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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-790

Filed: 5 April 2016

Randolph County, No. 14 JA 150

IN THE MATTER OF: A.E.

Appeal by respondent-father from order entered 12 April 2015 by Judge James P. Hill in Randolph County District Court. Heard in the Court of Appeals 7 March 2016.

Staff Attorney Erica Glass for petitioner-appellee Randolph County Department of Social Services.

Miller & Audino, LLP, by Jay Anthony Audino, for respondent-appellant.

Schell Bray PLLC, by Christina Freeman Pearsall, for guardian ad litem.

ELMORE, Judge.

Respondent-father appeals from an order adjudicating his minor child Amy¹ a dependent juvenile. Amy's mother does not appeal. We reverse and remand.

I. Background

At the time of Amy's conception and birth, respondent-father and Amy's mother were in a dating relationship. The relationship continued for two to three

¹ We employ a pseudonym to protect the identity of the minor child.

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months after Amy's birth. During that time, both parents provided for Amy's care. After the parents separated, Amy lived solely with her mother. Respondent-father initially paid child support pursuant to a court order and later pursuant to a private agreement "that lasted for a little while."

On 8 August 2014, the Randolph County Department of Social Services (DSS) initiated an investigation of Amy's mother. During the investigation, Amy's mother provided DSS with respondent-father's purported contact information and stated she had last seen him "months ago." DSS was initially unable to locate respondent-father using this information. On 23 October 2014, social worker Crystal Bryant (Bryant) located respondent-father through his own father (the paternal grandfather). After an initial conversation about DSS's involvement with Amy and the mother, respondent-father contacted Bryant later that evening. He informed Bryant that he could move in with the paternal grandfather to provide Amy an acceptable home. He also informed Bryant that he did not currently possess a driver's license due to various traffic charges. As a result, he would rely upon the paternal grandfather to assist with Amy's transportation needs.

On 24 October 2014, Bryant went to the paternal grandfather's home to conduct a home visit. During the visit, respondent-father disclosed that he would fail a drug test because he had used marijuana recently. The paternal grandfather also disclosed that he regularly used marijuana, including while he was driving,

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emphasizing that “it does not affect his stability when driving[.]” That same day, DSS filed a petition alleging that Amy was a neglected and dependent juvenile. In the petition, DSS alleged that Amy’s mother had untreated substance abuse issues, mental health issues, inappropriate housing, and no employment. It further alleged that respondent-father had untreated substance abuse issues, and neither the mother nor respondent-father had an appropriate alternative placement for Amy. DSS obtained nonsecure custody of Amy and placed her in a licensed foster home.

On 4 February 2015, the trial court conducted a hearing on the petition. Prior to the presentation of evidence, DSS dismissed its allegation that Amy was neglected. Amy’s mother stipulated that she had untreated substance abuse and mental health issues, as well as multiple pending criminal charges. Additionally, Bryant testified regarding her interactions with respondent-father and the paternal grandfather, including their admissions that they used marijuana. Regarding transportation and after school care, respondent-father testified that he currently pays a friend to take him to work, that he looked into a particular after school program, and that he could make arrangements with his boss to leave work early and have his friend transport him and Amy until he gets his driver’s license back. He also testified that he had paid \$3,200 in fines and that he has a court date for the remaining ticket for driving while his license was revoked. At the conclusion of the hearing, the trial court entered an order adjudicating Amy a dependent juvenile. At disposition, the court concluded

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Amy shall remain in DSS custody and approved the current foster home placement. The court ordered respondent-father to maintain stable housing, maintain employment, complete a substance abuse assessment, submit to random drug screens, and complete parenting classes. Respondent-father appeals.

II. Analysis

Respondent-father argues that the trial court erred by adjudicating Amy dependent. Specifically, he contends that the court's findings of fact fail to establish that he is unable to provide for her care and supervision. We agree.

This Court reviews an adjudication of dependency 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 B.M.*, 183 N.C. App. 84, 88, 643 S.E.2d 644, 646 (2007) (citation and quotations omitted). Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). The conclusion that a juvenile is dependent is reviewed *de novo*. *In re V.B.*, ___ N.C. App. ___, ___, 768 S.E.2d 867, 868 (Feb. 17, 2015) (No. COA14-812) (citation omitted).

A dependent juvenile is "[a] juvenile in need of assistance or placement because . . . 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."

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N.C. Gen. Stat. § 7B-101(9) (2015). “In determining whether a juvenile is dependent, the trial court must 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 T.B., C.P., & I.P.*, 203 N.C. App. 497, 500, 692 S.E.2d 182, 184 (2010) (citation and quotation marks omitted).

At the adjudication portion of the hearing, the trial court made the following unchallenged findings of fact regarding respondent-father:

11. As of October 23, 2014, [respondent-father] was residing in Greensboro, North Carolina with a friend and refused to give his address to Ms. Bryant. Later, [respondent-father] sent a text to Ms. Bryant saying that he could move in with his father Crystal Bryant looked into the matter for possible placement.

