NO. COA14-650

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

IN THE MATTER OF:

Polk County
Nos. 13 JA 31-32

H.H. and R.H.

Appeal by Respondent-mother from order entered 25 February 2014 by Judge Mack Brittain in Polk County District Court. Heard in the Court of Appeals 27 October 2014.

Feagan Law Firm, PLLC, by Phillip R. Feagan, for Petitioner Polk County Department of Social Services.

Michael E. Casterline for Respondent-mother.

The Opoku-Mensah Law Firm, PLLC, by Gertrude Opoku-Mensah, for Guardian ad Litem.

STEPHENS, Judge.

Facts and Procedural Background

Respondent-mother, the mother of the juveniles H.H. and R.H., appeals from an order adjudicating: (1) H.H. a neglected and dependent juvenile; and (2) R.H. an abused, neglected, and dependent juvenile. After careful review, we affirm in part, reverse in part, and vacate in part.

On 3 December 2013, the Polk County Department of Social Services ("DSS") filed petitions alleging that H.H., then age 10, was a neglected and dependent juvenile, and that R.H., then age 8, was an abused, neglected, and dependent juvenile. DSS stated that it received a child protective services report on 14 November 2013 alleging that R.H. had bruising on his legs due to physical discipline imposed by Respondent-mother. Respondent-mother admitted to causing the bruises and stated that she intended to continue to use physical discipline on the children as she deemed necessary. Respondent-mother was charged with misdemeanor child abuse as a result of the incident.

DSS further stated that, upon information and belief, Respondent-mother had contacted 911 on the evening of 21 November 2013 and requested that someone pick up the juveniles because she was unable to provide for their care. Rather than wait for a response, Respondent-mother called the juveniles' father who agreed to take them. Respondent-mother, having told the juveniles that "she is going to jail because she abused them and that the juveniles would not see her anymore[,]" drove them to a dark parking lot and made them stand crying outside her car while she waited inside. Respondent-mother drove away once the father arrived, without waiting for him to get out of his car.

Respondent-mother's behavior and statements left the juveniles "upset and scared."

On 2 December 2013, Respondent-mother attempted to remove the juveniles from their father's care by seeking an emergency custody order. DSS claimed that the father was unable to take any legal measures, such as obtaining an emergency custody order, because he could not afford legal representation. Accordingly, DSS sought a nonsecure custody order to ensure the safety of the juveniles. The juveniles remained in their father's care. Respondent-mother was granted visitation rights but declined to exercise them.

Adjudicatory and dispositional hearings were held in Polk County District Court on 14 January 2014. By order filed 25 February 2014, the juveniles were both adjudicated neglected and dependent, and R.H. was also adjudicated abused. Custody and placement authority was granted to DSS, the court ordered that the juveniles remain placed with their father, and Respondent-mother was granted supervised visitation. Respondent-mother appeals.

Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse [and dependency] 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) (citation, internal quotation marks, and brackets omitted), *affirmed as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation and internal quotation marks omitted).

Discussion

I. Adjudication of R.H. as an abused juvenile

Respondent-mother first argues that the district court erred when it adjudicated R.H. an abused juvenile. We disagree.

Under Chapter 7B, an abused juvenile is defined, *inter alia*, as

> [a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means; [or]
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[. . . .]

N.C. Gen. Stat. § 7B-101(1) (2013). Here, the juvenile petition filed by DSS alleged that R.H. was abused under the third prong set out above, to wit, that Respondent-mother "used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]" *See* N.C. Gen. Stat. § 7B-101(1)(c).

We begin by noting, first, that allegations in an abuse petition "must be viewed on a case-by-case basis considering the totality of the evidence[,]" *In re L.T.R.*, 181 N.C. App. 376, 384, 639 S.E.2d 122, 127 (2007) (citation omitted), and observing, second, that the cases cited by Respondent-mother, DSS, and the Guardian *ad Litem* are inapposite because none concern an adjudication of abuse under subsection 7B-101(1)(c). For example, *In re Mickle*, 84 N.C. App. 559, 353 S.E.2d 232 (1987),

> was decided under a statute (section 7A-517(1)) which is no longer in effect. That statute specifically required "a substantial risk of death, disfigurement, impairment of

> physical health, or loss or impairment of function of any bodily organ" to prove abuse of a juvenile. *See* N.C. Gen. Stat. § 7A-517(1) (Repealed by S.L. 1998-202). Given this statutory definition, the *Mickle* Court held that only "injuries permanent in their effect" would sustain a determination of abuse.

