IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-889

Filed: 6 March 2018

Haywood County, Nos. 06 JA 63-64, 14 JA 79

IN THE MATTER OF: D.A.C., O.I.C., S.T.A.

Appeal by respondent from orders entered 7 June 2017 by Judge Kristina L. Earwood in Haywood County District Court. Heard in the Court of Appeals 15 February 2018.

Rachael J. Hawes, for Haywood County Department of Social Services, petitioner-appellee.

Alston & Bird LLP, by Caitlin A. Counts, for guardian ad litem.

Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant.

CALABRIA, Judge.

Respondent is the mother of D.A.C. ("Danny") born in 2003, O.I.C. ("Oliver") born in 2005, and S.T.A. ("Sam") born in 2014.[1] She appeals from an adjudication order that declared all three boys to be abused, neglected and dependent juveniles, and an order on disposition and permanency planning that placed the children in the

[1] In accordance with N.C.R. App. P. 3.1(b), the parties stipulated to the use of these pseudonyms for the three juveniles.

custody of Haywood County Department of Social Services ("DSS") under a permanent plan of guardianship with a relative or court-approved caretaker and a concurrent plan of adoption.

I. Factual and Procedural Background

On 6 March 2017, DSS filed juvenile petitions seeking adjudications that all three boys were abused, neglected and dependent. The petitions, as subsequently amended on 18 April 2017, alleged that on 3 March 2017, a law enforcement officer found respondent in an unconscious and unresponsive state on the front seat of a vehicle parked outside the residence of respondent's sister. The officer discovered Sam in the back seat, naked with a sweatshirt covering him. The temperature outside was 42 degrees and the back window of the vehicle was down. The officer searched the residence of respondent's sister and found Sam's father hiding in a back bedroom. The officer observed a strong odor of marijuana in the residence. The officer arrested respondent and Sam's father on charges of misdemeanor child abuse.

The petitions alleged that removal of the children from the home was necessary due to: the incarceration of the parents; the parents' substance abuse; the homelessness and instability of the family; the lack of medical and educational consents for the children to receive care; and educational, medical and remedial neglect of the children. The petitions also alleged that the parents lacked an appropriate alternative childcare arrangement.

The trial court conducted an adjudication hearing on 22 May 2017. Respondent attended the hearing but did not present any evidence or testify. The putative fathers of Danny and Oliver did not appear. Sam's father also did not appear for the hearing but advised, through counsel, that he consented to placement of Sam with Sam's paternal grandmother. The trial court heard testimony from an investigative social worker and admitted the report prepared by DSS and the children's medical and school records into evidence without objection. The trial court entered a finding in open court that the children are abused, neglected and dependent juveniles.

The trial court then proceeded to the disposition phase. Over the objection of respondent's attorney, the trial court combined the disposition hearing with a permanency planning review hearing. The trial court heard testimony of the foster care social worker with DSS, and admitted into evidence without objection the trial court report prepared by this witness. At the conclusion of the hearing, the trial court adopted the recommendations of DSS, which included changing the permanent plan to guardianship for all three children.

The trial court filed separate adjudication and disposition orders on 7 June 2017. The trial court found in the adjudication order that removal of the children from the home was necessary due to the incarceration of the parents, the parents' untreated substance abuse, the homelessness of the family and lack of a plan for

housing for the children, the lack of stability for the children, the lack of medical and educational consents for the children to receive care, and the educational, medical and remedial neglect of the children. It concluded that the three boys were abused, neglected and dependent juveniles.

In the disposition order, the trial court found that it was not possible to return the children to respondent's home within the next six months or at any point because of her untreated substance abuse issues and unaddressed mental health needs, lack of a home and employment, inability to get the children to school or meet their medical and dental needs, and inability to appropriately care for them. It further found that DSS should no longer be required to make reasonable efforts to reunify the children with the parents as those efforts would "clearly be futile or would be inconsistent with the juveniles' health and safety, and need for a safe, permanent home within a reasonable period of time." The trial court approved a permanent plan of guardianship with a concurrent plan of adoption, and relieved DSS of further reunification efforts.

