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NO. COA08-808

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

IN THE MATTER OF:

A.M.

Guilford County
No. 08 JA 1

Appeal by respondent from order entered 8 April 2008 by Judge Patrice A. Hinnant in Guilford County District Court. Heard in the Court of Appeals 24 November 2008.

Court of Appeals

Mercedes O. Chut for petitioner-appellee.

Patricia Kay Gibbons for respondent-appellant.

Slip Opinion

GEER, Judge

Respondent mother appeals from an order adjudicating her son, A.M. ("Aaron"),¹ a dependent juvenile, contending that the trial court's findings of fact are not supported by clear, cogent, and convincing evidence. After careful review of the record, we conclude that the trial court's material findings of fact are fully supported by the evidence and that those findings in turn support the adjudication of Aaron as a dependent juvenile. Since we also hold that the trial court did not abuse its discretion in maintaining custody of Aaron with the Guilford County Department of Social Services ("DSS"), we affirm the trial court's order.

¹The pseudonym "Aaron" will be used throughout this opinion to protect the child's privacy and for ease of reading.

Facts

Aaron was born prematurely in January 2008 with serious birth defects. His parents, who are first cousins, were then both 15 years old. Respondent mother was herself, at that time, in the legal and physical custody of DSS as a result of placement by the Department of Juvenile Justice and Delinquency Prevention. Aaron's father was on probation through the Department of Juvenile Justice and Delinquency Prevention for assault with a deadly weapon inflicting serious injury.

The day after Aaron's birth, DSS received a report that he was a dependent juvenile. That same day, Aaron had surgery to correct a birth deformity. Aaron was ultimately diagnosed with pedal lymphadema, a swelling of the feet; omphacele, a condition in which several of his organs developed on the outside of his body in the womb; deformed toes; an enlarged tongue; and Beckwith-Wiedemann's Syndrome. Because of these diagnoses, he was at high risk for hypoglycemia, seizures, respiratory difficulties due to his enlarged tongue, feeding problems, and developing tumors. Aaron's medical conditions were expected to require physical and occupational therapy, multiple surgeries, and regular appointments with a pediatrician, a geneticist, and an opthamologist.

On 7 January 2008, when Aaron was less than a week old, DSS filed a petition alleging that he was a dependent juvenile in that his parents were unable to provide for his care or supervision and lacked an appropriate alternative child care arrangement. On 10

January 2008, the trial court entered a non-secure custody order placing Aaron in DSS custody after finding that there was a reasonable factual basis for the allegations in the petition.

The trial court conducted an adjudication hearing on 3 March 2008 and 6 March 2008. Aaron's father was not present for a portion of the second day of the hearing because of his incarceration for pending felony charges. On 8 April 2008, the trial court entered an adjudication and dispositional order finding that the paternal grandmother was an inappropriate option for placement because of her prior child protective services history and that the maternal grandfather was also not an appropriate placement because he had failed to cooperate and lacked adequate living arrangements for Aaron and respondent mother. Based on the lack of alternative caregivers, the special needs of Aaron, and the circumstances of the minor parents, the trial court determined that Aaron was a dependent child. Based on additional dispositional findings of fact, the trial court further concluded it was in the best interests of Aaron to remain in the legal custody of DSS. Respondent mother timely appealed to this Court.²

Discussion

"In a non-jury adjudication of abuse, neglect, and dependency, '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 P.M.*, 169 N.C. App. 423, 424, 610 S.E.2d 403, 404 (2005) (quoting *In re Helms*, 127

²Aaron's father is not a party to this appeal.