In re L.T.R., 181 N.C. App. at 382 n.2, 639 S.E.2d at 126 n.2. The opinions in *In re L.T.R.*, 181 N.C. App. at 380-81, 639 S.E.2d at 125, and *Scott v. Scott*, 157 N.C. App. 382, 387, 579 S.E.2d 431, 435 (2003), each considered whether specific instances of spanking had resulted in "serious physical injury" so as to constitute abuse under section 7B-101(1)(a). *See* N.C. Gen. Stat. § 7B-101(1)(a) (defining an abused juvenile as one whose parent "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means"). As such, these cases shed no light on what constitutes abuse by the use of "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]" *See* N.C. Gen. Stat. § 7B-101(1)(c).

Our review of the case law reveals only three cases, all unpublished and thus lacking precedential value, in which this Court has considered what actions constitute "cruel or grossly inappropriate procedures or cruel or grossly inappropriate

devices to modify behavior[.]" *See id.*[1] Two of those cases involve much more extreme examples of supposed "discipline" of juveniles than the incident here. *See In re C.A.G.*, __ N.C. App. __, 754 S.E.2d 258 (2014), *available at* 2014 N.C. App. LEXIS 53 (findings of fact that a child's grandmother, *inter alia*, choked him, threatened to force him to eat dog feces, and pointed a gun at him); *In re K.A.*, 217 N.C. App. 641, 720 S.E.2d 461 (2011), *available at* 2011 N.C. App. LEXIS 2630 (finding that a parent forced the "juvenile to stand in a 'T-Shape,' which entailed holding his arms straight out by his side for up to five minutes at a time; plac[ed] duct tape over his mouth; and/or [struck] him with a belt, paddle, switch, or other object").

However, the third unpublished opinion is both persuasive

[1] This Court has never held that corporal punishment of a child constitutes abuse *per se* under any subsection of 7B-101(1), *see, e.g.*, *In re C.B.*, 180 N.C. App. 221, 224, 636 S.E.2d 336, 338 (2006) *affirmed per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007), and we do not so hold in this case. Rather, each case reviewing whether a particular incident of spanking or other corporal punishment constituted abuse has turned on an analysis of the specifics of the case. *Compare id.*; *In re L.T.R.*, 181 N.C. App. at 380-81, 639 S.E.2d at 125; *Scott*, 157 N.C. App. at 387, 579 S.E.2d at 435; with *In re Rholetter*, 162 N.C. App. 653, 592 S.E.2d 237 (2004) (finding abuse where stepmother choked children, hit them with her fists and a cookie jar, and pulled out their hair); *In re Hayden*, 96 N.C. App. 77, 384 S.E.2d 558 (1989) (finding abuse where child received multiple burns over a wide portion of her body, requiring prompt medical attention).

and closely on point with the facts here. In that case, a juvenile was adjudicated abused based on subsection 7B-101(1)(c) where the evidence showed that the "[juvenile]'s mother hit [her] in the face with her hand and kicked [her] in the stomach." *In re Simone*, __ N.C. App. __, __, __ S.E.2d __, __ (2002), *available at* 2002 N.C. App. LEXIS 2611. When examined by a DSS employee approximately one and one-half hours later, the juvenile's face was not red or bruised, but her stomach was red where she had been kicked. *Id.* This Court concluded that the evidence was sufficient to establish that the juvenile was abused due to her mother's "cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]" *Id.* (quoting N.C. Gen. Stat. § 7B-101(1)(c)).

Here, the court's findings of fact include that Respondent-mother struck R.H. five times with a belt, leaving multiple bruises on the inside and outside of his legs which were still visible the following afternoon. The court also found that R.H. described the discipline as "a beating." We cannot say that "a beating" which involves striking a child five times with a belt hard enough to leave multiple bruises still visible a day later is less "cruel" than a single strike to the face which left no mark and a single kick to the stomach which did leave a red

mark. Accordingly, we conclude that the findings of fact made by the district court were sufficient to support its conclusion that R.H. is an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(c).

