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NO. COA05-448

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF:

B.I.,
Minor Child.

Buncombe County
No. 04 J 63

Appeal by respondent mother from order entered 14 September 2004 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 17 November 2005.

John C. Adams, for petitioner-appellee Buncombe County Department of Social Services.

Judy N. Rudolph, for petitioner-appellee Guardian ad Litem.

Winifred H. Dillon, for respondent-appellant.

TYSON, Judge.

H.I. ("respondent") appeals from order entered adjudicating her minor child, B.I., to be neglected. We affirm.

I. Background

T.I., respondent's first child, was born on 29 April 2002 in Missouri. When T.I. was nine months old, respondent took T.I. with her to a doctor's appointment. Respondent's doctor immediately noticed T.I. exhibited two black eyes and severe bruising on her arms and the back of her head. Respondent took T.I. to a hospital. A CT scan revealed that T.I. had suffered multiple skull fractures and a fractured disk in her neck.

Dr. David Riddle, the emergency room doctor, concluded the injuries resulted from abuse. Respondent and her husband denied any wrongdoing. They blamed the injuries on the child's behavior of banging her head against the side of the crib. They also blamed T.I.'s maternal grandmother and cited her extensive history with social services.

The pediatric neurosurgeon who treated T.I. opined that the skull fractures were caused by blunt force trauma. On 30 January 2003, the father admitted he had slapped and shaken T.I. when she cried.

A psychologist evaluated the father and diagnosed him to suffer from a Bipolar I Disorder, mood-congruent psychotic features, generalized anxiety disorder, obsessive-compulsive personality disorder, and problems "in almost every aspect of his life." The psychologist recommended an alternate placement of T.I. be considered due to potential risks to her health and safety.

Respondent suffers from a disease similar to Muscular Dystrophy and is bound to a wheel-chair. Respondent was diagnosed with major affective disorder and a mixed personality disorder with narcissistic and compulsive features.

Due to the injuries T.I. had suffered, the mental illness of respondent and the father and the physical inability of respondent to protect T.I. from abuse, both respondents voluntarily relinquished their parental rights at the Circuit Court of Johnson County, Missouri, Juvenile Division.

On 25 March 2004, the Buncombe County Department of Social Services ("DSS") received a Child Protective Services Complaint that respondent would be delivering a child by caesarean section the following day. The complaint alleged concern with leaving B.I. in the parent's care due to the family's past history with the Missouri Division of Family Services.

DSS learned of the injuries T.I. had suffered in Missouri. The Missouri juvenile file was received into evidence, without objection. Due to the abuse T.I. had suffered, DSS determined that B.I. would be at substantial risk if she remained in the custody of her parents.

On 26 March 2004, DSS filed a juvenile petition alleging B.I. lived in an environment injurious to her welfare and was neglected. DSS obtained non-secure custody and, with no appropriate relative available to care for her, placed B.I. in foster care. Non-secure custody hearings were held 29 March 2004, 5 April 2004, and 14 April 2004. At the last hearing, respondent and the father waived further hearings pending the adjudication hearing.

On 12 May 2004, both parents consented to a finding of neglect based on the allegations in the petition with additional stipulations, and the petition was adjudicated. The court entered an interim disposition and set 28 June 2004 for disposition. The trial court entered the adjudication judgment on 22 June 2004, ten days after it was statutorily due. N.C. Gen. Stat. § 7B-807 (2003).

The dispositional hearing was continued on 30 June 2004 until 12 and 13 August 2004. The court was told of allegations of an attack upon the guardian ad litem by the father. DSS requested: (1) respondent and the father no longer be allowed visits with B.I.; (2) they be prohibited from DSS's building; and (3) they not be allowed to attend team meetings. The court agreed with DSS's requests.

The court heard testimony on 12 and 13 August 2004 and ordered a dispositional order in which the court determined the best plan for B.I. was adoption with a concurrent plan of guardianship with a relative. The court released DSS from further reunification efforts with respondent and the father. B.I. has remained in DSS's custody for virtually her entire life, twenty months. The father did not appeal. Respondent timely appealed.

II. Issues

Respondent argues the trial court's: (1) conclusion that the juvenile was a neglected juvenile is not supported by the trial court's findings of fact, notwithstanding the parties' consent; and (2) finding of fact number twenty three and conclusion of law number four stating "[t]hat the Buncombe County Department of Social Services made reasonable efforts to prevent removal of the minor child from the home, but removal was necessary to protect the safety and health of [B.I.] and, the Buncombe County Department of Social Services has made reasonable efforts to return [B.I.] to the home" are not supported by the findings of fact or the evidence.