12. [Respondent-father] had no valid driver’s license. His source of support for transportation was [the] putative paternal grandfather Both [respondent-father] and the putative paternal grandfather . . . smoked marijuana in the past and continued to so regularly. [The putative paternal grandfather] regularly smokes on the back porch of his residence. On or about October 22, 2014, [the putative paternal grandfather] drove his motor vehicle while smoking marijuana.

13. [Respondent-father] was unable to provide any potential placements. The Mother was unable to provide potential placements.

. . . .

15. At this time, it has not been determined that [respondent-father] is the natural, legal or biological father of the minor child [Amy]. No evidence was presented that

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[respondent-father] had ever taken any steps to legitimate [Amy].

Respondent-father challenges findings of fact ten, fourteen, and sixteen.

10. On October 23, 2014, [respondent-father] called Crystal Bryant after [DSS] attempted to contact [respondent-father] for more than two months.

14. The putative paternal grandfather . . . and [respondent-father] admitted to the continuous use of illegal drugs which could lead to their arrests. No evidence indicated that [respondent-father] had ever cared for the minor child [Amy] or ever had a relationship with [Amy] or had developed the skills to care for [Amy]. No evidence was presented that [the putative paternal grandfather's] residence was physically adequate, safe or appropriate to support the residence of [Amy].

16. None of the parents in this matter were able to provide for the minor children's the juvenile's [sic] care or supervision and each lacks an appropriate child care arrangements [sic] for [Amy].

Based on the findings of fact, the trial court concluded as a matter of law that respondent-father is unable to care for Amy, and that Amy is a dependent juvenile.

Respondent-father argues that the three challenged findings are not supported by clear and convincing evidence, and because they are necessary to support the trial court's conclusion that Amy is a dependent juvenile, we should vacate the order.

We believe that finding number sixteen is more properly considered a conclusion of law as it requires the application of legal principles to the facts of the case. *See* N.C. Gen. Stat. § 7B-101(9) (2015); *Guox v. Satterly*, 164 N.C. App. 578,

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583, 596 S.E.2d 452, 455 (2004); *see also In re B.W.*, 190 N.C. App. 328, 335, 665 S.E.2d 462, 467 (2008) (“If a contested ‘finding’ is more accurately characterized as a conclusion of law, we simply apply the appropriate standard of review and determine whether the remaining facts found by the court support the conclusion.”) (citations omitted). Based on the record, we conclude there is competent evidence to support the remaining two challenged findings. Whether the findings support the conclusions of law, however, is a separate question.

At the adjudication hearing, “[t]he allegations in a petition alleging that a juvenile is . . . dependent shall be proved by clear and convincing evidence.” N.C. Gen. Stat. § 7B-805 (2015). Accordingly, DSS had the burden to affirmatively show that respondent-father was “unable to provide for [Amy]’s care or supervision[.]” N.C. Gen. Stat. § 7B-101(9) (2015). The trial court’s finding that “no evidence” was provided regarding respondent-father’s parenting skills or the adequacy of the paternal grandfather’s home does not establish that DSS met this burden. The absence of evidence regarding respondent-father’s previous care for Amy and the conditions of the paternal grandfather’s home does not affirmatively establish that respondent-father could not care for Amy going forward or that his proposed residence was inadequate.

Moreover, the court’s remaining findings, which pertained to respondent-father and the paternal grandfather’s marijuana use, are insufficient to support the

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trial court's conclusion that Amy was dependent. While the trial court found that respondent-father's "continuous use of illegal drugs . . . could lead to [his] arrest[,]” a dependency adjudication cannot be based on events which might occur in the future. *See* N.C. Gen. Stat. § 7B-802 (2015) (“The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition.”). There were no allegations in the petition or evidence presented at the adjudication hearing that respondent-father's past marijuana use would render him presently incapable of providing care. Although DSS argues that the adjudication was proper because respondent-father's drug use “poses a substantial risk of impairment to the minor child[,]” citing *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901–02 (1993), as DSS acknowledges, that standard applies to the determination of whether a child is neglected. *See id.* Here, DSS specifically dismissed its neglect allegation prior to the adjudication hearing.

Respondent-father also argues that the trial court's refusal to give him custody violates his “constitutionally protected paramount interest in Amy.” However, “the determinative factors [when adjudicating a child abused, neglected, or dependent] are the circumstances and conditions surrounding the child, *not* the fault or culpability of the parent.’ ” *In re A.W.*, ___ N.C. App. ___, ___, 765 S.E.2d 111, 115 (Nov. 18, 2014) (No. COA14-597) (quoting *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984)). Because we are remanding for additional findings of fact

regarding whether Amy is dependent, we do not reach respondent-father's second argument.

III. Conclusion

The trial court's findings do not support its conclusion that Amy was a dependent juvenile because they do not establish that respondent-father was unable to provide for her care or supervision. Accordingly, we reverse the trial court's order and remand for additional findings of fact, including if paternity remains at issue.

REVERSED AND REMANDED.

Judges GEER and DIETZ concur

Report per Rule 30(e).