N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)). This Court reviews the trial court's conclusions of law to determine whether they are supported by the findings of fact. *Id.*

I

Respondent mother contends initially that several of the trial court's findings of fact in the adjudicatory portion of its order are not supported by clear, cogent, and convincing evidence.³ We first note that with respect to a number of the challenged findings of fact, respondent mother argues that the only evidence supporting the finding of fact was testimony constituting hearsay. With respect to some of the identified hearsay, respondent mother did not object at trial and, therefore, that testimony was properly considered by the trial court in making its findings of fact. See *State v. Bryant*, 235 N.C. 420, 423, 70 S.E.2d 186, 188 (1952) (holding that although some of State's evidence was hearsay, it was admitted without objection and thus could be considered by fact-finder); *State v. Fuqua*, 234 N.C. 168, 170, 66 S.E.2d 667, 668 (1951) (holding that "where hearsay is admitted without objection, it may be considered with the other evidence and given any evidentiary value which it may possess").

As for testimony to which respondent mother did object, respondent mother did not assign error to the trial court's

³Although respondent mother assigns error to the trial court's finding of fact 7, her brief contains no specific argument as to that finding. Therefore, we deem that assignment of error abandoned. See N.C.R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.").

admission of the testimony. Rule 10 of the Rules of Appellate Procedure provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." Respondent mother's assignments of error assert only that the record contains insufficient evidence to support the challenged findings of fact. See also N.C.R. App. P. 10(c)(1) (requiring that an assignment of error "direct[] the attention of the appellate court to the particular error about which the question is made"). With these limitations on our review in mind, we turn to the specific findings of fact challenged by respondent mother on appeal.

Respondent mother first challenges finding of fact 8, which states:

The minor child, A.M., had surgery on January 2, 2008 to correct a birth deformity. The minor child was being tube fed on that date. The minor child has deformed toes, which were still being evaluated by physicians at Carolina Medical Center. It was unknown at that time how much additional medical treatment the minor child required. Medical staff at Carolina Medical Center continued to evaluate the minor child for disabilities commonly associated with first cousins conceiving a child, for which results were still pending at the time. The minor child was found to be at high risk for the following: hypoglycemia, seizures, respiratory difficulties due to the large tongue, feeding problems, and developing tumors. Hospital staff is concerned about the minor child and mother returning to the biological family due to the extensive medical needs and appointments.

The testimony of DSS Social Worker Rebeckia Fuller – given without objection – supported the portions of this finding of fact relating

to the surgery, the need for additional treatment, and Carolina Medical Center's continuing evaluation of Aaron. While respondent mother did object to Ms. Fuller's testimony regarding Aaron's medical diagnoses and likely future health concerns, she has not assigned error to the admission of that testimony, and, in any event, respondent mother's own testimony also provides the necessary support for that portion of the finding of fact.

We agree that two portions of finding of fact 8 are not supported by the record. First, the fact that Aaron was being tube fed at the time the petition was filed is only mentioned in the DSS petition that does not constitute evidence. Additionally, the DSS case summary, admitted only in the dispositional phase of the hearing, is the sole support for the finding that the hospital staff was "concerned about the minor child and mother returning to the biological family due to the extensive medical needs and appointments." Evidence admitted for dispositional purposes cannot provide support for facts found in connection with the adjudication.

Nevertheless, we do not believe that these portions of finding of fact 8 are sufficiently material to the trial court's order as to warrant reversal. There is no serious dispute that Aaron has extensive medical needs and appointments and that the teenage biological parents themselves have very limited capacity to care for those needs on their own. The trial court, in determining that the grandparents were not appropriate placements, made specific findings of fact that were not in any way dependent on the hospital

staff's assessment of the biological family's capabilities in dealing with or in meeting Aaron's medical needs.

Respondent mother next challenges finding of fact 10, which states:

The maternal grandfather, Mark Jones, was found to be an inappropriate option for placement of the minor child, since he had failed to cooperate with the Guilford County Department of Social Services in reference to the mother of the minor child, in that he had not signed or discussed a service agreement with the Department of Social Services and has refused to speak with Child Protective Services employees. Mr. Jones does not have adequate living arrangements for the minor child and the [respondent] mother[.]