III. Standard of Review

This Court's review of a trial court's conclusion of law is limited to whether it is supported by the findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The findings of fact must be supported by clear and convincing competent evidence. *Id.*

IV. Neglect

Respondent argues that the trial court's conclusion and judgment that B.I. was a neglected juvenile, is not supported by the trial court's findings of fact, notwithstanding the parties' consent. We disagree.

The North Carolina Juvenile Code defines a "neglected juvenile" 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. In determining whether a juvenile is a neglected juvenile, *it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (2003) (emphasis supplied).

"Allegations of neglect must be proven by clear and convincing evidence." *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. "This intermediate standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt

required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). Additionally, this Court held that to adjudicate a child to be neglected the child must be in danger of physical, mental, or emotional impairment. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

In *In re Helms*, the respondent mother argued that the trial court erred in adjudicating her minor child neglected. 127 N.C. App. at 511, 491 S.E.2d at 676. This Court affirmed the trial court's judgment. *Id.* at 512, 491 S.E.2d at 676. This Court found that the respondent exposed the child to risk by allowing her extended contact with the child's biological father and maternal grandfather. *Id.* Both men had abused the respondent. *Id.* The maternal grandfather used cocaine and attempted to sexually assault the respondent. *Id.* The respondent also violated her protection plan by residing with the child's abusive father. *Id.* This Court stated, "[i]n this case, clear and convincing competent evidence supports the trial court's findings of fact." *Id.*

In the case at hand, "clear and convincing competent evidence" supports the trial court's findings of fact." *Id.* The department took B.I. into custody immediately after her birth at the hospital. In the adjudication judgment, the trial court found and concluded as follows:

5. That all parties consent that the minor child is a neglected child based on the allegations contained in the Juvenile Petition, and upon additional stipulations consented to by all parties.

. . . .

9. That Robert['s] and Hester['s] first child is in the custody of Johnson County Missouri Children's Division. Both parents voluntarily consented to termination of their parental rights for adoption. This termination was granted by their Juvenile Court in September 2003. This child at the age of 8 months was found to have suffered serious abuse including skull fracture, a fractured vertebrae, and contusions on the face and arms while in the mother's and father's care.

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BASED ON THE ABOVE FINDING OF FACTS THE COURT CONCLUDES AS A MATTER OF LAW:

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2. That the Court finds by clear, cogent and convincing evidence that the minor child is a neglected child pursuant to N.C. Gen. Stat. § 7B-101(15) in that the minor child will not receive proper care and supervision from the parents and would be exposed to a substantial risk of potential serious injury in their care.

Respondent consented in the adjudication judgment "that the minor child is a neglected child." Respondent contends that evidence of T.I.'s prior abuse by itself is insufficient to support a conclusion that B.I. is neglected.

Even if it has been established that a child has suffered physical abuse in a home, that finding "does not require the removal of all other children from the home Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *In re Nicholson and Ford*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). This Court affirmed the trial court's decision in *Nicholson* when it stated that the statute "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).

Our Supreme Court stated in *Montgomery*:

the Court of Appeals vacated the trial judge's order to terminate the respondents' parental rights based upon its determination that there was insufficient evidence of neglect to support the judge's findings and conclusions. After giving careful consideration to the entire record, we hold that there exists substantial evidence in support of the neglect findings and conclusions.

311 N.C. at 111, 316 S.E.2d at 253. The trial court made the following findings regarding the neglect of the minor children in *Montgomery*:

1 -- Failure to send the three school age children to school with resulting poor grades. The children each missed school for over 30 days.

4 -- Prior adjudication of neglect.

5 -- The mother was unstable, delusional (believed that she could have a baby even though she had had a hysterectomy and believed that someone or something was trying to get inside of her) was nervous, failed to take medicine to control her condition and gets angry at her children when she does not take her medicine and that this condition causes problems between her and her husband when the children lived with them and that she yells at the children because of it.

Id. at 112, 316 S.E.2d 253. The trial court in *Montgomery* made numerous findings of fact to support the adjudication of neglect. 311 N.C. at 112, 316 S.E.2d at 253. Our Supreme Court held the evidence was sufficient and reversed this Court's determination of insufficient evidence of neglect. *Id.*

Here, while the trial court based its conclusion on a shorter list of findings, the findings were sufficient to adjudicate B.I. neglected. T.I., an infant and B.I.'s older sibling, suffered serious abuse while under respondent's supervision. The trial court complied with the statute and properly considered whether B.I. "lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15). B.I. would have been exposed to a substantial risk of serious injury while in respondent's care.

