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NO. COA11-603
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

IN THE MATTER OF:

J.L., S.L.
Juveniles.

Haywood County
Nos. 01 JA 20-21

Appeal by respondents from orders entered 15 March 2011 by Judge Richlyn D. Holt in Haywood County District Court. Heard in the Court of Appeals 5 September 2011.

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

Robert W. Ewing for respondent-mother appellant.

Richard Croutharmel for respondent-father appellant.

Pamela Newell for guardian ad litem.

McCULLOUGH, Judge.

Respondents are the mother and father of J.L., a male child born on 12 June 1993, and of S.L., a female child born on 1 March 1996. They appeal from an adjudication order entered on 15 March 2011, which adjudicated both children as neglected and dependent, and a disposition order entered on the same date which adopted a permanent plan of legal guardianship with a

relative or a court-approved caretaker for S.L. and a plan of adult guardianship for J.L.

We note at the outset that J.L. became eighteen years old on 12 June 2011, and therefore, he is no longer subject to the jurisdiction of the trial court in the present juvenile case. See *In re B.G.*, ___ N.C. App. ___, ___, 701 S.E.2d 324, 325 (2010), *dismissed as moot*, ___ N.C. ___, 709 S.E.2d 918, *appeal dismissed, disc. review denied*, ___ N.C. ___, 709 S.E.2d 919 (2011). Thus, respondents' appeal as to J.L. is now moot. *In re Beck*, 109 N.C. App. 539, 542, 428 S.E.2d 232, 234 (1993). Accordingly, we consider the issues raised by respondents only as they relate to S.L.

I. Background

S.L. has had an extended history in the juvenile court system. By an order filed 19 January 2001, S.L. was adjudicated a neglected juvenile in Jackson County, North Carolina. On 25 January 2001, the case was transferred to Haywood County, North Carolina, and by an order filed 19 November 2001, the Haywood County District Court adjudicated S.L. an abused juvenile. In March 2004, the Haywood County District Court awarded legal custody of S.L. to her paternal grandmother, with whom S.L. had been residing in Ohio since September 2003. S.L. remained with

her paternal grandmother in Ohio until the paternal grandmother died in 2009. S.L. thereafter returned to North Carolina to reside with respondent-mother on or about 31 October 2009.

On 2 August 2010, the Haywood County Department of Social Services ("DSS") received a report indicating that S.L., then 14 years old, was approximately ten weeks pregnant. DSS investigated the report, and on 16 September 2010, DSS filed a petition in Haywood County District Court alleging that S.L. was a neglected and dependent juvenile. On that same date, the trial court placed S.L. in the nonsecure custody of DSS.

The trial court conducted adjudication and disposition hearings over the course of three days in late February 2011. The trial court filed the subject orders on 15 March 2011. In its adjudication order, the trial court found as fact, *inter alia*, that respondent-mother allowed a male, age 18, to spend the night with S.L. in S.L.'s bedroom on at least three or four occasions. Respondent-mother failed to cooperate with law enforcement officers when they sought to investigate the sexual activity of S.L. with the eighteen-year-old male. Respondent-mother also failed to force S.L. to cooperate in the investigation. When a DSS social worker arrived at the residence of respondent-mother on 2 August 2010 to investigate, a man with

a history as a sex offender was there. The same man was at the home with respondent-mother and the two juveniles when a DSS social worker made a home visit on 26 August 2010. The social worker observed a strong odor of alcohol on the man.

The trial court's findings of fact further indicate that on 5 September 2010, respondent-mother failed to take the juveniles to an eye appointment. Around the same time, the estranged husband of respondent-mother, a man who had sexually abused the juveniles on a prior occasion, began to visit with respondent-mother. When a DSS social worker arrived at the residence of respondent-mother on 16 September 2010, the estranged husband was at the residence. He was belligerent and had the odor of alcohol on his breath.

The trial court also found that S.L. has had at least one other sexual partner besides the eighteen-year-old who impregnated her. While living with respondent-mother, S.L. entered inappropriate sexual content on her Facebook and MySpace internet pages. Respondent-mother never provided or sought any mental health care for S.L. related to S.L.'s pregnancy and subsequent miscarriage. Respondent-mother supplied S.L. with condoms because she did not believe she could stop S.L. from engaging in sexual intercourse.

