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NO. COA06-1050

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

IN THE MATTER OF:
J.D.

Wake County
No. 04 J 233

Appeal by respondent-mother from an order entered 12 May 2006 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 8 January 2007.

Wake County Human Services, by Albert Singer, for petitioner.

Terry F. Rose, for respondent-mother.

Robin Strickland, for respondent-father.

Richard Croutharmel, for Guardian ad Litem.

LEVINSON, Judge.

By order entered 12 May 2006, the trial court ordered that custody of J.D., a minor child, be changed from Wake County Human Services (WCHS) to his father, Randy D. The trial court also ordered that J.D.'s mother, Rachel D. (respondent), have consistent visitation with J.D. Respondent appeals. We affirm.

WCHS filed a juvenile petition on 30 April 2004, alleging neglect because J.D. was living in an injurious environment and did not receive proper care, supervision, or discipline from his parents. J.D.'s home situation leading up to 30 April 2004 was

chaotic and violent. Further, J.D. had trouble in school; was impulsive and physically aggressive with his peers; had difficulty staying "on task"; and had a history of lying and stealing. On 30 April 2004, WCHS removed J.D. from his parents' care, took him into WCHS custody, and placed him in an emergency foster home. After a few days, J.D. was moved to a therapeutic foster home.

J.D. was adjudicated as a neglected juvenile on 4 August 2004, on the grounds that he lived in an environment injurious to his well-being due to domestic violence and concerns about his parents' mental health. A case plan was developed with J.D.'s parents following the adjudication. The record suggests the trial court conducted periodic reviews and permanency planning hearings between August 2004 and May 2006, the details of which are not contained in the record. According to court summaries, J.D.'s parents separated immediately after WCHS removed J.D. from their care, and both parents began working on case plans with WCHS to effect reunification with J.D.

In June 2005, the trial court granted Randy D. unsupervised visits with J.D. and changed respondent's visits from supervised to monitored. About that same time, J.D.'s behavior worsened; he became disrespectful of adults and regularly struck other children, lied, and stole items.

In late October 2005, J.D. was removed from his therapeutic foster home because he became a danger to himself and others. In or around that time, J.D. was evaluated by adolescent psychiatric and psychological specialists. His assessment was completed in

November 2005, at which time he was diagnosed with attention-deficit/hyperactivity disorder (ADHD), oppositional defiant disorder, generalized anxiety disorder with psychotic features, and dysthymic disorder. On 16 January 2006, J.D. was placed in a residential treatment program at the Children's Treatment Center (CTC).

The trial court conducted a permanency planning hearing, which is the subject of this appeal, on 2 May 2006. At the time of the hearing, J.D. was still enrolled at the CTC. The following evidence was presented at the hearing: Rena Bendancourt, the WCHS social worker involved with this case, submitted a written court summary and testified it was her recommendation that J.D.'s father be awarded custody of J.D., that J.D. continue to receive his treatment at CTC, and that J.D. continue to receive his case management services. Bendancourt testified that since WCHS's first involvement with the family, J.D.'s father had "always been very cooperative" with the agency; completed all of the services and recommendations requested by the agency and ordered by the court; maintained stable employment and a stable home environment; attended meetings with the treatment team at CTC regarding J.D.'s care; and followed the recommendations of the CTC treatment team when J.D. had home visits with him.

Bendancourt testified respondent was difficult when the agency initially became involved in the case and had been more cooperative in the year preceding the hearing. She further testified respondent participated in a substance abuse assessment, completed

the Women's Pretreatment 1 and 2, participated in a domestic violence group, and completed her psychological evaluation. Bendancourt testified that respondent had not always complied with her case plan to attend individual therapy, but that this was not entirely her "fault." Respondent had not been to individual therapy since February of 2006. According to Bendancourt, respondent has had difficulty obtaining stable housing. Specifically, respondent had lived in three separate residences from Thanksgiving 2005 until the hearing in May 2006. In addition, Bendancourt testified she had concerns that respondent's medical issues may interfere with her ability to consistently parent J.D.

Tom Sheller, a clinical supervisor/therapist at CTC, testified J.D. was beginning to make progress and estimated J.D. may be able to go home in six months. He further testified J.D.'s visits with his parents had been going well and both of J.D.'s parents had been cooperative with the program.

Avis Dublin, J.D.'s case manager, testified she had been providing case management services to J.D. since October 2005. Although she had not worked much with either of J.D.'s parents, she testified she had worked with J.D.'s father more than respondent. Dublin believed J.D. would continue to need her services for the indefinite future and she had "no doubt" that J.D.'s father would continue to use her services if he was given custody of J.D. Because Dublin had not had enough contact with respondent, she was unable to ascertain whether or not respondent would continue her services if respondent was given custody of J.D.