In the adjudication judgment and dispositional order filed 12 May 2004, respondent stipulated that T.I. had "suffered serious abuse including skull fracture, a fractured vertebrae, and contusions on the face and arms while in the mother's care." Respondent also stipulated "[t]hat based on the information that is currently available it would be contrary to the welfare and best interest of [B.I.] to remain in the custody of [respondent and the father] as she would be exposed to a substantial risk of potential serious injury in their care."

The fact that B.I. was taken from respondent two days after her birth does not negate the fact that she "lives in an environment injurious to the juvenile's welfare." *Id.* Nor does the fact that the abuse of T.I. took place prior to any physical injury to B.I. lessen the likelihood that B.I. could suffer a substantial risk of serious injury.

In *In re E.N.S.*, the respondent mother argued: (1) the trial court erred in concluding the minor child was living in an

environment injurious to the his welfare since the minor child was taken from her immediately following his birth; and (2) the trial court erred when it relied on events that took place before the minor child's birth to adjudicate the child to be neglected. 164 N.C. App. 146, 149, 595 S.E.2d 167, 169, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). This Court affirmed the trial court's judgment that adjudicated the minor neglected. The Court held that it is important for a trial court to consider whether there is a likelihood of future abuse. *Id.* The Court stated:

Here, the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that [the minor child] would be at risk if allowed to remain with respondent. Because the neglect statute affords the trial judge some discretion in determining the weight to be given such evidence, we hold that the findings of fact taken in their entirety are sufficient to support the conclusion that [the minor child] was a neglected child. This assignment of error is overruled.

Id. at 151, 595 S.E.2d 169 (internal quotation and citation omitted).

The trial court did not commit reversible error when it adjudicated B.I. neglected. This assignment of error is overruled.

V. Findings of Fact

Respondent argues that the trial court's finding of fact number twenty-three and conclusion of law number four are not supported by the findings of fact or the evidence.

Finding of fact number twenty-three and conclusion of law number four state:

That the Buncombe County Department of Social Services made reasonable efforts to prevent removal of the minor child from the home, but removal was necessary to protect the safety and health of the child, and, the Buncombe County Department of Social Services has made reasonable efforts to return the child to the home.

N.C. Gen. Stat. § 7B-507(a)(2) (2003) mandates:

(a) An order placing or continuing the placement of a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order:

. . . .

(2) Shall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile, unless the court has previously determined under subsection (b) of this section that such efforts are not required or shall cease.

N.C. Gen. Stat. § 7B-101(18) (2003) defines reasonable efforts as:

The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time. If a court of competent jurisdiction determines that the juvenile is not to be returned home, then reasonable efforts means the diligent and timely use of permanency planning services by a department of social services to develop and implement a permanent plan for the juvenile.

Even if DSS failed to make reasonable efforts to prevent B.I.'s removal, the trial court possessed the power to place B.I.

in the department's custody. N.C. Gen. Stat. § 7B-507 (a) provides:

A finding that reasonable efforts have not been made by a county department of social services shall not preclude the entry of an order authorizing the juvenile's placement when the court finds that placement is necessary for the protection of the juvenile. Where 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.

Although parents maintain constitutionally protected rights to the care, custody, and control of their children, "N.C. Gen. Stat. § 7B-507, reiterates the well established principle . . . in determining placement issues is [to consider] the welfare of the child." *In re J.J.L.*, ___ N.C. ___, 612 S.E.2d 404, 407 (2005).

In the case at hand, the department made reasonable efforts to prevent B.I.'s removal from respondent's custody. The department: (1) considered the Missouri child protective case whereby respondent voluntarily gave up her parental rights to T.I.; (2) referred respondent and the father to Dr. Robert McDonald for psychological evaluation; and (3) provided them with visitation and team meetings. This assignment of error is overruled.

VI. Conclusion

The trial court's conclusion and judgment that B.I. was a neglected juvenile is supported by the trial court's findings of fact. The trial court's conclusion of law number four is supported by the findings of fact and clear, competent, and convincing evidence. The trial court's order is affirmed.

Affirmed.

Judges HUDSON and LEVINSON concur.

Report per Rule 30(e).