II. Adjudication of H.H. and R.H. as neglected juveniles

Respondent-mother next argues that the district court erred when it adjudicated R.H. and H.H. neglected juveniles. We disagree.

"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). Section 7B-101(15) affords a district 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) (citation omitted). However, in order to support an adjudication of neglect, there must be either "physical, mental, or emotional impairment of the juvenile[s] *or a substantial risk* of such impairment as a

consequence of [respondent's] failure to provide proper care, supervision, or discipline. . . ." *In re E.C.*, 174 N.C. App. 517, 524, 621 S.E.2d 647, 653 (2005) (citation and internal quotation marks omitted; emphasis added)).

Here, along with its findings concerning Respondent-mother's "beating" of R.H., the court's other findings of fact, as well as Respondent-mother's own testimony at the adjudication hearing, reveal the following: On 21 November 2013, Respondent-mother called 911 to report that she could not or would not care for the juveniles. Respondent-mother told the 911 operator that if someone did not pick up the juveniles, she would drop them off at a safe haven. However, before law enforcement or DSS personnel could reach her home, Respondent-mother contacted the juveniles' father and arranged for him to take them. Respondent-mother made this request despite the fact that she had repeatedly stated her belief that the father was a chronic substance abuser.[2] Respondent-mother told the juveniles she

[2] We note that the record on appeal does not support Respondent-mother's allegation that the father was a chronic substance abuser. The father cooperated with substance abuse screening offered by DSS. Immediately after the juveniles were placed with their father, he had one positive test for marijuana, but all subsequent tests were negative. At the time of the adjudication hearing, the father had also agreed to complete a substance abuse assessment which was scheduled for the following week. Finally, DSS conducted an investigation of the father's

might go to jail for having abused them and that the juveniles would never see Respondent-mother again. The juveniles were scared, crying, and upset when their father arrived at the pickup location in the dark corner of a commercial parking lot that night.[3] Respondent-mother had forced the juveniles to stand by themselves outside in the dark while waiting for their father's arrival, while Respondent-mother waited in her car. Respondent-mother drove away as soon as the father arrived in the parking lot. Respondent-mother also declined to exercise her permitted visitation rights with the juveniles in the roughly eight weeks between the time she left them with their father and the date of the adjudication hearing. Respondent-

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home and found it a "safe and suitable" placement for the juveniles. However, the truth of Respondent-mother's allegation is irrelevant in determining whether the juveniles were neglected as a result of Respondent-mother's actions. The decisive point is that *Respondent-mother apparently believed the father was a chronic substance abuser* when she chose to leave the juveniles in his care, rather than wait for law enforcement or DSS personnel to arrive at her home. That decision reflects Respondent-mother's extremely poor judgment which in turn placed the juveniles at substantial risk of harm if they remained in her care.

[3] The record suggests that the father arrived in the parking lot to take the juveniles around 7:00 p.m. On 21 November 2013, the sun set in Columbus, the Polk County seat, at 5:20 p.m. *See* http://www.sunrisesunset.com/usa/north_carolina.asp (last visited 30 October 2014). Thus, it would have been well after nightfall as the juveniles stood alone and crying in the parking lot.

mother "largely refused" to attend classes and meetings recommended by DSS and refused to discuss a case plan for the juveniles.

Thus, by Respondent-mother's own account, she felt so overwhelmed that she could not care for the juveniles, and, rather than await assistance from law enforcement or DSS, she left the juveniles with a person she believed was a substance abuser without even interacting with him in person to assess his sobriety and current fitness to care for the juveniles. She disciplined R.H. in such an inappropriate manner that he has been adjudicated an abused juvenile and Respondent-mother herself was charged with misdemeanor child abuse. Yet, despite Respondent-mother's obvious and, in regard to the 21 November incident, self-admitted, inability to properly care for the juveniles, she has refused virtually all assistance offered by DSS. All of this evidence would have supported a finding of fact that Respondent-mother placed the juveniles at "a substantial risk of [physical, mental, or emotional] impairment as a consequence of [her] failure to provide proper care, supervision, or discipline." *See In re E.C.*, 174 N.C. App. at 524, 621 S.E.2d at 653. Accordingly, there is no error in the district court's failure to make such a finding. *See In re*

Padgett, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (noting that, even when "there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding") (citation omitted).