The trial court also found that respondent-mother admitted that she had smoked marijuana with J.L. While the juveniles were living in Ohio with their paternal grandmother, respondent-father, who also resided in Ohio, would go for periods without visiting the juveniles and would average approximately one visit per month.

Based upon these findings, the trial court concluded that S.L. was a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15) (2009), and a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9). In its disposition order, the trial court ceased reunification efforts with respondents and adopted a permanent plan for S.L. of legal guardianship with a relative or court-approved caretaker. The trial court ordered no visitation between respondents and S.L. unless initiated by her therapist. From these orders, respondents appeal.

II. Discussion

As to S.L., respondents argue the trial court erred: (1) by failing to make sufficient findings of fact to support a conclusion of law that S.L. is a dependent juvenile; (2) by prohibiting visitation with S.L. by respondents; and (3) by conducting a permanency planning review hearing at disposition

without providing notice of a permanency planning review hearing to the parents.

"The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). "The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile." *Id.* Accordingly, "[a] proper review of a trial court's finding of [dependency and] neglect entails a determination of (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 Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)).

Respondents first contend that the trial court's findings of fact do not support its conclusion of law that S.L. is a dependent juvenile as defined by N.C. Gen. Stat. § 7B-101(9). A dependent juvenile is defined by this statute as one "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). Thus, to support the conclusion of dependency, the trial court's findings of fact must show by clear, cogent and convincing evidence that either: (1) there is no parent, guardian, or custodian responsible for the juvenile's care; or (2) the parent, guardian, or custodian is unable to provide for the proper care and supervision of the juvenile. *Id.*

Respondents maintain that the first portion of this statutory definition does not apply in the present case because both respondents were present, and therefore S.L. had a parent responsible for her care.

In its adjudication order, the trial court made the following pertinent findings of fact:

11. The Court took Judicial Notice of the Court files and the prior Orders contained therein, and conducted the independent determination required when taking Judicial Notice of the prior Orders. . . .
12. The juveniles were adjudicated Neglected on December 1, 2000 in Jackson County, North Carolina and the Order was signed on January 16, 2001.
13. The juveniles were again adjudicated, this time Abused in Haywood County, North Carolina on November 2, 2001, pursuant to

an Order signed November 19, 2001. . . .

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15. Ultimately, custody of [S.L.] . . . was placed with Paternal Grandmother . . . who lived around Cleveland, Ohio. The Custody was in early 2004 The Paternal Grandmother died in 2009.
 16. The Department of Social Services was relieved of making reasonable efforts with respect to the Respondent Mother at Disposition in 2001 and relieved of making reasonable efforts with respect to the Respondent Father in 2005.
 17. . . . [S.L.] came to North Carolina on or about October 31, 2009 to her Mother.
 18. No formal custody was obtained and no official documents from the Court in Ohio or the Court in North Carolina were obtained.

Neither respondent contests the sufficiency of the evidence to support these findings on appeal. "Given the absence of any such challenge, these findings of fact are deemed to be supported by sufficient evidence and are binding on us for purposes of appellate review." *In re T.B.*, ___ N.C. App. ___, ___, 692 S.E.2d 182, 186 (2010). The trial court's findings of fact quoted above show that at the time of the paternal grandmother's death in 2009, S.L. had no parent, guardian, or custodian responsible for her care or supervision. Neither respondent had legal custody of S.L., and upon her legal

guardian's death, S.L. no longer had a guardian responsible for her care. Despite the fact that neither respondent had legal custody of S.L., S.L. returned to respondent-mother's care in October 2009 where she remained until removed by DSS on 16 September 2010. Given these circumstances, we are unable to conclude that the juvenile had no parent responsible for her care or supervision.

Regarding the second portion of the statutory definition of a dependent juvenile, respondent-father argues the evidence and findings of fact do not support the trial court's conclusion of law because the trial court failed to find that he is unable to provide care or supervision for the child. In addition, both respondents argue the trial court erred by failing to consider the availability of alternative child care arrangements.

