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NO. COA11-60  
NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2011

IN THE MATTER OF:

D.L.,  
Juvenile.

Caswell County  
No. 10 JA 21

Appeal by respondents from order entered 22 November 2010 by Judge Mark Galloway in Caswell County District Court. Heard in the Court of Appeals 7 June 2011.

*Stuart N. Watlington for petitioner-appellee.*

*Michael E. Casterline for respondent-appellant father.*

*Charlotte Gail Blake for respondent-appellant mother.*

*Deana K. Fleming for guardian ad litem.*

HUNTER, Robert C., Judge.

Respondent-father W.L., Jr. and respondent-mother D.L. appeal from the trial court's adjudication and disposition order in which the court adjudicated their minor daughter "Dawn" abused and neglected.<sup>1</sup> After careful review, we affirm.

Facts

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<sup>1</sup> The pseudonym "Dawn" is used throughout this opinion to protect the minor's privacy and for ease of reading.

On 5 October 2010, the Caswell County Department of Social Services ("DSS") filed a juvenile petition alleging that Dawn was an abused and neglected juvenile. The basis for the allegation was that on 2 October 2010, Dawn, who was eight years old at the time, suffered cardiac arrest and was taken to Danville Regional Medical Center and later life-flighted to UNC Hospital. Doctors with UNC Hospital reported that although the cause of Dawn's cardiac arrest was not "entire[ly] clear," they believed that it was attributable to "cardiac dysfunction from starvation or from re-feeding." Due to the lack of blood flow during the 20 minutes it took respondents to transport Dawn to the hospital, she suffered "irreversible" brain damage and was in a "persistent vegetative state," requiring her to be put on life support.

During post-admission interviews with DSS social workers and law enforcement officers, respondents reported that roughly a year before this event, Dawn began having episodes during which she would "mentally black[] out," or "stare, go limp and fall down." Although respondents indicated that Dawn previously had weighed as much as 60 pounds, she weighed only 36 pounds when admitted to the hospital on 2 October 2010. Respondents indicated that Dawn's weight loss had become noticeable roughly three months prior to October 2010 because "her clothes were

falling off her." Respondents scheduled a doctor's appointment for Dawn on 3 September 2010, but when Dawn began crying and stated that she did not want to go, respondents did not take her to the appointment. Respondents also indicated that Dawn had not been to the doctor since 2004.

The trial court granted DSS non-secure custody of Dawn on 5 October 2010.<sup>2</sup> Both respondent-father and respondent-mother were arrested and charged with felony child abuse. The trial court, in an order continuing custody with DSS, directed that "as a condition of any bond in the criminal matters in this case," respondents were prohibited from "initiat[ing] any communication with any of their children[.]" After conducting the abuse, dependency, and neglect hearing on 21 October 2010, the trial court entered an order on 22 November 2010, in which it adjudicated Dawn as being an abused and neglected juvenile as defined by the Juvenile Code and ordered that custody of Dawn remain with DSS. Respondent-father and respondent-mother timely appeal to this Court.

#### Father's Appeal

Respondent-father argues that the trial court erred in concluding that Dawn is an abused juvenile within the meaning of

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<sup>2</sup> The record indicates that DSS obtained non-secure custody of Dawn's three siblings as well. The status of those juveniles, however, is not at issue in this appeal.

N.C. Gen. Stat. § 7B-101(1)(b) (2009). Typically, "[t]he role of this Court in reviewing a trial court's adjudication of . . . 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) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). Here, however, respondent-father does not challenge any of the trial court's findings of fact and thus the sole issue for review is whether the trial court's findings, now binding on appeal, *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991), support the court's conclusion that the juvenile is abused. See *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999) ("Whether a child is neglected or abused is a conclusion of law.").

The Juvenile Code defines an "abused" juvenile, in pertinent part, as one whose parent, guardian, custodian, or caretaker "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(b). As the Juvenile Code does not contain a definition for the term "serious physical injury" with respect to Chapter 7B abuse

cases, this Court has incorporated the definition provided by N.C. Gen. Stat. § 14-318.4 (2009), the felony child abuse statute. *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125-26 (2007). "Under N.C. Gen. Stat. § 14-318.4, a 'serious physical injury' is defined as an injury that causes 'great pain and suffering.'" *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (quoting *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991)). Conceding that a heart attack, such as the one suffered by Dawn, "cause[s] great pain and suffering," respondent-father contends that "a heart attack is not an injury," but, rather, is an "event" or "condition."