While the district court's findings of fact here are sufficient to support its adjudication of neglect, we take this opportunity to urge our district court judges to make detailed findings of fact on *all* competent evidence relevant to juvenile adjudications. In this matter, for example, numerous reports from DSS and the Guardian *ad Litem* were admitted without objection and incorporated by reference in the district court's order. Those reports contained evidence about past incidents of Respondent-mother (1) failing to provide sufficient food, heating, and stable housing for the juveniles; (2) exposing the juveniles to domestic violence between Respondent-mother and the juveniles' maternal grandmother; and (3) failing to enroll the juveniles in school. Had the district court made additional findings of fact based on this evidence, they would have provided a more complete context for its adjudication of R.H. and H.H. as neglected juveniles.

III. Adjudication of H.H. and R.H. as dependent juveniles

Respondent-mother also argues that the district court erred by adjudicating H.H. and R.H. dependent juveniles. We agree.

"Dependent juvenile" is defined as

> [a] juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9). Where, as here, *all* of the evidence and findings of fact indicate that the juveniles are living with a parent who is willing and able to provide for their care and supervision, the juveniles simply cannot be adjudicated dependent.

The adjudication order contains findings of fact that: the juveniles have been placed with their father since 21 November 2013 (findings of fact 22 and 23), DSS has found his home a safe and suitable placement (finding of fact 26), and the juveniles have adjusted well to the placement and their new school (finding of fact 31). The district court also concluded that the juveniles' placement with their father should be continued (conclusion of law 6). The unchallenged findings of fact, which are presumed supported by competent evidence, *see Koufman v.*

Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.") (citations omitted), as well as the court's decision to continue placement with the father, make clear that the juveniles' father is able to provide proper care for them. Therefore, the district court erred in adjudicating the juveniles dependent.

IV. Order to maintain stable housing and employment

In her final argument, Respondent-mother contends that the district court erred in ordering her to maintain stable housing and employment. Under the circumstances present in this case, we must agree.

Section 7B-904 of our General Statutes describes a district court's "[a]uthority over parents of juvenile[s] adjudicated as abused, neglected, or dependent[.]" N.C. Gen Stat. § 7B-904 (2013).

> A trial court may not order a parent to undergo any course of conduct not provided for in N.C. Gen Stat. § 7B-904. Section 7B-904 provides that a court may order a parent to pay for certain specific treatments, counseling and classes for the child and/or parent . . . . The trial court may also order a parent to take appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication

> or to the court's decision to remove custody of the juvenile from the parent. . . . Section 7B-904 does not grant juvenile courts the authority to order a parent to obtain and maintain employment [unless this contributed to the juvenile's removal].

In re W.V., 204 N.C. App. 290, 297, 693 S.E.2d 383, 388-89 (2010) (citations, internal quotation marks, and certain brackets omitted).

Here, nothing in the findings of fact suggests that Respondent-mother's lack of employment or unstable housing contributed to the juveniles' removal from her custody. As reflected by the district court's findings of fact, the primary factors which led to the removal of the juveniles in November 2013 were Respondent-mother's inability to provide proper care and discipline for the juveniles, in that she abused R.H. and neglected both juveniles.

Respondent-mother's inability to properly care for the juveniles *may well be* due to employment, financial, and/or housing concerns, as opposed to emotional, psychological, or other issues. Indeed, as discussed *supra*, there was copious evidence before the district court in the DSS and GAL reports which suggested that Respondent-mother moved the juveniles frequently, had suffered from unstable housing situations in the past, and was financially dependent on her own mother despite an

apparently conflicted relationship which resulted in domestic violence between them. However, the petitions did not allege and the district court did not find as fact that these issues led to the juveniles' removal from Respondent-mother's custody or formed the basis for their adjudications. Accordingly, the court lacked authority to order Respondent-mother to maintain stable housing and employment, and that portion of the order must be vacated.

Conclusion

We affirm the adjudication of R.H. as an abused juvenile and the adjudication of H.H. and R.H. as neglected juveniles. We reverse the adjudication of H.H. and R.H. as dependent juveniles. We vacate the district court's order for Respondent-mother to maintain stable housing and employment.

AFFIRMED in part; REVERSED in part; VACATED in part.

Judges GEER and MCCULLOUGH concur.