Respondents are correct in that, "[u]nder 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). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make

these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

We first address respondent-father's contention that the trial court failed to find that he is unable to provide care or supervision for S.L. The trial court's adjudication order contained the following findings of fact:

67. [S.L.] does not like to talk about her Father. She makes negative comments about him; she does not want any contact with him; she does not want to see him, and she does not want to talk to him. She indicates that she hates him.

. . . .

82. . . . [Respondent-father] now lives with [a female] who is a friend of his. He does seasonal work. Today he is not earning income, but he has plans to earn income in the immediate future.

83. . . . [Respondent] Father has called [S.L.] a b__h and he has told her that she is not his daughter.

84. While the juveniles were in Ohio living with their Paternal Grandmother, the Respondent Father would go for periods and not see them. He averaged seeing them approximately once per month.

Respondent-father has not challenged these findings of fact on appeal, and therefore they are binding on this Court. *In re T.B.*, ___ N.C. App. at ___, 692 S.E.2d at 186.

In addition, there is evidence in the record that respondent-father failed to comply with previous orders of the trial court, including failing to provide reports to DSS on his compliance with attendance at Narcotics Anonymous/Alcoholics Anonymous meetings and failing to complete a home study. "[F]ailure to comply with court-ordered protection plans may establish an inability to care for or supervise a child if the plans were adopted to ensure proper care and supervision of the child[.]" *In re P.M.*, 169 N.C. App. at 428, 610 S.E.2d at 406-07. Taken in their entirety, we believe the trial court's findings of fact and the competent evidence in the record demonstrate that respondent-father lacked the ability to care for or supervise S.L.

However, we have carefully searched through the court's order and we fail to locate any findings of fact which indicate that the parents lack alternative child care arrangements. Although the trial court found that "[n]either Parent has an appropriate plan of care for either juvenile or the ability to effectuate any such plan" in its dispositional order, such findings must be addressed before the juvenile may be adjudicated dependent. "Where previous case law makes clear that such a finding is required, we must reverse the lower court

as to the finding and conclusion that [S.L.] is a dependent juvenile and remand for entry of findings as to the ability of the parent to provide care or supervision and the availability of alternative child care arrangements." *In re B.M.*, 183 N.C. App. at 90, 643 S.E.2d at 648.

Respondents also contend that the trial court erred by denying respondents visitation with S.L. Respondents argue that the trial court made no findings that visitation is not in the child's best interests and that the trial court improperly delegated the decision of whether or not to allow visitation to the discretion of the child's therapist.

"Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c) (2009). "The trial court maintains the responsibility to ensure that an appropriate visitation plan is established within the dispositional order." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 651 (2005). The trial court must "either adopt a visitation plan or specifically determine that such a plan would

be inappropriate in light of the specific facts under consideration." *In re K.C.*, 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009). The decision whether or not to permit visitation is a judicial one which may not be delegated by the trial court. *In re E.C.*, 174 N.C. App. at 522, 621 S.E.2d at 652.

In the present case, the trial court made the following findings of fact in its dispositional order:

85. . . . [Respondent-father] has called [S.L.] a b__h and he has told her that she is not his daughter. . . .

86. While the juveniles were in Ohio living with their Paternal Grandmother, the Respondent Father would go for periods and not see them. He averaged seeing them approximately once per month.

. . . .

98. [S.L.] recalls vividly that her Father has called her a b__h. He has told her that she is not going to be his child or have any contact with her. [S.L.] does not want contact with the Respondent Father.

. . . .

101. . . . [J.L.] struggled with Respondent Father to get back into the car and the Father struggled with him. This event was a traumatic event for [S.L.] and for [J.L.].

In addition, the trial court specifically "took Judicial Notice of the prior adjudications and dispositions in this case." The trial court found as fact that "[b]ecause of those adjudications and dispositions, the Respondent Mother was to have almost no contact with the juveniles." In fact, the record shows that the trial court's order on nonsecure custody filed 19 October 2010 found as fact that "[o]n December 6, 2001, the Department of Social Services was relieved of making reasonable efforts to reunify with the Respondent Mother. She was allowed no visitation with the juveniles."

