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NO. COA09-982

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN THE MATTER OF:
B.H.

Harnett County
No. 08 J 145

Appeal by Respondents from an adjudication and disposition order entered 30 April 2009, *nunc pro tunc* 13 March 2009, by Judge Charles P. Bullock in District Court, Harnett County. Heard in the Court of Appeals 10 November 2009.

E. Marshall Woodall; and Duncan B. McCormick, for Harnett County Department of Social Services, Petitioner-Appellee.

Windy H. Rose for Respondent-Mother-Appellant.

Ryan McKaig for Respondent-Father-Appellant.

Pamela Newell Williams for Guardian ad Litem.

McGEE, Judge.

Respondent-Mother and Respondent-Father appeal from an order adjudicating B.H. an abused and neglected juvenile. We affirm in part, and reverse and remand in part.

The Harnett County Department of Social Services (DSS) filed a juvenile petition on 8 October 2008, alleging that B.H. was an abused and neglected juvenile. DSS alleged that B.H. was abused in that she

was in the care of both parents when she

sustained a[n] impact to her left skull, which has resulted in a long, non[-]depressed skull fracture with overlying hematoma. The child was approximately 1 week old when she sustained this injury.

Respondent[] parents were the principal caretakers of the juvenile and reported that the juvenile had not been involved in an accident with the exception of an incident [where] an 8 year old girl was patting and/or rubbing the child's head.

DSS further claimed that B.H. was neglected, in that she lived in an environment injurious to her welfare, because Respondents had "failed to appropriately supervise her care but have caused or allowed the child to sustain an impact to her head causing a fracture and bru[i]sing (hematoma)." A non-secure custody order was entered and B.H. was removed from Respondents' care.

Adjudicatory and dispositional hearings were held on 23 January 2009 and 13 March 2009. The trial court entered the written adjudicatory and dispositional orders on 30 April 2009, *nunc pro tunc* 13 March 2009, concluding that B.H. was an abused and neglected juvenile. The trial court awarded custody to DSS with placement to be continued in the home of B.H.'s maternal aunt and uncle. The trial court further ordered that the plan for B.H. was reunification, and that Respondents were allowed supervised visitation in accordance with a plan prepared by DSS. Respondents appeal.

Respondents first argue that the trial court erred when it concluded that B.H. was an abused juvenile. Respondents assert that there was no finding of fact that they caused the injury to B.H. or put B.H. at risk to sustain the injury by other than

accidental means. Respondents contend that, absent a finding that either parent had inflicted the injury or knowingly allowed the injury to be inflicted on B.H., the trial court's conclusion of abuse is unsupported by sufficient findings of fact.

The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact[.]" *In Re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008) (citations omitted). An abused juvenile is defined as a juvenile whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(a) (2007). "[S]erious physical injury" is defined as an injury that causes "great pain and suffering." *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 302, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991).

In this case, the trial court made the following findings of fact:

4. At the time of the filing of this proceeding, the juvenile was residing with the Respondent parents[.]

. . .

7. On July 30, 2008, the juvenile was taken to Excel Pediatrics Clinic at about 4:50 p.m. by the [R]espondent mother because of a goose egg on the juvenile's head. Dr. Alahari observed a bruised, swollen area [hematoma] on the juvenile's head and ordered an x-ray at

Betsy Johnson Hospital in Dunn, NC. The test results were positive for a skull fracture.

8. Later, on 31 July, 2008, a CT scan was completed for the juvenile at Betsy Johnson Hospital. The test results were negative for intra-cranial bleeding but there was a non-depressed fracture. The radiology report discloses the following diagnosis, to wit: (1) left parietal non-depressed skull fracture without acute intracranial abnormality and (2) left parietal subgaleal hematoma.

9. A skeletal survey at Betsy Johnson Hospital on July 31, 2008, disclosed no additional fractures for the juvenile.

10. The juvenile was hospitalized on July 31, 2008 at Betsy Johnson Hospital for observation. She was discharged on August 1, 2008.

