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NO. COA07-1577

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

IN THE MATTER OF:

B.K.

Forsyth County
No. 06 J 235

Appeal by respondent-mother from order entered 10 October 2007 by Judge Lisa V. Menefee in Forsyth County District Court. Heard in the Court of Appeals 14 April 2008.

Mary McCullers Reece for respondent-mother appellant.

Assistant County Attorney Theresa A. Boucher, for Forsyth County Department of Social Services petitioner appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Murray C. Greason, III, for guardian ad litem appellee.

McCULLOUGH, Judge.

Respondent, mother of the minor child B.K., appeals from an order of the district court which, *inter alia*, awarded guardianship of the child to his paternal great-aunt and great-uncle, Cathy and Darrell Beaver, and waived further review hearings. Respondent G.K., the child's father, is not a party to the instant appeal.

On 11 September 2006, Forsyth County Department of Social Services (DSS) obtained non-secure custody of three-year-old B.K. upon filing a juvenile neglect petition alleging repeated acts of domestic violence between the parents. The petition detailed

respondent's history of unstabilized mental illness and G.K.'s substance abuse and violence toward respondent. Neither parent appeared at the non-secure custody hearing on 18 September 2007. The district court found that respondent had been admitted to the psychiatric unit at Forsyth Medical Center, and that G.K. was in a rehabilitation center in another county. DSS filed a second petition on 18 September 2006, which included an allegation of dependency. Following respondent's release from the hospital, the court vacated the non-secure custody order and returned B.K. to his parents at a hearing held 27 September 2007.

On 3 November 2006, DSS filed a juvenile abuse and neglect petition in conjunction with a motion for emergency review of non-secure custody filed by the Guardian ad Litem (GAL). The parties alleged that respondent had left her parents' home with G.K., in violation of an outstanding domestic violence protective order, and had taken the minor child to a motel in Columbus, Ohio. Respondent's psychiatrist, Dr. Maurice Redden, reported that he had not seen respondent since May of 2006, and that she was placing herself and the child at risk if she did not follow her medication regimen, particularly in light of her history with G.K. The district court awarded non-secure custody of B.K. to DSS and maintained the child in DSS custody after a hearing attended by the parents on 8 November 2006.

The district court entered an adjudication of dependency on 23 January 2007, upon the parents' stipulation to, *inter alia*, the following:

[Respondent], mother of [B.K.], has been diagnosed with having bi-polar disorder, schizoaffective disorder, and dependent personality disorder. She is at times non-compliant with her medication regime which leads to occasional mental health hospitalizations. Dr. Redden . . . has stated that without her medication [she] could be a danger to herself and those around her.

. . . .

. . . Based on the mental health issues of both parents, their failure to engage in consistent mental health treatment, their issues regarding housing and necessary medical treatment[,] they are unable to appropriately care for the juvenile, [B.K.], at this time[.]

The order included a finding that, "Return of the juvenile to his home would be contrary to the welfare of the juvenile[,] " and a conclusion that DSS had made "reasonable effort to attempt to reunite this family and such reunification is not appropriate at this time." The court granted DSS legal custody and placement authority over B.K. and awarded each parent one hour of weekly supervised visitation. A permanency planning hearing was scheduled for 14 March 2007.

Although the court held a hearing as scheduled on 14 March 2007, the resultant 23 April 2007 order characterized the proceeding as a periodic review hearing under N.C. Gen. Stat. § 7B-906 (2007). The court maintained the parties' *status quo* and made findings regarding respondent's visitation with the child and initial progress on the requirements of her family services case plan with DSS. As in the original adjudication order, the court found that "[r]eturn of the juvenile to his home would be contrary

to the welfare of the juvenile[,]” and concluded that “reunification is not appropriate at this time.” Although noting the recommendations of the treatment team, DSS, and GAL, the court did not announce a permanent placement plan for the child. It instead cautioned respondent that her “[f]ailure to take medication as prescribed may result in a new permanent plan for [B.K].”

The district court held additional review hearings on 18 May 2007 and 13 July 2007, and entered orders maintaining B.K. in DSS custody. In each instance, the court found that “[r]eturn of the juvenile to his home would be contrary to the welfare of the juvenile[,]” and concluded that DSS had “expended reasonable effort to attempt to reunite this family and such reunification is not appropriate at this time.” An additional review hearing was scheduled for 29 August 2007.

When the parties convened on 29 August 2007, the district court announced that the matter was scheduled for a permanency planning hearing. Respondent’s counsel noted that respondent was awaiting additional psychological testing as recommended by her counselor at the Epilepsy Institute. DSS noted that the court was required to hold a permanency planning hearing within twelve months of the child’s removal from the home, see N.C. Gen. Stat. § 7B-907(a), and that B.K. had been in DSS custody “just a week shy of a year.” The court declined to continue the proceeding and received into evidence the written reports of DSS and GAL. Counsel for DSS joined GAL in recommending that the court (1) award

guardianship of the minor child to his maternal great-aunt and great-uncle, Cathy and Darrell Beaver, (2) waive further review hearings pursuant to N.C. Gen. Stat. § 7B-906(b), and (3) determine the parents' visitation rights. Counsel further advised the court that the Beavers were "aware of how that would impact their responsibilities with regard to this child."