While these findings support the conclusion that visitation with respondents is contrary to both S.L.'s best interests and her health and safety, the trial court failed to make any specific findings of fact directly stating such. Rather, the trial court simply ordered there be no visitation by respondents with S.L., "unless initiated by [S.L.'s] Therapist[]." Thus, the trial court also impermissibly delegated the decision to permit any visitation to the child's therapist. Accordingly, we must vacate the trial court's decision to deny visitation and remand the matter for additional findings of fact concerning whether visitation with either parent is in S.L.'s best interests; if so, the trial court must allot an appropriate

visitation schedule, without delegating such authority to S.L.'s therapist. *In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652.

Respondent-mother additionally contends that the trial court erred by conducting a permanency planning review hearing at disposition without the parties' having advance notice of the court's intention to conduct such a hearing. A dispositional order of the trial court must comply with the requirements of N.C. Gen. Stat. § 7B-507. N.C. Gen. Stat. § 7B-905(c) (2009). N.C. Gen. Stat. § 7B-507(c) provides:

At any hearing at which the court finds that reasonable efforts to eliminate the need for the juvenile's placement are not required or shall cease, the court shall direct that a permanency planning hearing as required by G.S. 7B-907 be held within 30 calendar days after the date of the hearing and, if practicable, shall set the date and time for the permanency planning hearing.

Id. In turn, N.C. Gen. Stat. § 7B-907(a) states:

In any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906.

Id. This section further provides that a parent shall receive "15 days' notice of the hearing and its purpose." *Id.* "The

purpose of the permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." *Id.*

This Court has previously held that "N.C. Gen. Stat. §§ 7B-507 and [-]907 do not permit the trial court to enter a permanent plan for a juvenile during disposition[.]" *In re D.C.*, 183 N.C. App. 344, 356, 644 S.E.2d 640, 646 (2007). In *In re D.C.*, the trial court adjudicated the juvenile neglected, entered a disposition ceasing reunification efforts, and awarded permanent legal guardianship of the juvenile to the juvenile's maternal aunt and her husband in a single order following hearings on adjudication and disposition. *Id.* at 355, 644 S.E.2d at 646. This Court held that the respondent-mother did not have the statutorily required notice that the trial court would consider a permanent plan for the juvenile; therefore, this Court remanded the matter for a permanency planning hearing and entry of a permanency planning order containing findings as required by N.C. Gen. Stat. § 7B-907. *In re D.C.*, 183 N.C. App. at 356, 644 S.E.2d at 646-47.

In the present case, respondent-mother concedes the trial court made the findings required by N.C. Gen. Stat. § 7B-907 in its disposition order before setting the permanent plan for S.L.

In addition, the trial court specifically took judicial notice of the prior orders and adjudications in this case, and the permanent plan for S.L. has been the same throughout this matter since reunification efforts with respondent-mother were ceased in 2001. In the present disposition order, the trial court simply established the same permanent plan that was in place for S.L. prior to her paternal grandmother's death.

Nonetheless, it appears from the record that after S.L. returned to her mother's care in October 2009, DSS noted in its court report that the permanent plan for S.L. at the time of the adjudication and disposition hearing was reunification. That report was admitted into evidence at disposition. The DSS court report further recommended that the trial court relieve DSS of any future reasonable reunification efforts with respondents and that the permanent plan for S.L. be changed to guardianship with a relative or court-approved caretaker. Given the procedural posture of this case at disposition, the trial court was required to provide respondents with the statutorily required notice before holding a permanency planning review hearing establishing a new permanent plan for S.L. pursuant to N.C. Gen. Stat. §§ 7B-507 and -907. Therefore, the permanent plan adopted for S.L. must be vacated and the matter remanded for a proper

permanency planning hearing after having provided respondents with the statutorily mandated notice.

Finally, we note that neither respondent challenges the trial court's adjudication of S.L. as a neglected juvenile. That adjudication thus stands and is affirmed.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).