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NO. COA07-901

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

IN THE MATTER OF:
I.D.S., III, MINOR CHILD

Wilkes County
No. 03 JA 160

Appeal by respondent-father from an order entered 24 April 2007 by Judge Mitchell L. McLean in Wilkes County District Court. Heard in the Court of Appeals on 26 November 2007.

Paul W. Freeman, Jr., for Wilkes County Department of Social Services petitioner-appellee.

David A. Perez for respondent-father appellant.

Tracie M. Jordan for Guardian ad Litem appellee.

McCULLOUGH, Judge.

Respondent-father appeals from an order declaring his son, I.D.S., born 8 September 1992, neglected and granting to the Wilkes County Department of Social Services ("DSS") legal and physical custody of the child. For the following reasons, we affirm.

Respondent-father and I.D.S.'s biological mother, Ms. B, separated in 2000, after which point I.D.S. lived with his father. DSS has been intermittently involved with this family since 2003, when it found that respondent-father had been physically and verbally abusive to I.D.S. and removed I.D.S. from respondent-father's home. On 15 January 2004, Judge Gregory declared I.D.S. a

neglected juvenile, concluded that it was not in the child's best interest to be returned to the home of either parent, and granted physical and legal custody of I.D.S. to DSS. Legal and physical custody of I.D.S. was subsequently awarded to Ms. B in November of 2004; however, in December of 2005, she was convicted of Driving While Impaired and was sentenced to 30 days in prison. At that point, the trial court awarded full custody of I.D.S. to respondent-father.

On 17 November 2006, DSS filed its most recent petition alleging that I.D.S. is a neglected juvenile. Hearings were held on 20 February 2007 and 19 March 2007. The evidence at the hearing tended to show that on 18 October 2006, an incident arose at I.D.S.'s school, during which I.D.S. and another student were roughhousing and jumped on the back of the physical education teacher. After the teacher directed I.D.S. to fill out a Disciplinary Referral Form, I.D.S. became visibly shaken and told the teacher that his father would "beat [him] to death" if he received a disciplinary report. The teacher referred I.D.S. to the school counselor, Donna Rollings.

Donna Rollings testified that during her conversation with I.D.S., I.D.S. stated, "I can't go home, my dad will hurt me. Did you know he's hurt me before?" "I'm not going home, I'll run if I have to." I.D.S. told Ms. Rollings that his father had previously pushed him in the chest, causing him to fall backwards over a plow or a tiller.

Social worker, Linda Brooks, subsequently met with I.D.S., and I.D.S. told her that respondent-father sometimes became angry without much reason and, in August, had punched I.D.S. in the stomach. Ms. Brooks began an investigation, and I.D.S. went to stay with his mother. DSS was unable to find any physical evidence to support I.D.S.'s October allegation and, on 9 November 2007, DSS closed the case.

Nonetheless, I.D.S. refused to return to respondent-father's home and threatened to run away. Assistant Principal Ramona Hemric spoke to respondent-father several times over the phone to discuss the situation. Ms. Hemric testified that when she spoke to respondent-father, he was agitated, used profanity, and on at least one occasion, hung up on her.

Eventually, respondent-father came to the school and met with Ms. Hemric, Ms. B., and Ms. Brooks. When I.D.S. was brought into the conference room where the meeting was taking place, I.D.S kept his head down and would not make eye contact with his father. Although respondent-father had not seen I.D.S. for three weeks, respondent-father immediately reprimanded his son for having written in marker on his hand another student's phone number and for having an earring in his ear. Ms. Hemric described respondent-father's behavior toward his son as being aggressive and condescending.

At the hearing, Ms. Hemric, Ms. Rollings, and Ms. Brooks testified that they believed the child's fear of his father was

genuine. Ms. Brooks also testified that she believed respondent-father had abused I.D.S.

The trial court entered an adjudication and disposition order on 24 April 2007. The trial court made the following pertinent findings of fact:

7. On or about November 9, 2006, the Department of Social Services received another report that the child's father had come to the school where the child was a student, had become very belligerent and abusive, had been threatening to school personnel, and that the child was in fear for his safety. The child expressed his feeling that his father would beat him if he went home. The child threatened to run away if he was made to return to the father's home. On this occasion, the father was verbally abusive to the child, as well as school personnel.

8. It is apparent that the child is genuinely afraid of his father.

9. Mr. S. was particularly abusive to Donna Rollins [sic], the School Counselor, on this occasion. During the October, 2006 incident, [I.D.S.] told Ms. Rollins, [sic] and the Court so finds, that his father would kill him by beating him to death; and that his father had hurt him before.

Based on these findings, among others, the trial court concluded that I.D.S. has been the subject of inappropriate discipline by his father, has lived in an environment that is injurious to his welfare, and is a neglected juvenile, as that term is defined by N.C. Gen. Stat. § 7B-101 (2005). The trial court ordered that legal and physical custody be placed with DSS, with conditional placement of the child with his mother.