After hearing testimony from respondent and psychiatrist Dr. Burt Bester Bennett, III, the district court entered an order on 10 October 2007, awarding guardianship of B.K. to the Beavers and decreeing that "[a]ny visitation between [respondent] and B.K. shall be supervised and at the discretion of Cathy and Darrell Beaver." As in each of its prior orders, the court found that "[r]eturn of the juvenile to his home would be contrary to the welfare of the juvenile[,]" and concluded that DSS had "expended reasonable effort to attempt to reunite this family and such reunification is not appropriate at this time." The order further provided that "[t]his matter shall require no further Court reviews and is subject to review pursuant to N.C.G.S. 7B-906, 7B-1000, and 7B-600."

On appeal, respondent first claims that the district court abused its discretion by leaving the terms of her visitation with B.K. to the discretion of his guardians. We agree.

Article 9 of the Juvenile Code provides that any dispositional order which leaves the minor child in a placement "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) (2007). We have repeatedly held that the granting of visitation is an exercise of a non-delegable judicial function. *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005); *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). “Thus, a trial court is not permitted to grant the privilege of visitation to the discretion of the guardian of the juveniles, as was done in the instant case.” *In re T.T.*, 182 N.C. App. 145, 149, 641 S.E.2d 344, 346 (2007). Therefore, we must remand to the district court “to make sufficient findings of fact regarding respondent's right to visitation with [B.K.,]” and “to provide a ‘minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised[,]’” insofar as visitation is found to serve the best interest of the child. *Id.* at 149, 641 S.E.2d at 346-47 (quoting *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005)).

Respondent next claims that the court erred by ceasing efforts to reunify her with B.K. without making the necessary findings of fact under N.C. Gen. Stat. § 7B-507(b) (2007). GAL responds that no such findings were required, because the court neither ceased reunification efforts nor established guardianship as the permanent placement plan for the minor child under N.C. Gen. Stat. § 7B-907(c) (2007). By contrast, DSS suggests that the court's 10 October 2007 order “realized” the permanent plan of guardianship for B.K., thereby obviating the need to cease reunification efforts or to enter the attendant findings under N.C. Gen. Stat. § 7B-

507(b), and bypassing the need for a permanency planning order under N.C. Gen. Stat. § 7B-907(c).

A court may appoint a guardian of the person for a juvenile under N.C. Gen. Stat. § 7B-600 (2007), prior to entering a permanent placement plan for the child under N.C. Gen. Stat. § 7B-907, and without ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b). See *In re E.C.*, 174 N.C. App. at 521, 621 S.E.2d at 651. Here, however, both the hearing transcript and the 10 October 2007 order reflect the court's intention to proceed with "a permanency planning review hearing pursuant to N.C.G.S. 7B-907." Moreover, as observed by DSS at the beginning of the hearing, the court was required to hold a permanency planning hearing within twelve months of the minor child's removal from the home. N.C. Gen. Stat. § 7B-907(a). The court also decreed in its order that any subsequent review in this cause would be "pursuant to N.C.G.S. [§§] 7B-906, 7B-1000, and 7B-600." We note that the only provision of N.C. Gen. Stat. § 7B-600 which addresses the issue of a review hearing conducted after an award of guardianship appears in subsection (b), and applies "where the court has determined that the appointment of a . . . guardian of the person for a juvenile is in the best interest of the juvenile and has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile[" N.C. Gen. Stat. § 7B-600(b) (emphasis added). Likewise, both N.C. Gen. Stat. §§ 7B-906 and 7B-1000 contemplate a single occasion in which N.C. Gen. Stat. § 7B-600 impacts a review hearing, providing that "if a guardian of the person has been

appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).” N.C. Gen. Stat. § 7B-906(b) (emphasis added). Therefore, although the 10 October 2007 order does not explicitly announce a permanent placement plan for B.K., we infer from its decretal provisions and the surrounding circumstances that the district court intended to establish guardianship with the Beavers as the permanent plan.

While we agree with respondent that the district court established a permanent placement plan of guardianship for B.K., we find no merit to her claim that the court was required to make findings of fact under N.C. Gen. Stat. § 7B-507(b). The statute provides as follows:

(b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

- (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time;
- (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;
- (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent;
or

- (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

N.C. Gen. Stat. § 7B-507(b) (emphasis added). Likewise, the permanency planning statute, N.C. Gen. Stat. § 7B-907, provides only that, "[i]f the court continues the juvenile's placement in the custody or placement responsibility of a county department of social services, the provisions of G.S. 7B-507 shall apply to any order entered under this section." N.C. Gen. Stat. § 7B-907(c) (emphasis added). Here, the district court did not place or continue B.K. "in the custody or placement responsibility of" DSS. N.C. Gen. Stat. §§ 7B-507(b), -907(c). It instead granted legal guardianship of the child to Cathy and Darrell Beaver. As guardians of the person for B.K., the Beavers "have the care, custody, and control of the juvenile or may arrange a suitable placement for the juvenile[,] subject only to the court's supervision. N.C. Gen. Stat. § 7B-600(a). "Thus, section 7B-507 was not applicable, and the trial court did not err" in failing to make findings thereunder. *In re Padgett*, 156 N.C. App. 644, 649, 577 S.E.2d 337, 341 (2003).

The record on appeal includes additional assignments of error not addressed by respondent in her brief. Pursuant to N.C.R. App. P. 28(b), we deem these assignments of error abandoned.

For the reasons discussed above, we affirm the award of guardianship, but vacate the visitation provisions of the order and remand for further proceedings in accordance with *In re T.T.*, 182 N.C. App. at 149, 641 S.E.2d at 346-47.

Affirmed in part, vacated in part, and remanded.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).