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NO. COA01-239

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

In the Matter of:
BETHANY ANN FINDLEY and
CALEB JOSHUA FINDLEY

Alexander County
No. 99 J 19
99 J 20

Appeal by respondent-appellant from judgment entered 20 October 2000 by Judge Wayne L. Michael in Alexander County District Court. Heard in the Court of Appeals 5 December 2001.

James F. Mock, and Andrea D. Edwards, for petitioner-appellee Alexander County Department of Social Services.

Edward L. Hedrick, IV, for intervenor-appellees David and Syblena Findley.

Caryn Lee Brzykcy, for respondent-appellant Diana Findley.

HUDSON, Judge.

Respondent-appellant Diana Findley (the "mother") is the mother of two minors, Bethany Ann Findley, born 5 January 1992, and Caleb Joshua Findley, born 2 October 1994 (the "children"). The children's father, Dearel Findley ("the father"), married

defendant-appellee in 1991 and divorced her in 1997; he died in August 1999. David and Syblena Findley ("the Findleys"), Dearel's brother and sister-in-law, have been the caretakers of the children since that time. In June 1999, the District Court of Alexander County entered an Order giving custody of the children to petitioner Alexander County Department of Social Services ("ACDSS"), with placement of the children in its discretion. The mother is appealing those portions of the Order entered 20 October 2000, which ended the mother's regular visitation with the children, except when allowed in the discretion of the Findleys. We reverse.

In April 1993, ACDSS first became involved with this family when it responded to reports of domestic violence in the household. Over the next five years, ACDSS periodically intervened in response to repeated allegations of domestic violence. The mother and father separated in 1995 and, in 1996 the court entered an order giving them joint custody of the children. They divorced in 1997, and in 1998 the court changed the custody arrangement by awarding the father primary legal custody, and giving the mother physical custody three weekends and one weeknight per month. Because he became very ill with pancreatic cancer, Dearel asked the Findleys to help him take care of the children. They agreed and became the primary caretakers of the children at that time.

On 29 April 1999, ACDSS filed two Juvenile Petitions alleging that the children were dependant, and that the mother and father were neglecting them. These petitions were based in part on reports of the mother's conduct during weekend visitation with the children. According to the children, the mother struck Bethany with a wooden paddle, causing bruises. The children told investigators that their mother forced Caleb to hold his sister's legs so she would stay still during the paddling, and that their mother instructed them not to tell the Findleys about the incident. The petition also alleged that the father was unable to care for the children because of his illness.

In response to ACDSS' allegations of neglect and dependency, the mother and father voluntarily signed a Memorandum of Judgment/Order on 23 June 1999 in which they stipulated that the children were dependent. The court then so found, awarded legal and physical custody of the children to ACDSS, and provided that placement of the children was in the discretion of ACDSS. As a result of this Judgment/Order, the children remained in the care of the Findleys.

Thereafter, ACDSS arranged for supervised visitation between the children and their mother, but the attempts at visitation were fraught with problems. Visits often ended early because the children were distraught and their mother could not communicate

with them. In a 7 September 2000 order, the trial court found as fact that, "[m]ost of the visitations have been disruptive to the children. Dianna Findley has argued with the children and had difficult times controlling the behavior of the minor children." On more than one occasion, ACDSS employees observed Caleb vomiting outside of ACDSS before scheduled visits, because he did not want to visit his mother.

In multiple Orders between June 1999 and October 2000, the trial court found as fact numerous other incidents which supported its decisions to limit and ultimately end visitation between the children and their mother. For example, in July 1999, the mother refused to return the children on schedule, and did not relinquish them until a social worker arrived to pick them up late in the evening. A week later, the mother barricaded herself and the children in her home for an extra day and night, remaining there until Sheriff's deputies obtained a court order and broke into the home to retrieve the children. The deputies found both of the children frightened and locked in a back bedroom. On that occasion, Bethany had bruises on her body.

