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NO. COA11-348
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

IN THE MATTER OF:

F.E.P., Jr.

Brunswick County
No.09 JA 132

Appeal by respondents from adjudication and disposition orders entered 18 January 2011 by Judge Sherry Dew Tyler in Brunswick County District Court. Heard in the Court of Appeals 29 August 2011.

Jess, Isenberg & Thompson, by Elva L. Jess, for petitioner-appellee Brunswick County Department of Social Services.

Pamela Newell for respondent Guardian ad Litem.

Mary McCullers Reece for respondent-appellant aunt.

Harrington, Gilliland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for respondent-appellant uncle.

MARTIN, Chief Judge.

Respondents appeal from orders adjudicating F.E.P., Jr. a neglected and dependent juvenile, and ordering custody of F.E.P., Jr. to remain with the Brunswick County Department of

Social Services (DSS). Respondents contend the trial court erred in concluding that F.E.P., Jr. was a neglected and dependent juvenile. We affirm in part and vacate in part.

Respondents, F.E.P., Jr.'s aunt and uncle, were awarded custody of him in December 2009 after F.E.P., Jr. was removed from his biological parents' home due to sexual abuse and concerns about his parents' mental health. F.E.P., Jr. has an IQ of 40 and has been diagnosed with Moderate Mental Retardation, Attention Deficit Hyperactivity Disorder-Combined Type, and Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. On 16 November 2010, DSS filed a juvenile petition alleging that sixteen-year-old F.E.P., Jr. was abused, neglected, and dependent. The petition alleged that respondents failed to provide proper discipline and remedial care for F.E.P., Jr. and that, as a result, he had suffered educational neglect. DSS took nonsecure custody of F.E.P., Jr.

After holding a hearing, the trial court entered an order adjudicating F.E.P., Jr. a neglected and dependent juvenile. In its disposition order, the trial court continued custody of F.E.P., Jr. with DSS and ordered DSS to work toward the goal of reunification with respondents. Respondent-aunt and respondent-uncle appeal separately.

The allegations in a petition alleging abuse, neglect, or dependency must be proved by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2009). The role of this Court in reviewing an initial 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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "In a nonjury neglect [and dependency] 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).

I.

Respondents first argue that the trial court erred in concluding that F.E.P., Jr. was a neglected juvenile. Specifically, respondents challenge findings of fact 17, 27, and 28 as being unsupported by the evidence. Those three findings state:

17. The failure on the part of [respondents] to allow [F.E.P., Jr.] to participate in off-campus activities and ROTC prevented him from developing educationally and limited

his ability to practice skills that were taught in the classroom.

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27. The evaluation secured in July 2010 stressed specific services that were necessary in order to properly provide for the juvenile's care. These recommendations were not followed as CAP services were terminated and [respondents] did not follow the recommendations of the IEP team in April 2010. The failure on the part of [respondents] to allow [F.E.P., Jr.] to participate in all phases of the special education program deprived the child of his full potential in the education setting. The failure on the part of [respondents] to participate fully in CAP services and terminating services from time to time as a punishment for [F.E.P., Jr.'s] behaviors in their home deprived [F.E.P., Jr.] of an opportunity to benefit from said services. The child did not receive the necessary remedial care or medical care with regard to his condition.

28. The juvenile was in need of special assistance in order to address his condition and [respondents] denied him this special assistance.

These findings are supported by the evidence. F.E.P., Jr.'s teacher, Donna Mooneyham testified that the community-based activities helped students like F.E.P., Jr., who had an impaired cognitive ability, with how to socialize and prepare for post-high school. She further testified that although participating in the activities was not academic, the community-

based activities were "[e]ssential for him to be a successful adult." The teacher also testified that the off-campus activities were designed to increase life skills and are important to educational growth and development; that respondents did not allow F.E.P., Jr. to participate in the community-based activities or ROTC; and that she was concerned about limiting the activities because they benefitted F.E.P., Jr. educationally. Accordingly, challenged finding of fact 17 is supported by clear, cogent, and convincing evidence.

Findings of fact 27 and 28 are also supported by the July 2010 Psychological Evaluation and testimony at the hearing. After evaluating F.E.P., Jr., the neuropsychologist recommended, in part: (1) "an IEP to provide special education services due to [his] intellectual disabilities, ADHD, and emotional/behavioral disturbance;" and (2) CAP services or "targeted case management, developmental therapy, and personal assistance due to [F.E.P., Jr.'s] intellectual disabilities."