Black's Law Dictionary defines an "injury" generally as "[a]ny harm or damage," and more specifically defines "physical" or "bodily" injury as "[p]hysical damage to a person's body." *Black's Law Dictionary* 801 (8th ed. 2004). We conclude that, according to both of these definitions, a heart attack, which is typically characterized as the death or damage of a portion of the heart muscle due to insufficient blood supply, may constitute an "injury" for purposes of N.C. Gen. Stat. § 7B-101(1)(b).

Respondent-father further contends that the trial court erred in adjudicating Dawn as abused since he did not

"intentionally harm" her. Respondent-father argues that while the "lack of medical care may have led to the materialization of the risk" of a heart attack, the "[f]ailure to alleviate or minimize a risk is far different than creating a risk." Contrary to respondent-father's contention, the plain language of N.C. Gen. Stat. § 7B-101(1)(b) does not require that the parent "create[]" the risk of injury in order to support a determination of abuse; it is sufficient if the parent "allows to be created a substantial risk of serious physical injury to the juvenile . . . ." N.C. Gen. Stat. § 7B-101(1)(b) (emphasis added). This Court has held that a parent allows a risk of injury to be created when the parent is aware of the existence of the risk and "fail[s] to take the necessary steps to protect the minor child[]." *In re M.G.*, 187 N.C. App. 536, 549, 653 S.E.2d 581, 589 (2007), *rev'd in part on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

Here, the trial court found with respect to Dawn's malnourishment, the cause of her heart attack: "the [respondents] saw the problem, and realized it was a problem, and they failed to get the child to the Health Department or to health care professionals." The court's uncontested findings are sufficient to support its determination that respondent-father "created a substantial risk of serious physical injury to

the child by other than accidental means." See *id.* (holding trial court's determination of abuse under § 7B-101(1)(b) was supported by findings that mother knew of father's abusive and violent nature and alcohol abuse but failed to take necessary steps to protect her children). Moreover, to the extent that respondent-father argues that N.C. Gen. Stat. § 7B-101(1)(b) requires evidence of an intent to inflict serious physical injury, this Court has explained that in initial adjudication proceedings, the issue is "whether the juvenile should be adjudicated as having the status of abused, neglected or dependent," not the "question of culpability regarding the conduct of an individual parent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). Accordingly, respondent-father's argument is overruled and the trial court's order is affirmed with respect to respondent-father.

#### Mother's Appeal

Turning to respondent-mother's appeal, she challenges only the dispositional portion of the trial court's order. She first argues that the court erred in failing to schedule a review hearing in accordance with N.C. Gen. Stat. § 7B-905 (2009), which provides in pertinent part:

A dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker shall direct that the review hearing required by

G.S. 7B-906 be held within 90 days from of [sic] the date of the dispositional hearing and, if practicable, shall set the date and time for the review hearing.

N.C. Gen. Stat. § 7B-905(b).

Although the trial court's order does not explicitly direct that a review hearing be held in compliance with N.C. Gen. Stat. § 7B-905(b), this omission does not warrant reversal under the facts of this case. The trial court's order indicates that during the disposition stage of the proceedings, the court stated that it "intend[ed] to appoint a Guardian of the person of the juvenile" pursuant to N.C. Gen. Stat. § 7B-906 (2009), but that it would defer appointing the guardian so that it could "properly . . . involve counsel in such proceedings." As the trial court's order demonstrates that it anticipated holding a subsequent review hearing in this matter, remanding this case to the trial court is unnecessary.

Respondent-mother next contends that the trial court erred in failing to establish a minimum visitation schedule. The Juvenile Code provides that "[a]ny dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker . . . 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). Because the threshold decision as



to whether to grant visitation hinges on whether the visitation is in the best interest of the juvenile, "the [trial] court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child" in the event that it "finds that the parent has by conduct forfeited the right or if the court finds that the exercise of the right would be detrimental to the best interest and welfare of the child . . . ." *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971); accord *In re C.M.*, 198 N.C. App. 53, 66, 678 S.E.2d 794, 802 (2009) ("If a court finds that visitation would not be in the best interest and welfare of the child, the court may deny the parent visitation rights.").