Respondent appealed from both orders. Although her notice of appeal references all three children, respondent has abandoned her appeal of the adjudication of Sam as abused, neglected and dependent. She challenges only the adjudications of Danny and Oliver and the trial court's elimination of reunification efforts at the initial disposition hearing.

II. Standard of Review

"The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2015). We review the lower court's adjudication to determine whether the (1) findings of fact are supported by clear and convincing evidence, and (2) legal conclusions are supported by the findings of fact. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566, *appeal dismissed and disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied, Harris-Pittman v. Nash Cty. Dep't of Soc. Servs.*, 538 U.S. 982, 155 L.E. 2d 673 (2003). "The conclusion that a juvenile is abused, neglected, or dependent is reviewed *de novo*." *In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015). We review the disposition to determine whether the trial court abused its discretion in making its determination of the child's best interests. *In re C.W.*, 182 N.C. App. 214, 219, 641 S.E.2d 725, 729 (2007).

III. Dependent Juveniles

Respondent first contends that the trial court erred in adjudicating Danny and Oliver as dependent juveniles. We agree.

A juvenile is dependent if his "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) (2015). "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. 423, 427, 610 S.E.2d 403, 406 (2005). Respondent argues that Danny and Oliver were not dependent because they were in the care of suitable adult caregivers at the time of the filing of the petitions.

"Our courts have . . . consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives." *In re L.H.,* 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011). "Having an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement – it is not enough that the parent merely goes along with a plan created by DSS. " *Id.* at 366, 708 S.E.2d at 198. In addition, it must be shown that the alternative arrangement is appropriate, and that the caregiver is ready, willing and able to accept responsibility for the minor children. *In re D.J.D.*, 171 N.C. App. 230, 239, 615 S.E.2d 26, 32 (2005).

The trial court's findings of fact show that respondent brought Oliver and Danny to the home of Jordan Johnson and George Hunsucker on 19 February 2017, and asked them to care for the juveniles because she did not have transportation to take the children to school. Respondent did not leave any clothing or toothbrushes for the two boys, leaving them for the schools and Ms. Johnson and Mr. Hunsucker to provide. On 22 February 2017, respondent came to the Johnson/Hunsucker home

with Sam and asked them to keep Sam indefinitely. Sam had no clothes, shoes or diapers. Sam was dirty with matted hair and a sore on his ear, and his toenails were growing over his toes. Ms. Johnson told a social worker that she barely knew respondent's family other than that her sons played football with Danny and Danny occasionally spent the night at her house. Ms. Johnson also told the social worker that respondent had not called to check on the boys and that she had to initiate any contact with respondent. DSS agreed to allow the boys to stay with Ms. Johnson and Mr. Hunsucker under the terms of a temporary safety agreement to which respondent verbally assented. Ms. Johnson and Mr. Hunsucker have six children of their own, and Danny and Oliver slept on couches in their home.

We conclude these findings do not support a conclusion that respondent lacked an appropriate alternative child care arrangement. Respondent on her own initiative left the children with Ms. Johnson and Mr. Hunsucker, who had children of the same age, and with whom Danny had previously stayed overnight. Ms. Johnson and Mr. Hunsucker provided clothing and other needs for the boys. Although the findings reflect that Ms. Johnson did not have a close relationship with respondent, nothing in the findings indicates that the home was inappropriate or unsafe, or that Ms. Johnson and Mr. Hunsucker were unwilling or unable to care for the children. In fact, DSS allowed the children to stay with Ms. Johnson and Mr. Hunsucker. We accordingly reverse the adjudication that the boys were dependent juveniles.

IV. Abused Juveniles

Respondent next contends that the trial court erred in adjudicating Danny and Oliver as abused juveniles. We agree.