This finding of fact is substantially supported by Ms. Fuller's testimony.⁴ Respondent mother argues that this finding of fact is refuted by testimony that Mr. Jones had a Section 8 voucher for more substantial housing. Ms. Fuller testified, however, that Mr. Jones "has had that housing voucher for some time and has not utilized it." Given this testimony and the lack of evidence of intended use of the voucher, the trial court was entitled to give the evidence of the existence of that voucher little weight and find that the current one-bedroom apartment – shared by Mr. Jones,

⁴In challenging this finding of fact, respondent mother contends that Ms. Fuller's testimony regarding Mr. Jones' failure to cooperate with DSS was hearsay to which she objected. Even though respondent mother has not challenged the admission of that testimony on appeal, we note that the objection was not to the portion of the testimony that indicated Mr. Jones did not cooperate with DSS, but rather was an "[o]bjection as to not cooperating with the delinquency court" because Ms. Fuller was "not with the delinquency court."

respondent mother, and her sister — was an inadequate living arrangement for Aaron.

With respect to finding of fact 10, DSS concedes that there is no adjudication-phase evidence that Mr. Jones refused to speak with Child Protective Services or to sign a services agreement. Although the DSS case summary in the record states that Mr. Jones refused to speak with Child Protective Services, had not returned phone calls to the in-home services DSS worker, and had not taken steps to initiate in-home services, this evidence was only admitted in the disposition stage of the case. Nonetheless, respondent mother has made no showing that elimination of this portion of finding of fact 10 would likely result in the trial court changing its view that there was no adequate alternative child care arrangement for Aaron.

At this point, we must stress that the trial court was required to determine Aaron's status as a dependent juvenile *as of the date of the petition* and not as of the date of the hearing. In an initial adjudication proceeding, in contrast to the disposition stage, the trial court "is limited to a determination of the items alleged in the petition." *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006) (holding that trial court did not err in concluding "that the relevant time period for adjudication was from the birth of the child to the filing of the petition"). As the trial court found — and the undisputed evidence showed — respondent mother was in the legal and physical custody of DSS on the date that the petition was filed. We cannot determine that the

unsupported portion of finding of fact 10 would, in light of this fact, alter the trial court's ultimate factual finding that, at the time of the filing of the petition, there was no adequate alternative child care arrangement.

Respondent mother also challenges finding of fact 11, which states:

The Department of Social Services was unable to make reasonable efforts to prevent the filing of the petition and assumption of custody of the juvenile due to the minor child's age, vulnerability, and lack of an appropriate caregiver.

Respondent mother contends that the evidence established that her father was an appropriate caregiver. Respondent mother points to the fact that she was returned to the custody of her father and argues that this development necessarily means that her father was an appropriate caregiver. Although this fact does not address the inadequate living arrangements, we also note that this restoration of custody did not occur until after the petition was filed and, therefore, is not pertinent to the question whether Aaron was a dependent juvenile as of the date of the filing of the petition. We hold that this finding of fact is supported by the testimony presented at the hearing.

Finally, respondent mother challenges finding of fact 13, which states:

According to the testimony of the Social Worker, it is possible for the Department of Social Services to provide the services to the family without the necessity of Court supervision, the Court's concern is that the parents of the minor child are minors themselves and have significant distractions

occurring in their lives which would appear to make the significant medical conditions of the minor child a burden.

Respondent mother's argument regarding this finding of fact is based on a mistaken interpretation of this finding. It appears that respondent mother has construed the trial court's finding as asserting that the minor parents have engaged in misconduct that prevents them from adequately parenting Aaron. We, however, read that finding as acknowledging that the minor parents have many other important issues in their own lives to address that would make it difficult for them to also fully participate in Aaron's care and medical treatment. The record supports this Court's construction of that finding of fact. Both parents have significant delinquency issues, problems with school, and no source of income. In addition, respondent mother's own mother recently died after being shot in the head outside respondent mother's home, and respondent mother had not received grief counseling to help deal with that incident. Given the evidence of Aaron's significant medical conditions, the trial court could reasonably find that Aaron's needs would be a burden on teenage parents already confronted with substantial personal issues unrelated to their role as parents.