Ms. Sarah Walsh testified that Maxim Health Care Services provided CAP services to F.E.P., Jr. to help him with math skills, social skills, learning how to interact with others, holding conversations, and using eye contact; that their services were cancelled as punishment for F.E.P. Jr.'s bad

behaviors; that she spoke with respondent-uncle "about needing consistency in order for the services to do any good[;]" and yet the CAP services were terminated when she spoke with DSS about F.E.P., Jr.

Ms. Mooneyham testified that as part of F.E.P., Jr.'s IEP, the community-based activities were needed to provide socialization skills and self-sufficiency; that although F.E.P., Jr. was greatly challenged by academics, the community-based activities give him work skills; and that respondents refused to allow F.E.P., Jr. to participate. Accordingly, challenged findings of fact 27 and 28 are supported by clear, cogent, and convincing evidence.

Respondents, however, argue that the trial court's conclusion that F.E.P., Jr. was neglected was unsupported by the findings of fact. A neglected juvenile is defined 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) (2009) (emphasis added). This Court has "required that there be some physical, mental, or

emotional impairment of the juvenile or a *substantial risk of such impairment* as a consequence of the failure to provide "proper care, supervision, or discipline" in order to adjudicate a juvenile neglected.'" *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676 (italics in original) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (listing cases holding that a substantial risk of impairment is sufficient to show neglect)).

In addition to the two challenged findings, the trial court also made the following relevant findings, which are presumed to be correct and supported by competent evidence. See *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982).

9. An obstruction petition was filed by [DSS] on September 29, 2010 alleging a refusal on the part of [respondents] to allow DSS to arrange for an evaluation of the juvenile by a physician or other expert. At the hearing on October 1, 2010, [respondents] were ordered to execute a consent for [DSS] to secure a CFE, provide access to the child and to proceed to authorize the CFE. [DSS] was allowed access to the child and the consent for the CFE was executed. However, [respondents] did not make contact with the therapist who was retained to perform the CFE and it was never completed, although [respondent-aunt] told Ms. Price that she would call her.

10. A psychological evaluation was conducted on July 5, 2010 by Dr. Kimberly S. Adams on the juvenile in order to assess his

cognitive and emotional status, to determine his needs for services and to provide treatment planning. The evaluation noted that the juvenile was the victim of abuse by his biological parents, [and] that his intellectual functioning falls in the extremely low range. It was recommended that he continue to receive mental health, community and educational services due to these issues. The recommendations included the following: a) an IEP to provide special education services due to intellectual disabilities; b) continued psychotherapy with a psychologist in order to develop a consistent behavior plan. Corporal punishment should not be used due to his history of abuse; c) He would benefit from CAP services and personal assistance.

11. [Respondent-uncle] advised Ms. Price on two occasions that he would and could use any method of discipline that he desired, including the use of a belt.

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14. [Respondents, F.E.P., Jr.,] and school personnel met to conduct an IEP meeting in April 2010. At that time [respondents] made it clear that they did not want the child to participate either in any activities that the class engaged in off campus, or the ROTC program. [Respondents] wanted staff to concentrate on academic activities. At this IEP meeting, [respondents] asked [F.E.P., Jr.] to count coins, after throwing them down on the table in front of him and he could not complete the task. [Respondents] asked him to stand and perform an "about face" and when he performed the task they represented that he had not done it correctly. [F.E.P., Jr.] was visibly upset by their requests, he "teared up," became red faced, his hands trembled and he began

to shake.

15. [Respondents] used their denial of permission for [F.E.P., Jr.] to participate in school activities as punishment for what they deemed to be inappropriate behaviors exhibited by [F.E.P., Jr.] in their home. Except for one activity, [F.E.P., Jr.] was the only child in his class who could not participate in the regular activities arranged off campus, which included trips to the grocery store, to the store to secure gardening supplies and plants, [and] Special Olympics. A permission slip was sent home with regard to attending a yoga class. [F.E.P., Jr.] and one other student were the only two students who could not attend.

16. Educational staff present for the IEP meeting stressed the need for the child to be involved in activities that involved more than academic study or the "three R's." In addition to academic studies, the child needed to be exposed to life and social skills if he was to secure any level of independence.

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18. [F.E.P., Jr.] has an impaired cognitive ability and may have achieved the highest level of academic knowledge possible. However, the self-contained class in which he is enrolled stresses life skills that are intended to provide him an ability to secure employment and maintain socialized activities. The students are taught to fill out forms, participate in a variety of activities that include: baking dog biscuits and offering them for sale; washing, drying and folding clothes; preparing simple meals; accessing the computer and internet; engaging in social activities to learn workplace skills with others; working in the

garden where he was in charge of the plants in front of the school and planting a garden and tending to it. Each of the activities involved an application of a skill. For example, to cook one must read a recipe and measure the ingredients. To plant the garden one must measure the area, keep it free of weeds and water it appropriately.