An abused juvenile is defined by N.C. Gen. Stat. § 7B-101(1) in part as one whose parent inflicts or allows to be inflicted or creates or allows to be created a substantial risk of serious physical injury or emotional damage. N.C. Gen. Stat. § 7B-101(1) (2015). "Each definition [in N.C. Gen. Stat. § 7B-101(1)] states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm. The harm may be physical, . . . emotional, . . . or some combination thereof [.] " *In re M.G.*, 363 N.C. 570, 573, 681 S.E.2d 290, 292 (2009) (citations omitted). Whether an injury is serious is to be determined by the fact finder based on the evidence in each case. *In re L.T.R.*, 181 N.C. App. 376, 383, 639 S.E.2d 122, 126 (2007). Respondent argues that the trial court's conclusion that Danny and Oliver were abused juveniles is not supported by the findings of fact, as the findings failed to show that either boy was seriously injured or harmed, or subjected to the risk of serious physical injury or emotional harm.

We agree with respondent that the findings of fact fail to show that Danny and Oliver have actually been seriously injured or physically harmed or that they have been subjected to the risk of serious physical injury or emotional harm. The findings,

at best, show that other children of respondent may have been abused in infancy. We therefore reverse this adjudication.

V. Neglected Juveniles

Respondent next contends that the findings of fact do not support an adjudication of Danny and Oliver as neglected juveniles. We disagree.

A juvenile is neglected if he "does not receive proper care, supervision or discipline from [his] parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; . . . or who lives in an environment injurious to [his] welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2015). "In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* The purpose of the latter provision "is self-evident: it allows the trial court to consider the substantial risk of impairment to the remaining children when one child in a home has been subjected to abuse or neglect." *In re McLean,* 135 N.C. App. 387, 394, 521 S.E.2d 121, 126 (1999).

Respondent argues the adjudication is inappropriate because she had addressed the school truancy issues at the time the petitions were filed. The trial court's findings of fact, however, show that school truancy, if in fact remedied, was only one of several factors the trial court considered in determining that Danny and

Oliver were neglected juveniles. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (erroneous finding is harmless error if ample other findings of fact support the adjudication of neglect).

The trial court's findings show that respondent has had an "extensive" history with DSS dating back to 2003, when she gave birth at the age of fifteen to Danny. At that time, Danny had special medical needs that respondent failed to address. Respondent has a long history of prior substance abuse. Respondent tested positive for THC and opiates when she gave birth in 2006 to another child, J.M.G., who is not a subject of these petitions. In 2010, DSS provided services to the family after receiving a report that Danny was coming to school dirty and was missing a lot of days at school. At that time, respondent was living with a drug dealer and she was "always impaired." Respondent tested positive for opiates, oxycodone, hydrocodone, and THC.

The findings of fact further show that Danny, Oliver, Sam, and J.M.G. were adjudicated as neglected juveniles on 26 November 2014 based upon findings of fact showing, *inter alia,* that J.M.G. came to school on 10 September 2014 with an injured hand; that Sam had unexplained scratches and bruises and an abscess on his anus; that respondent tested positive for THC; that the children had multiple medical appointments which were not kept, including an appointment with a cardiologist for further evaluation and testing of Sam for a heart murmur; that Oliver was

recommended to have a root canal due to excessive tooth decay and infection but respondent never took the child to a dental specialist for this treatment; and that Oliver was diagnosed with several eye conditions in January 2013 and was prescribed corrective lenses with follow-up in one year, but respondent failed to follow up.

After the children were returned to the parents' care on 16 February 2016, DSS received a report that Sam came to his daycare on 2 June 2016 with visible marks on his head, the right side of his face, and down his back; that Sam was not being taken to daycare on a consistent basis, and as a result, he was not receiving his speech therapy services consistently; and that respondent was not picking up Sam from daycare. In addition, respondent was using methamphetamines and lying around all day, and Oliver and Danny were missing school constantly because respondent was not taking them to the bus stop on time. Danny's school filed for truancy because of Danny's excessive absences. The school sent respondent notices to come and intervene on Danny's behalf but respondent never made contact to prevent court action. Danny was very anxious about not passing his grade because of his poor attendance. He was given the opportunity to make up classes on Saturdays, but respondent never brought him and Danny was having to find rides to school on his own. Respondent and Sam's father showed up at the Hunsucker household on 22 February 2017 with Sam, who had no clothes, shoes or diapers and had soiled hands and feet, matted hair, toenails growing over his toes, and a sore on

his ear. Five days later, Sam's father came and removed Sam from the home without warning.