Again, although the trial court did not explicitly address visitation in its order, we conclude that, given the unique circumstances of this case, the trial court did not err. Here, as the trial court found, "both parents were placed in custody as a result of felony child abuse charges against them, and that they were under a court order not to communicate with any of their four children under further order of the court." The trial court further observed that "after the parents were charged with the criminal offenses, they were arrested and incarcerated, and remain[ed] incarcerated" at the time of the initial adjudication proceedings. Thus, because Dawn was to

remain in the intensive care unit of UNC's Children's Hospital due to her being in a "persistent vegetative state" as a result of "irreversible" brain damage, any visitation would necessarily occur in the hospital and while respondent-mother was not incarcerated. Yet at the time of the initial abuse, dependency, and neglect hearing, respondent-mother was incarcerated while awaiting trial and was under court order not to have any contact with her children. Consequently, given the practical impossibility of visitation under the exceptional circumstances existing at the time of the initial adjudication, we hold that the trial court did not err. We note, moreover, that respondent-mother is free to file a motion in the cause with the trial court, upon release, requesting visitation with Dawn.

In her final argument on appeal, respondent-mother contends that the trial court "erred in failing to outline steps DSS and [respondent-mother] needed to take for reunification." Respondent-mother is correct that N.C. Gen. Stat. § 7B-507 (2009) dictates that a "trial court's order placing or continuing placement of a juvenile with DSS must contain findings regarding reasonable efforts to reunify the juvenile with the parent unless the court is ordering that such reunification efforts cease." *In re R.B.B.*, 187 N.C. App. 639, 646, 654 S.E.2d 514, 519 (2007), *disc. review denied*, 362 N.C.

235, 659 S.E.2d 738 (2008). The statute further provides, however, that "[w]here efforts to prevent the need for the juvenile's placement were precluded by an immediate threat of harm to the juvenile, the court may find that the placement of the juvenile in the absence of such efforts was reasonable." N.C. Gen. Stat. § 7B-507(a).

With respect this issue, the trial court found:

XXIV.

That for the juvenile to be returned to the custody of her parents at this time would be contrary to her health, safety and welfare; [t]he parents are currently in jail, and the [j]uvenile is in intensive care. For the juvenile to remain in DSS custody[] is in the best interests of said minor child, and not contrary to her health, safety and welfare[.]

XXV.

That efforts to prevent the need for placement of the juvenile, [Dawn] were precluded by an immediate threat of harm to the juvenile; that the juvenile was already admitted to the hospital at the time DSS learned of the juvenile; that [DSS] was precluded from making reasonable efforts to avoid placement of this juvenile, due to the fact that the juvenile was already in Intensive Care when DSS became aware of the case, and due to the fact [that] the juvenile's parents were subsequently placed in custody and charged with criminal child abuse; that DSS has made reasonable efforts on behalf of this juvenile since becoming involved in her case[.]

Based on these findings, the trial court concluded:

That [DSS] was precluded from making reasonable efforts to avoid placement of this juvenile, due to the fact that the juvenile was already in Intensive Care when DSS became aware of the case, and due to the fact [that] the juvenile's parents were subsequently placed in custody and charged with criminal child abuse; that DSS has made reasonable efforts on behalf of this juvenile since becoming involved in her case[.]

As the trial court's order indicates, it determined that the immediate threat of harm to Dawn precluded reasonable efforts to reunify Dawn with respondent-mother. Since DSS did not become involved in this case until after Dawn was placed in intensive care and after respondents had been arrested and charged with felony child abuse, the trial court properly concluded that it was not in Dawn's best interest to order DSS to use reasonable efforts to reunify her with her parents. The trial court's findings and conclusion demonstrate that it complied with the requirements of N.C. Gen. Stat. § 7B-507(a). See *R.B.B.*, 187 N.C. App. at 646, 654 S.E.2d at 519 ("Here, the trial court repeatedly found that the immediate threat of harm to R.B.B. outweighed the reasonable efforts to reunify him with respondent. Due to the severe abuse by the mother and the mother's reaction to the boyfriend's abuse, the trial court determined it was not in the best interests of the child to order DSS to use reasonable efforts to reunify R.B.B. with

respondent, as it was too dangerous to do so. The trial court properly complied with N.C.G.S. § 7B-507."). Consequently, respondent-mother's argument is overruled and the trial court's order is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).