19. [F.E.P., Jr.] was able to travel independently throughout the school, could follow instructions with a series of tasks up to five, was able to answer the phone and deliver messages to others. He was a happy student at school, well-behaved and well-mannered. During the two years when he was in Ms. Mooneyham's class, there were only two incidents where he demonstrated inappropriate behavior. On one occasion he took a jacket from the closet in the classroom that was not his and replaced it with his own. On another occasion he bullied another student. Other than these two incidents, he was always compliant in school and his behavior was always appropriate. The behaviors described by [respondent-uncle] in the home were not observed by school personnel.

20. [Respondents] would not allow him to participate in ROTC or in any community based activities of the class. During times when his class took trips off campus, [F.E.P., Jr.] was supplied with busy work and would have to sit in another room on campus.

21. [F.E.P., Jr.] gave full effort to his classwork. He was not a lazy child at school. However, there were many skills that he simply could not learn. For example, he simply could not learn to write his name and address although it was practiced over a hundred times.

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23. [Respondent-uncle] made it clear that [F.E.P., Jr.] wasn't learning at school and that he would make the decisions about what [F.E.P., Jr.] will do or won't do. [Respondent-uncle] advised Ms. Mooneyham that "you haven't taught him sh[--]."

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25. Maxim Health Care was contracted to provide services to the [] family for the benefit of [F.E.P., Jr.]. CAP services were provided during June through August 2010 to provide the child with life skills and aid in increasing his independence. Services were terminated during this period from time to time as punishment to [F.E.P., Jr.] for behaviors that he exhibited in the home. [Respondent-uncle] was advised that consistency was important if the services were to be beneficial. [Respondent-uncle] informed Ms. Walsh with Maxim that "He would do whatever the f[--]k he wanted." He terminated services completely when Maxim provided information to [DSS].

26. Carol Feely is a case manager with ACI, which "brokers" services to individuals with special needs. She met with [respondents] on July 10, 2010. At that time, [F.E.P., Jr.] was receiving services through Maxim, said services to assist him with developing social and life skills. They reported to her that [F.E.P., Jr.] had discipline issues in the home - that he would keep them up all night and wouldn't listen to them. On September 19, 2010 Ms. Feely received a call that [respondents] had taken [F.E.P., Jr.] to the emergency room as a result of a bad temper tantrum and had been having trouble with him telling lies. When Feely arrived,

[F.E.P., Jr.] was laying on a gurney. He was calm and made eye contact with her. [Respondent-aunt] told [Ms. Feely] that she "couldn't take it anymore" and discussed hospitalization. Ms. Feely spoke with a nurse on duty and [respondent-uncle] advised her that she should not talk with the nurse without him being present. He yelled at her, stepped close to her and she felt threatened by his demeanor and behavior. He fired her and told her that he no longer needed her services.

We conclude these relevant findings of fact support the trial court's conclusion that F.E.P., Jr. was a neglected juvenile. The trial court's relevant findings show that, despite being ordered by the court to execute consent for DSS to have F.E.P., Jr. evaluated by a physician, respondents failed to make contact with the therapist retained to perform the evaluation. Further, respondents' failure to allow F.E.P., Jr. to participate in community-based activities, which were part of his IEP, impacted F.E.P., Jr.'s educational growth; and respondents' cancellation of CAP services impacted F.E.P., Jr.'s remedial care and opportunity to progress toward his full development. *See In re Huber*, 57 N.C. App. 453, 458, 291 S.E.2d 916, 919 ("To deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child."), *appeal dismissed and disc. review denied*, 306 N.C. 557, 294 S.E.2d 223 (1982). These findings

support the conclusion that F.E.P., Jr. was a neglected juvenile. See N.C. Gen. Stat. § 7B-101(15).

II.

Respondents also contend the trial court's findings do not support its conclusion that F.E.P., Jr. is a dependent juvenile. We agree.

A dependent juvenile is defined as one "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). In determining whether a juvenile is dependent, the trial court is required to "address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the [trial] court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

In the present case, the court made no finding, nor was there evidence to support such a finding, that respondents did not have an appropriate alternative child care arrangement. Thus, there are no findings to support the conclusion that F.E.P., Jr. was "a dependent juvenile . . . in that his custodians did not provide for [his] proper care or supervision and did not have an appropriate alternative child care arrangement" and the trial court erred in adjudicating F.E.P., Jr., to be dependent.

Affirmed in part and reversed in part.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).