On 8 September 1999, the Findleys filed a Motion to Intervene in the court proceedings, and asked that they be awarded legal custody of the children. In a 24 November 1999 Order, the trial court granted the Findleys' Motion to Intervene.

On 6 January 2000, the trial court also allowed the children's maternal grandmother, Carol Ann Spears ("Ms. Spears"), to intervene in the proceedings.

On 20 April 2000, the trial court continued ACDSS' custody and placement authority, and named the Findleys guardians of the children. In support of its decision, the court made findings based on the testimony of two psychologists, Dr. James A. Powell and Dr. Doris B. Tinker, who both examined the mother. According to Dr. Powell, the mother exhibited signs of "obsessive-compulsive behaviors, a distorted perception of interpersonal relationships, immaturity, and impulsivity, and poor judgment." He also reported that she "could have inadequate control over her responses and might result in behavior which could place the children in danger." Dr. Powell did not believe that the mother "was able to adequately care for her children or be alone with them in an unsupervised environment." He also testified that visitation may benefit the mother, but was not in the best interests of the children. Dr. Tinker made similar recommendations to the court.

In the April 2000 Order, the court required that the children "receive meaningful and appropriate counseling," provided for visitation between the children and the mother, and for separate visitation between the children and Ms. Spears. The

court further provided that it would review the visitation at a later date to determine if it should continue. This Order was not appealed.

On 20 October 2000, the trial court reviewed the visitation between the children and their mother, but made no findings of fact other than incorporating by reference a number of reports and documents. The court then ordered visitation for the mother at the sole discretion of the Findleys. This 20 October 2000 order is the one at issue in this appeal.

On appeal, the mother contends that in the 20 October 2000 Order, the trial court: (1) did not make proper findings, (2) improperly gave the Findleys discretion in allowing visitation between the mother and her children, and (3) improperly ordered a *de facto* termination of her parental rights. The mother seeks to regain regular visitation with her children.

We hold that the trial court erred as a matter of law when it gave the Findleys the sole discretion to determine if and when the mother could visit with her children. The trial court concluded that "[a]ny visitation that occurs will be in the sole discretion of [the Findleys], with the only restriction being that any contact between the children and [the mother] shall be supervised by some adult who is satisfactory to [the Findleys]." This Court has held that the trial court "should not assign the

granting of this privilege of visitation to the discretion of the party awarded custody of the child." *In re Custody of Stancil*, 10 N.C. App. 545, 551-52, 179 S.E.2d 844, 849 (1971). In *Stancil*, we reversed an order which had allowed the children's grandmother to decide if and when the children visited with their natural mother. See *id.* We explained that the awarding of visitation or the custody of a child is an exercise of a judicial function, and that a trial court may not delegate this function to the custodian of a child. See *id.* In addition, this Court held that the trial court, not the guardian or custodial entity, must make findings as to whether the parent has forfeited his/her right to visitation and whether it is in the best interest of the child to deny visitation to the parent. See *id.* In the absence of findings that the parent has forfeited this right, the court, weighing the best interests of the child "should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised." *Id.* at 552, 179 S.E.2d at 849.

Here, the trial court made no findings concerning the mother's fitness or the best interests of the children. The trial court simply concluded as law that there is "no other benefit to these children for continued visits with their mother,

Diana Findley.” When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show what it considered. See *In re Chasse*, 116 N.C. App. 52, 62, 446 S.E.2d 855, 861 (1994); see also *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984). Without such findings, we are unable to review this order or determine if the court applied the law properly, or exercised its discretion soundly. See *Chasse*, 116 N.C. App. at 62, 446 S.E.2d at 861.

Because the trial court improperly gave the Findleys unfettered discretion over visitation instead of addressing the necessary issues itself, we vacate the Order of 20 October 2000. In light of this disposition, we do not reach the mother’s other arguments on appeal. We reverse and remand to the trial court for further proceedings in accordance with this opinion.

ORDER VACATED.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).