Finally, on 3 March 2017, Sam was found naked underneath a sweatshirt in the back seat of a vehicle in which respondent was sitting, unconscious, in the front seat in cold weather with the window down. As a result, respondent and Sam's father were charged with misdemeanor child abuse and were incarcerated. Respondent and Sam's father did not have stable or permanent housing, as they stayed in hotels or with friends and relatives. Respondent and Sam's father could not tell DSS when they would obtain housing or what their plan for housing was.

These findings demonstrate a long history and repetitious pattern of respondent's failure to provide proper care, supervision, and remedial care of her children up to the filing of the present petitions. The youngest child, Sam, was subjected to abuse by an adult who regularly resided in the same household with Danny and Oliver. We hold the findings support the trial court's conclusion that Danny and Oliver were neglected juveniles.

VI. Cessation of Reunification

Respondent lastly contends that the trial court erred, and improperly circumvented the requirements of N.C. Gen. Stat. § 7B-901(c), by ceasing reunification efforts and not entering a concurrent plan of reunification at the initial disposition hearing. We agree.

Upon adjudicating a juvenile as abused, neglected or dependent, the trial court must conduct a dispositional hearing "immediately following the adjudicatory hearing" and the hearing must be concluded within 30 days thereafter. N.C. Gen. Stat. § 7B-901(a) (2015). If custody of the juvenile is placed with a county department of social services, "the court shall direct that reasonable efforts for reunification . . . shall not be required if the court makes written findings of fact pertaining to any of the following[:]

> (1) A court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
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> a. Sexual abuse.
> b. Chronic physical or emotional abuse.
> c. Torture.
> d. Abandonment.
> e. Chronic or toxic exposure to alcohol or controlled substances that cause impairment of or addiction in the juvenile.
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent, (iii) has committed a felony assault

> resulting in serious bodily injury to the child or another child of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c) (2015). "When the court determines that reunification efforts are not required," it must then order "a permanent plan as soon as possible [and] . . . schedule a subsequent hearing within 30 days to address the permanent plans in accordance with G.S. 7B-906.1 and G.S. 7B-906.2." N.C. Gen. Stat. § 7B-901(d) (2015).

In the first published decision construing the 2015 amendment to N.C. Gen. Stat. § 7B-901 that added subsection (c), this Court reversed an order ceasing reunification efforts at the initial disposition because the trial court failed to make a finding that a court of competent jurisdiction had made one or more of the determinations listed in N.C. Gen. Stat. § 7B-901(c). *In re G.T.*, ___ N.C. App. ___, ___, 791 S.E.2d 274, 279 (2016), *aff'd per curiam,* ___ N.C. ___, 808 S.E.2d 142 (2017). More recently, in *In re J.M.*, ___ N.C. App. ___, ___, 804 S.E.2d 830, 841, *disc. review allowed,* ___ N.C. ___, 807 S.E.2d 146, *and* ___ N.C. ___, 807 S.E.2d 564 (2017), we reversed the trial court's cessation of reunification efforts in a combined dispositional and permanency planning order entered at initial disposition. We observed that because the trial court ceased reunification efforts following an initial disposition hearing, N.C. Gen. Stat. § 7B-901(c) "was necessarily implicated" and consequently

the trial court was required to make the finding mandated by the statute in order to cease reunification efforts at the initial disposition. *Id.* at ___, 804 S.E.2d at 840-41. We stated that the "clear command" of N.C. Gen. Stat. § 7B-901(c) "may [not] be eluded in favor of the more lenient requirements of N.C.G.S. § 7B-906.2(b) simply by combining dispositional and permanency planning matters in a single order." *Id.* at ____, 804 S.E.2d at 841.

In the case at bar, the trial court did not make the findings required by N.C. Gen. Stat. § 7B-901(c) to allow ceasing reunification efforts at the initial disposition. We thus vacate the portion of the order that released DSS from further reunification efforts.

In summary, we reverse the adjudications that Danny and Oliver are dependent and abused juveniles. We affirm the adjudication that they are neglected juveniles. We vacate the portion of the disposition order directing DSS to cease reunification efforts.

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).