We, therefore, hold, except as indicated above, that the trial court's adjudication findings of fact are supported by clear, cogent, and convincing evidence. Those limited portions of the findings of fact that are not supported by evidence admitted in the adjudication phase of the hearing were not material to the trial

court's adjudication of dependency and, therefore, do not warrant reversal of the order. We urge trial courts and counsel, however, to take steps to ensure that information presented in the dispositional phase of a hearing is not mistakenly incorporated in the adjudicatory findings of fact.

II

Respondent mother next contends that the trial court's conclusion of law that Aaron is a dependent juvenile was error.⁵

A dependent child is defined as

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

N.C. Gen. Stat. § 7B-101(9) (2007). "Under this definition, 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 P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406.

The trial court made findings, supported by the evidence, that at the time of the filing of the petition, (1) respondent mother was a minor with a juvenile delinquency history; (2) respondent mother was in DSS custody herself; (3) Aaron's father, also a

⁵Respondent mother also assigns error to the trial court's finding of fact 12 that Aaron is a dependent juvenile under N.C. Gen. Stat. § 7B-101(9), but as that finding is more accurately characterized as a conclusion of law, we address that argument here.

minor, was on probation for assault with a deadly weapon inflicting serious injury; (4) Aaron is a special needs child with severe medical problems; and (5) the minor parents have significant distractions in their lives apart from Aaron's serious medical condition. With respect to any alternative child care arrangement available at the time of the petition, the trial court found that respondent mother was in the legal and physical custody of DSS rather than her father; that her father in any event had only a one-bedroom apartment; and Aaron's paternal grandmother was not an appropriate placement option because she had a prior DSS history of substantiated neglect.

These findings of fact are sufficient to support the trial court's determination that Aaron is a dependent juvenile. See *In re J.J., J.J., J.J.*, 180 N.C. App. 344, 347, 637 S.E.2d 258, 261 (2006) (holding that trial court's findings that parent could not care for her child "without constant assistance, and that such assistance [was] not available to her" supported the conclusion that the child was a dependent juvenile), *aff'd in part and cert. improvidently allowed in part*, 362 N.C. 172, 655 S.E.2d 712 (2008); *In re D.J.D., D.M.D., S.J.D., J.M.D.*, 171 N.C. App. 230, 615 S.E.2d 26 (2005) (upholding trial court's determination that children were dependent when neither parent was able to care for them, and there was no evidence that their father's aunt, suggested by father as an alternate placement, was willing or able to care for them). As discussed in connection with the findings of fact, respondent mother's arguments regarding the appropriateness of her father as

an alternative placement focus on the wrong time frame and go to the weight and credibility of the evidence – questions within the sole province of the trial court.

III

Respondent mother challenges three findings of fact made by the trial court in the dispositional portion of the order as unsupported by clear, cogent, and convincing evidence. First, respondent mother points to finding of fact 16, in which the court found that "the mother was discharged from Florence Crittenton due to behavior issues, which frustrated the plan for the minor child to remain in placement with the mother and for the minor child to receive medical care through the facility closely located to the mother's then placement at Florence Crittenton." This finding is supported by Ms. Fuller's testimony and the DSS case summary. See *In re J.J.*, 180 N.C. App. at 347-48, 637 S.E.2d at 261 (explaining that "the formal rules of evidence do not apply to [dispositional] hearings" and thus the court can consider any evidence, including hearsay evidence). Although respondent mother contends that her own testimony is contrary to this finding of fact, the trial court was not required to credit that testimony. In any event, respondent mother agreed that Florence Crittenton had "kicked [her] out."