11. Respondent mother reported to Dr. Alahari the following explanation of activity concerning the juvenile on July 30, 2008, to wit: an 8 year old child was popping the juvenile on the head with a flat hand. Later, the mother saw a goose egg on the juvenile's head and brought the juvenile to the clinic.

12. On August 26, 2008, [R]espondent mother reported to Dr. St. Claire at Duke University Medical Center in Durham, NC the following, to wit: several family members were together for lunch when the juvenile (baby) was one (1) week old (July 30, 2008); while a 16 year old girl (Sarah) was holding the baby, a 8 year old girl (Anna) kept touching the baby's head; when Sarah stood up to pass/hand the infant to the grandmother, the baby's head bumped the table. The mother did not see the above incident but was so informed by the children. The juvenile did not cry or fuss at this time. Later (about 2 minutes) when the grandmother handed the baby to the mother, the juvenile started to cry. The mother stated that she almost immediately noted swelling on the juvenile's left head where there was previously a small bump from birth. Immediately, the mother took the juvenile to the clinic.

13. The minor trauma [the 8 year old patting the baby's head or the bumping of the baby's head on the edge of the table] related by the mother is inadequate to explain the significant swelling of the juvenile's skull and the fracture suffered by the juvenile.

14. The [R]espondent mother also related that immediately after the juvenile's birth, she and several family members observed a knot or raised place on the top of the juvenile's head.

15. Dr. St. Clair[e] examined the medical records made during and after the juvenile's birth and a copy of those records were introduced into evidence.

16. The birth records do not disclose any trauma or procedure used at birth that could have caused the fracture and the swelling of the juvenile's skull.

17. There is no explanation of any accident or any related history of previous trauma that could explain the fracture of the juvenile's skull.

18. A significant force or trauma to the juvenile's skull was necessary to have caused the fracture and swelling of the child's skull. Such force would have constituted a head injury that could be dangerous and would normally result in an experience of pain, causing a young infant to cry out. The treating medical persons caused the juvenile to be hospitalized for observation.

19. The [R]espondent parents served as the primary caretakers of the juvenile prior to the juvenile's hospitalization and eventual placement outside the home.

Respondent-Father contends that findings of fact numbers 13 and 17 are unsupported by the evidence, because "adequate explanations of trauma were provided by the parents." We disagree.

Dr. St. Claire testified that "the only history that we had of-of any sort of accident or trauma was the child bumping the head

against the table, uh, to a degree that the baby did not even cry, which did not appear to be . . . an amount of force that would cause a skull fracture." Dr. St. Claire further testified that, in her opinion, an eight-year-old child patting or slapping the infant on the head would be an insufficient amount of force to cause the skull fracture. Finally, Dr. St. Claire testified that she had not heard of any explanation, whether in the medical records or in her interviews with Respondent-Mother, which would adequately explain B.H.'s injuries.

Although Respondents contend that they have provided adequate explanations for B.H.'s injuries, that determination was properly before the trial judge.

[W]hen a trial judge sits as 'both judge and juror,' as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

In re Whisnant, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). Thus, the trial court could give greater weight to the testimony of Dr. St. Claire and reject Respondents' explanations for B.H.'s injuries. "In a non-jury adjudication of abuse, neglect, and dependency, '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 P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005) (citations omitted). We conclude there was sufficient evidence to support findings of fact numbers 13 and 17.

Respondents do not contest the remaining findings of fact. Therefore, the remaining findings of fact are deemed to be supported by sufficient evidence, and are binding on appeal. N.C.R. App. P. 28(b)(6); see also *In re P.M.*, 169 N.C. App. at 424, 610 S.E.2d at 404 (concluding the respondent had abandoned factual assignments of error when she "failed to specifically argue in her brief that they were unsupported by evidence").