On appeal, respondent-father contends that: (1) aspects of findings of fact numbers 7-11 are not supported by competent evidence of record; and (2) the trial court erred in concluding that I.D.S. is a neglected juvenile, as defined by N.C. Gen. Stat. § 7B-101(15). Respondent-father challenges findings of fact numbers 10 and 11 on the basis that they are supported by inadmissible hearsay statements; however, because respondent-father failed to specifically object to these statements when they were made, he waived his right to raise these issues on appeal, and we need not address them. See N.C. R. App. P. 10(b)(1).

The role of this Court in reviewing an 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).

I. Findings of Fact

Allegations of neglect must be proved by "clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). "Clear and convincing evidence 'is greater than the preponderance of the evidence standard required in most civil cases.' It is defined as 'evidence which should fully convince.'" *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citations omitted). "'In a ... neglect 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*

A.J.M., 177 N.C. App. 745, 748, 630 S.E.2d 33, 35 (2006) (citation omitted).

Respondent-father first asserts that the last line of finding of fact number 7, that respondent-father was "verbally abusive" to I.D.S. and school personnel, is not based on clear and convincing evidence. We disagree.

Ms. Hemric, the assistant principal, testified that respondent-father was very agitated during their phone conversation, that he used profanity, and that he hung up on her. Further, Ms. Hemric testified that during his exchange with I.D.S. at the meeting, respondent-father's behavior--leaning on the table and standing up at various points--was very aggressive. There is evidence in the record that despite not seeing I.D.S. in three weeks, respondent-father immediately scolded the child for temporary markings of a phone number on the child's arm and that throughout the meeting I.D.S. submissively kept his head down and avoided eye contact with respondent-father. Finally, the evidence shows that when respondent-father accidentally bumped his own head into the side of a door on the way out of the meeting, respondent-father immediately turned back into the room and blamed I.D.S. for his injury. We conclude that clear and convincing evidence supports the trial court's finding that respondent-father was verbally abusive to I.D.S. and school personnel.

Respondent-father next asserts that finding of fact number 8, that I.D.S. is genuinely afraid of his father, is not supported by competent evidence because I.D.S. did not testify at the hearing

and the trial court had no opportunity to assess I.D.S.'s credibility. We disagree.

Here, the trial court heard testimony from the assistant principal, the school counselor, and the DSS social worker. The assistant principal and DSS social worker observed respondent-father and I.D.S. at the meeting. The school counselor and DSS social worker spoke with I.D.S. All three opined that I.D.S. had a genuine fear of respondent-father. Further, the social worker opined that respondent had abused I.D.S. We conclude that clear and convincing evidence supports the trial court's finding that I.D.S. was genuinely afraid of his father.

Respondent-father next asserts that portions of finding of fact number 9, specifically (1) that on 9 November 2006, respondent-father was abusive to the school counselor, Donna Rollings; and (2) that I.D.S. told Donna Rollings that respondent-father would beat him to death, are not supported by competent evidence. We agree.

First, Ms. Rollings testified at the hearing that she had no conversation with respondent-father after October of 2006, and there is no other evidence in the record that shows respondent-father was abusive toward her in November of 2006. Next, although Donna Rollings testified that I.D.S. told her that respondent-father had hurt him before, the evidence in the record reveals that I.D.S. told his teacher--not Donna Rollings--that respondent-father would beat him to death. Thus, finding of fact number 9 is not supported by competent evidence. However, given the sufficiency of

the other findings made by the court, as discussed below, we conclude that these misstatements by the trial court constitute harmless error.

II. Legal Conclusions

Lastly, respondent-father contends that the trial court's findings of fact do not support its conclusion that I.D.S. is a neglected juvenile. Respondent-father argues that past findings of abuse do not support its conclusion that I.D.S. is currently a neglected juvenile. However, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231 (1984) (reasoning that evidence of changed circumstances must be considered in light of any history of neglect by the party and the probability of repetition of past behavior by the parents). After reviewing the trial court's findings of facts,¹ we cannot agree with respondent-father.

N.C. Gen. Stat. § 7B-101 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 lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15). This Court has further required that in order to adjudicate a juvenile

¹We do not include finding of fact number 9 in our analysis, as we have determined that it is not supported by clear and convincing evidence.

neglected, "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 re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation omitted). "It is well-established that the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re T.S., III, & S.M.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22, *disc. review denied*, 360 N.C. 647, 637 S.E.2d 218 (2006), *aff'd*, 361 N.C. 231, 641 S.E.2d 302 (2007).

Here, the trial court has found: (1) that respondent-father has anger management and alcohol problems, as well as a history of violence toward I.D.S., which includes a 2001 conviction of misdemeanor child abuse; (2) that in November of 2006, respondent-father was verbally abusive to school personnel and I.D.S.; (3) that respondent-father has "pushed [I.D.S.] in the chest and knocked him over various things"; and (4) I.D.S. is genuinely afraid of his father and has threatened to run away if he is made to return to his father's home. The trial court's findings as to respondent-father's history of abusive behavior toward and recent pushing of I.D.S. combined with respondent-father's aggressive behavior during the meeting with school personnel sufficiently support the trial court's conclusion that I.D.S. is a neglected juvenile, as defined by N.C. Gen. Stat. § 7B-101. Accordingly, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).