Next, respondent mother challenges finding of fact 17, in which the court stated that it was "concerned with whether or not the mother is willing to cooperate with the medical service providers." This "concern" was amply supported by evidence of

respondent mother's disruptive behavior while Aaron was in the hospital, her failure to attend critical prenatal appointments, her adjudication of delinquency for assault on a government official, and her poor school attendance. While respondent mother disputes this evidence, it was for the trial court to decide whether to credit respondent mother's testimony rather than the evidence submitted by DSS.

Additionally, respondent mother argues that it was error for the trial court "to project future behavior onto Respondent, and then to rule based on that projected behavior." Respondent mother cites no authority for this novel argument that a trial court is prohibited from looking at past actions to anticipate what may likely occur in the future when determining the best interests of the child.

In deciding on the proper disposition, a trial court must necessarily determine how the child's interests will best be served in the future and, in doing so, the behavior of the parties in the past is a relevant consideration. Predictions of future behavior, grounded in evidence, are regularly required with respect to questions of abuse, neglect, and dependency. *See, e.g., In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (holding that "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect"); *In re A.H.*, 183 N.C. App. 609, 616, 644 S.E.2d 635, 639 (2007) (holding that trial court did not err in making findings as to respondent mother's previous

alcohol relapses and probability that she might relapse again in the future in terminating her parental rights); *Smith v. Alleghany County Dep't of Soc. Servs.*, 114 N.C. App. 727, 732, 443 S.E.2d 101, 104 (holding that trial court properly considered both evidence of mother's improved living conditions at the time of hearing and evidence of her past history in finding a probability of repetition of neglect in the future), *disc. review denied*, 337 N.C. 696, 448 S.E.2d 533 (1994). Here, for example, the trial court could properly consider evidence of respondent mother's failure to attend scheduled prenatal appointments as evidence that she might miss some of Aaron's medical appointments in the future.

Finally, respondent mother challenges finding of fact 19, in which the trial court found that since the filing of the petition, DSS provided numerous services and referrals to respondent mother, such as foster care at Florence Crittenton, Medicaid, visitation, foster home placement through Lifegains, Children's Developmental Services Agency, parenting assessments, in-home services, and Behavioral Links for Community Support Services for the mother. The DSS case summary showed that these services and referrals were in fact provided and, therefore, this finding of fact is supported by the evidence.

IV

Respondent mother's last contention on appeal is that the trial court erred in ordering that Aaron remain in the custody of DSS. "[I]n placing a juvenile outside of the home, 'the court shall first consider whether a relative of the juvenile is willing

and able to provide proper care and supervision of the juvenile in a safe home.'" *In re D.S.A.*, 181 N.C. App. 715, 719-20, 641 S.E.2d 18, 22 (2007) (quoting N.C. Gen. Stat. § 7B-903(a)(2)(c) (2005)). The trial court is not, however, required to place the juvenile with that relative if "the court finds that the placement is contrary to the best interests of the juvenile." N.C. Gen. Stat. § 7B-903(a)(2)(c) (2007).

A trial court's conclusion of law in its dispositional order as to what placement serves the best interests of a neglected, abused, or dependent juvenile will be upheld by this Court absent an abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *appeal dismissed and disc. review denied*, 356 N.C. 163, 568 S.E.2d 608-09 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673, 123 S. Ct. 1799 (2003). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Here, the trial court made extensive findings of fact regarding Aaron's medical conditions, his medical care by numerous specialists, his experience with the foster mother, visitation with the parents, Aaron's father's current incarceration, the lack of grief counseling for respondent mother, respondent mother's behavioral issues, the court's concern about respondent mother's willingness to cooperate with medical service providers, the inappropriate alternative family caregivers, and the services already offered by DSS. In light of those findings regarding a

truly special needs child born to teenage parents with substantial personal issues and grandparents who presently cannot provide an appropriate living arrangement, we cannot conclude that the trial court's decision regarding Aaron's best interests was manifestly unsupported by reason. Therefore, we affirm.

Affirmed.

Judges HUNTER and ARROWOOD concur.

Report per Rule 30(e).