The trial court's findings of fact establish that: (1) B.H. was seen at Excel Pediatrics Clinic and Betsy Johnson Hospital due to a "goose egg" on her head; (2) examination of the injury revealed that B.H. had a non-depressed skull fracture and a hematoma; (3) that Respondent-Mother's explanations were not consistent with the injuries observed; and (4) that the injuries occurred while B.H. was in the physical custody of Respondents. We hold that the trial court's findings of fact support its conclusions of law that B.H. was an abused juvenile in that Respondents either inflicted, or allowed to be inflicted, on the juvenile serious physical injury by other than accidental means, or in the alternative created or allowed to be created a substantial risk of serious physical injury to B.H. by other than accidental means. See N.C. Gen. Stat. §7B-101(1); *In Re T.H.T.*, 185 N.C. App. at 345-46, 648 S.E.2d at 525 (noting that, along with other factors, explanations inconsistent with the injuries sustained permitted inference that injuries were sustained by other than accidental means).

Respondents next argue that the trial court erred by

adjudicating B.H. a neglected juvenile. We disagree.

Review of a trial court's determination of abuse, neglect and dependency is limited to the issue of whether the trial court's conclusion of law is supported by adequate findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

"Neglected juvenile" is defined in N.C. Gen. Stat. § 7B-101(15) 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). Section 7B-101(15) "allows the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999). "In cases of this sort [involving a newborn], 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." *Id.* at 396, 521 S.E.2d at 127. We conclude that the trial court's findings of fact, as cited previously herein, adequately support the trial court's conclusion of law that B.H. was a neglected juvenile in that she did not receive proper care or supervision from Respondents. *In Re T.H.T.*, 185 N.C. App. at 345-46, 648 S.E.2d at 525.

Respondents next argue that the trial court erred by denying their motion for a directed verdict. We note that "directed verdicts are appropriate only in jury cases." *Mayo v. Mayo*, 73 N.C. App. 406, 408, 326 S.E.2d 283, 285 (1985) (citations omitted). Because this action was tried by the court without a jury, the proper motion to test the sufficiency of Petitioner's evidence was a motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). *Id.* Although Respondents' motion was not properly made, we treat it as having been a motion for involuntary dismissal under Rule 41(b). *Id.* at 408-09, 326 S.E.2d at 285. The question raised by Respondents' motion to dismiss is "whether any findings of fact could be made from the evidence which would support a recovery for [Petitioner.] If such findings can be made the motion to dismiss must be denied." *Neasham v. Day*, 34 N.C. App. 53, 55, 237 S.E.2d 287, 288-89 (1977) (citations omitted). Thus, Respondents' argument amounts to a general contention that the evidence could not support a finding and conclusion of abuse or neglect. In light of our review and holdings as to Respondents' previous arguments regarding the findings and conclusions that B.H. was an abused and neglected juvenile, we overrule this argument.

Lastly, Respondent-Father argues that the trial court erred by leaving visitation to the discretion of DSS. At disposition, the trial court granted Respondents supervised visitation in accordance with a visitation plan prepared by DSS and approved by the trial court. The visitation plan provided for "liberal visitation, minimum of 1 hour a week." Respondent-Father contends that the

visitation plan approved by the trial court failed to comply with the minimum requirements established in *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005). We agree.

N.C. Gen. Stat. § 7B-905(c) provides that any dispositional order which leaves the minor child in a placement "outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2007). This Court has held that "[a]n appropriate visitation plan" in compliance with N.C. Gen. Stat. § 7B-905(c) "must provide for a minimum outline of visitation, such as the *time, place, and conditions* under which visitation may be exercised." *In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652 (emphasis added). The order in this case does not contain the "minimum outline" required by *In re E.C.* The trial court's approval of "liberal visitation" is too vague to be enforceable, and the plan does not provide for the time or place of visitation. As such, the plan constitutes an impermissible delegation of the trial court's authority under N.C. Gen. Stat. § 7B-905. See *In Re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). Accordingly, we remand for clarification of Respondents' visitation rights.

Affirmed in part; reversed and remanded in part.

Judges GEER and HUNTER, JR. concur.

Report per Rule 30(e).