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NO. COA07-639

NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2007

IN THE MATTER OF:  
M.J.W., S.F.W, E.E.W

Orange County  
Nos. 06 JA 165;  
06 JA 166;  
06 JA 167

Appeal by respondent from orders entered 8 March 2007 and 27 April 2007 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 20 August 2007.

*Duncan B. McCormick, for respondent-appellant.*

*Pamela Newell Williams, for appellee Guardian ad Litem.*

JACKSON, Judge.

Suzanne R. ("respondent") appeals from an order adjudicating her daughter E.E.W. abused. She also appeals from an order adjudicating all three of her daughters, M.J.W., S.F.W, and E.E.W (collectively, "the juveniles"), neglected and placing them in the custody of the Orange County Department of Social Services ("DSS"). For the following reasons, we reverse and remand.

On 9 October 2006, DSS filed petitions alleging that the juveniles were neglected. The petitions claimed that E.E.W. had been sexually abused and that respondent both failed to address the abuse and resisted DSS's attempt to investigate the matter. DSS

further alleged that respondent emotionally abused the children and exposed them to an "unclean and unhealthy" home environment based upon, *inter alia*, acts of domestic violence between her and the juveniles' father. Pursuant to a consent order entered into on 10 October 2006, respondent was permitted to retain custody of the juveniles.

On 1 March 2007, the trial court held a hearing on DSS's petitions, and at the beginning of the hearing, the court announced "that one of the parties, which is all the law requires, has consented to an adjudication" of abuse as to E.E.W. and neglect as to each child. The juveniles' father confirmed his consent to the adjudications, and the court overruled respondent's objection to the adjudications based upon the juveniles' father's consent. After reviewing written reports submitted by DSS and the guardian *ad litem*, the trial court announced its decision to remove the children from respondent's custody. When respondent stated, "I don't think we've had an opportunity to be heard," the court responded, "You're not going to be heard. It's, it's not, this is not the time for it. In other words your lawyer is going to make a record. Your lawyer is going to appeal this. She's going to make statements, but my decision is made."

The trial court's 8 March 2007 order provided that "[t]his order is entered by Respondent father's consent. Respondent mother . . . objects to the entering of this order. Respondent mother's objection is overruled." The court made additional findings, which apparently were based upon written reports submitted by DSS and the

guardian *ad litem*, to support its conclusions that each of the three children were abused and neglected. The court granted custody of the children to DSS for placement "in foster care or with a court approved caretaker" and left visitation to DSS's discretion. The court ordered respondent to obtain a psychological evaluation and cooperate with DSS in completing her case plan.

On 30 March 2007, respondent filed timely notices of appeal. On 27 April 2007, the trial court entered an amended order deleting the adjudications of abuse as to M.J.W. and S.F.W., and respondent gave timely notices of appeal from this order.

On appeal, respondent contends that the trial court erred in entering the adjudications of abuse and neglect without her consent and without an evidentiary hearing, based upon the consent of the juveniles' father. In its brief, the guardian *ad litem* concedes error and avers that the cause should be reversed and remanded for a new hearing. We agree.

Article 8 of the North Carolina Juvenile Code guarantees a parent the right to a hearing before her child is adjudicated abused, neglected, or dependent. Specifically, North Carolina General Statutes, section 7B-802 provides that

[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile and the juvenile's parent to assure due process of law.

N.C. Gen. Stat. § 7B-802 (2005). "As the link between a parent and child is a fundamental right worthy of the highest degree of

scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence." *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002) (quoting *Thrift v. Buncombe County Dep't of Soc. Servs.*, 137 N.C. App. 559, 563, 528 S.E.2d 394, 396 (2000)). Therefore, this Court has held that a court may not enter an adjudication by default or summary judgment. See *Thrift*, 137 N.C. App. at 563, 528 S.E.2d at 396 ("Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect."). Further, although North Carolina General Statutes, section 7B-902 authorizes the entry of a consent order in an abuse and neglect proceeding, the *sine qua non* of such an order is the consent of all the parties. See *id.* at 562, 528 S.E.2d at 396 ("A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court . . . ." (quoting *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948))).

In the case *sub judice*, the trial court erred by entering its orders without an adequate evidentiary hearing. At the 1 March 2007 hearing, the trial court did not permit respondent to present evidence and specifically denied her the opportunity to be heard. Further, the record does not support entry of a consent order pursuant to North Carolina General Statutes, section 7B-902, because (1) respondent objected to entry of the order, see *id.*, and

(2) the acts supporting the adjudications were allegedly committed by respondent and her ex-boyfriend. See *In re J.R.*, 163 N.C. App. 201, 202-03, 592 S.E.2d 746, 747 (2004) (“[The father’s] consent to a finding of neglect as alleged in the petition could not bind [the mother], as the allegations of neglect in the juvenile petition pertained solely to her actions and not those of [the father].”). Accordingly, we reverse and remand for further proceedings consistent with this opinion.

In light of our holding, we do not address the additional arguments raised by respondent’s appeal. See *id.* at 203, 592 S.E.2d at 747. However, we do note, *sua sponte*, that the trial court erred with respect to respondent’s visitation rights. “The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child. The trial court should not assign the granting of . . . visitation to the discretion of the party awarded custody . . . .” *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005). As this Court has explained, “[a]n appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised.” *Id.* at 523, 621 S.E.2d at 652. Here, both the original and amended orders provide that “[v]isitation between Respondents and the juveniles is in the discretion of the Orange County Department of Social Services.” The trial court did not provide a minimum outline of visitation, but instead, left the time, place, and conditions to DSS’s discretion. Accordingly, on

remand, DSS must submit a visitation plan to the court for approval, and "the trial court is ordered to provide a 'minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised.'" *In re T.T.*, \_\_ N.C. App. \_\_, \_\_, 641 S.E.2d 344, 346-47 (2007) (quoting *E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652).

Reversed and remanded.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).