of respondent's first assignment of error and again find that the trial court is merely explaining DSS's grounds for

the results of the home study and did not err. In addition, we conclude that sufficient evidence was presented to support this finding. While respondent disagrees with the statement that her father was argumentative and argues that her partial compliance with A.M.'s case plan was dispositive in this matter, Mr. Cheeley testified to Mark J.'s lack of cooperation and argumentative stance towards DSS on more than one occasion. Further, the concerns DSS had with allowing respondent or her father to care for J.J. stem directly from their failure to fully comply with A.M.'s case plan and DSS guidelines and procedures.

Respondent makes no specific argument regarding dispositional Finding of Facts 9 and 10 and has thus waived these assignments of error. N.C.R. App. P. 28(b)(6) (2009) (amended Oct. 1, 2009).

Respondent next asserts that the trial court erred in concluding that the minor child is a dependent child because DSS failed to show that she is unable to parent the child and that she lacks an appropriate alternative placement arrangement. We disagree.

On appeal, the trial court's conclusions of law are reviewable *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). However, if the findings of fact support the conclusions of law, the order will be affirmed. *In re Small*, 138 N.C. App. 474, 477, 530 S.E.2d 104, 106 (2000). A "dependent juvenile" is "[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) (2007). This Court has already found that the challenged findings are supported by clear and convincing evidence from the testimony presented by the two DSS workers, testimony presented by respondent herself, and by the report submitted to the court by DSS during disposition. As such, those findings are sufficient to support the conclusions of law that respondent is not currently able to parent J.J., and that no appropriate alternative placement existed. Together, all of these findings support the trial court's determination that J.J. is a dependent child. Thus, this assignment of error is overruled.

By her next argument, respondent contends the trial court erred by concluding that DSS made reasonable efforts to prevent assumption of custody of the minor child. First, she claims that no evidence was presented to show that DSS made any efforts to consider the clear alternative to foster care, Mark J., and that no evidence was presented to show that Mark J. did not cooperate with DSS. As previously stated, this Court has already concluded that these claims are supported by clear and convincing evidence in the challenged findings of fact above. These findings are sufficient to support the conclusion that reasonable efforts were made to prevent assumption by DSS.

Then, in regard to this conclusion, respondent claims that the trial court failed to make the necessary findings required by section 7B-507 in the Juvenile Code. Respondent, however, fails to

challenge specific findings as not satisfying the statutory requirements leading to the conclusion that DSS made reasonable efforts to prevent assumption of custody. Rather, respondent merely argues that "[t]he Record is silent to any evidence that reasonable efforts were prevented by anyone." As we have previously determined that clear and convincing evidence exists to support the findings of fact in the trial court's adjudication and dispositional order, these findings support the conclusion of law that reasonable efforts were made to prevent assumption by DSS of custody of the minor child. Thus, we need not address this claim further. Consequently, this assignment of error fails.

Finally, respondent argues that the trial court erred by concluding that it is in the best interest of the minor child to remain in the custody of DSS. Once again, respondent contends that her father is a suitable placement option for the juvenile, and that the court's decision to give custody to DSS is unwarranted. Decisions of the trial court regarding best interests are within the discretion of the trial court and will not be overturned absent an abuse of discretion. *In re L.T.R. & J.M.R.*, 181 N.C. App. 376, 385, 639 S.E.2d 122, 128 (2007). In light of the evidence presented to the court, and all the findings of fact made which we find are supported by competent evidence, we do not find that the trial court abused its discretion in determining that the best interest of the child is served by granting DSS custody. This assignment of error is overruled.



In conclusion, we find the trial court's findings of fact are supported by competent evidence, and the conclusions of law are supported by the findings of fact. The trial court did not err in adjudicating the minor child dependent, or in ordering the child to remain in DSS custody. Accordingly, the trial court's adjudication and disposition order is hereby affirmed.

Affirmed.

Judges ELMORE and BEASLEY concur.

Report per Rule 30(e).