Larry Tombaugh, J.D.'s guardian ad litem, testified it was his recommendation that legal custody of J.D. remain with WCHS and that a permanent plan of reunification with one of J.D.'s parents continue to be pursued. Based upon J.D.'s behavior in the past, Tombaugh was concerned that J.D.'s behavior would change if he was informed that one of his parents was given legal custody of him even if he remained at CTC. Tombaugh testified he had concerns about the stability of respondent's housing environment because "she has no claim on [the] residence" in which she currently resides and because she had moved several times in the six months leading up to the hearing. He "cautiously advocate[d] for [respondent to have] unsupervised visitation" with J.D. as long as it was being monitored. Tombaugh testified that if the trial court continued to have hearings in this matter, his concerns about giving legal custody to one of J.D.'s parents would be reduced.

Both of J.D.'s parents also testified at the hearing. Respondent testified that she was taking care of a mentally handicapped woman with whom she was currently living.

By order entered 12 May 2006, the trial court awarded custody of J.D. to his father; granted respondent unsupervised visitation; ordered both parents to continue to engage in therapy; and ordered that J.D. continue to reside at CTC and receive case management services until his treatment team determined he could successfully reside in the community. The trial court also maintained jurisdiction over the matter and scheduled a review hearing on 17 October 2006. Respondent appeals.

In her sole assignment of error on appeal, respondent contends "[t]he trial court abused its discretion when it gave sole legal custody of the minor child to the minor child's father rather than awarding joint custody to the mother and father." We disagree.

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2005). "The judge may . . . make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile." N.C. Gen. Stat. § 7B-907(c) (2005).

It is well-established that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody . . . [is] that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984). "'In determining the best interests of the child, the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail.'" *In re T.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741 (quoting *In re Parker*, 90 N.C. App. 423, 431, 368 S.E.2d 879, 884 (1988)), *aff'd*, 360 N.C. 163, 622 S.E.2d 494 (2005).

Respondent has not assigned error to any of the trial court's findings of fact. Thus, the trial court's findings are conclusive on appeal. See *In re J.D.S.*, 170 N.C. App. 244, 250, 612 S.E.2d

350, 354 (trial court's findings of fact binding on this Court where no assignments of error were made to particular findings), *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). Here, the trial court made the following findings of fact:

2. That the father has completed his psychological evaluation and has been engaged in therapy, has completed a substance abuse assessment and participated in a pre[-] treatment group, has maintained a stable home and employment, and has attended treatment team meetings regarding [J.D.] He has been cooperative with the staff at the group home in which the child has lived since January, 2006. The director of the group home believes that the father will cooperate with the recommendations of the staff of the home and the treatment team. The case manager for the child also believes the father will be cooperative with the recommendations of the treatment team.

3. That the mother who presented as being difficult to work with at the outset of this case, has cooperated with the agency. She has completed her psychological evaluation, but has not engaged in therapy since February, 2006. She also completed a domestic violence group and pre[-]treatment group. The mother has attended treatment team meetings and the professionals working with the child believe she will be cooperative with treatment recommendations regarding the minor child.

4. That the mother has had difficulty in maintaining a stable home environment having moved into three separate residences since Thanksgiving of 2005, and there are concerns about her recurring medical issues. The court also has concerns that the mother has taken on the responsibility of caring for an adult with mental handicaps, which would make it more difficult for her to assume responsibility of full time care of the minor child.

5. That the parents have improved their communication since the initiation of this action. However, because of their inability to get along and the domestic violence in the

past, the Court finds that it is not in the child's best interest for the Court to grant the parties joint custody. The child needs consistent structure and a sense of order, and there is a risk that if the parents have joint custody they will not be able to make important decisions together concerning the child.

6. That although both parents have made substantial progress in regard to the orders of this Court, the Court feels the child's interests would be best served in the custody of the father, who has maintained a stable home and employment.

7. That the child's current placement at the Children's Treatment Center in Laurinburg, NC and his receiving certain services including case management will not be jeopardized if the court transfers custody from Wake County Human Services to one of the parents.

8. That the child's placement in residential treatment is meeting his needs and remaining in this therapeutic environment and receiving case management services are in the child's best interests at this time.

9. That the father is capable of making informed decisions concerning the health, education, and general welfare of the child.

Here, respondent contends the trial court erred by granting sole legal custody of J.D. to J.D.'s father rather than awarding them joint legal custody. Respondent asserts that "[j]oint legal custody would allow [her] to participate in decision making activities concerning the child . . . [and] would further facilitate communication between the parents rather than having the father be in a position of more authority than the mother."

On this record, we cannot conclude the trial court abused its discretion in determining it was in J.D.'s best interest not to award the parents joint legal custody. We therefore overrule this assignment of error.

Affirmed.

Chief Judge MARTIN and Judge McCullough concur.

Report per Rule 30(e).