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NO. COA08-1229

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2009

IN THE MATTER OF:

A.N. and N.N.

Onslow County  
Nos. 07 JA 03-04

Appeal by respondent from orders entered 29 January 2008, 7 April 2008 and 5 June 2008 by Judges Sarah C. Seaton, William M. Cameron, III, and James L. Moore, Jr., respectively, in District Court, Onslow County. Heard in the Court of Appeals 2 February 2009.

# Court of Appeals

## Slip Opinion

*Mary McCullers Reese, for respondent-appellant mother.*

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

*Dana B. Southard, for petitioner-appellee Onslow County Department of Social Services.*

WYNN, Judge.

Respondent, the Mother of A.N. and N.N., appeals from an adjudication order adjudicating A.N. a neglected juvenile and N.N. an abused and neglected juvenile. The Mother also appeals from a disposition order continuing legal custody of A.N. with Onslow County Department of Health and Human Services (DSS), and giving temporary joint custody of N.N. to the Mother and to N.N.'s father. Upon review, we hold that the trial court's findings of fact are

insufficient to support the conclusion that A.N. was neglected, and that the trial court lacked subject-matter jurisdiction to enter the dispositional orders in this case.

This appeal concerns the adjudication and dispositional orders for the Respondent-Mother's two minor children - A.N. and N.N. The Mother lived in Maryland with the children and her husband who is the father of N.N. When the couple separated in 2006, the Mother and N.N. stayed with the Mother's grandmother in Chicago, Illinois and the Mother placed A.N. with a family friend, Vanessa Mearday, who lived in Jacksonville, North Carolina. In October 2006, a Maryland court entered a consent order in which the Mother was granted legal and physical custody of N.N., subject to weekend visitations with his father.

On 26 December 2006, the Mother brought N.N. to her stepfather's house in Onslow County, North Carolina. N.N. was injured during the visit and, upon admission to Onslow Memorial Hospital, was diagnosed with subdural hematomas and retinal hemorrhages in both eyes.

On 3 January 2007, DSS filed a juvenile petition alleging that N.N. was an abused juvenile and that A.N. and N.N. were neglected juveniles because they lived in an environment injurious to their welfare. The petition noted that Maryland was the home state of the children, but asserted that North Carolina had emergency jurisdiction to decide the issue of child custody under the Uniform Child Custody Jurisdiction Enforcement Act and the Parental Kidnapping Prevention Act. The petition alleged that A.N.

and N.N. were in Onslow County with the Mother when N.N. was admitted to the hospital with subdural hematomas; that N.N.'s injuries were non-accidental; and that the Mother's explanation of how N.N. was injured was not consistent with the injuries N.N. sustained. DSS took custody of the children.

On 5 January 2007, the trial court ordered N.N. to remain in nonsecure custody of DSS; an expedited home study on N.N.'s paternal aunt in Maryland; and supervised visitation for the Mother. The Mother entered into a case plan with DSS on 26 January 2007. Following a second nonsecure custody hearing, the trial court ordered on 15 February 2007 that full custody of N.N. remain with DSS; legal custody of A.N. remain with DSS; and physical custody of A.N. be with Vanessa Mearday. The trial court conferred with Judge Robert Hefron of Prince George County, Maryland and noted that "the State of Maryland retains jurisdiction of this matter, but has agreed to allow adjudication of this Petition in North Carolina. However, disposition shall be heard in Maryland." The trial court continued the adjudication until March 2007.

On 22 March 2007, the trial court again continued the adjudication for DSS to obtain the juveniles' medical records. On 11 May 2007, the trial court continued the adjudication for the Mother's newly appointed attorney to review the juveniles' medical records. By order filed 13 July 2007, the trial court granted physical custody of N.N. to his paternal aunt in Maryland; continued legal custody of both children with DSS; and again postponed the matter for adjudication. The order reiterated that

"[d]isposition of this matter is to be heard in Maryland as agreed upon by both Judge Robert Hefron of Maryland, and Judge James L. Moore of Onslow County, North Carolina." On 27 June 2007, the trial court continued adjudication because DSS's medical witness was unavailable.

The matter came on for adjudication on 31 October 2007. The next day, the trial court filed a Memorandum Order finding that "A.N. is adjudicated as neglected by clear cogent and convincing evi[d]ence, and N.N. is abused and neglected by clear, cogent and convincing evidence." The trial court subsequently filed a more detailed order on 29 January 2008 entitled "Juvenile Adjudication Order," which adjudicated both children neglected juveniles and N.N. an abused juvenile. The trial court found that A.N. and N.N. were in the Mother's care when N.N.'s injuries occurred and that N.N.'s injuries were non-accidental. The trial court ordered N.N. to remain in the legal custody of DSS and physical custody with his paternal aunt. The order directed A.N. to remain in the legal custody of DSS and in physical custody with Vanessa Mearday "until disposition of this matter is heard in the State of Maryland." The Mother gave notice of appeal from the 29 January 2008 adjudication order.

In an order filed on 29 February 2008, the trial court allowed the Mother to have unsupervised overnight visitation with N.N. and that A.N. be placed with the Mother without further hearings. The court also ordered "the entire file of the Onslow County Juvenile Clerk concerning these juveniles be forwarded to Maryland for their

reference in regards to disposition in this matter." By order filed 7 April 2008, the trial court returned physical custody of A.N. to the Mother, but continued legal custody of A.N. with DSS. The trial court also ordered that "the State of Maryland be notified that North Carolina will take jurisdiction of the matter unless notified otherwise by Maryland prior to the Pre-Trial Conference" scheduled for the first week in June 2008. The Mother filed a notice of appeal from the 7 April 2008 order.

The pretrial conference was held on 4 June 2008. At the hearing the Mother and N.N.'s father presented to the court a proposed consent judgment "outlining the various rights and responsibilities between them over the course of the next six months." On 5 June 2008, the trial court entered a memorandum order in which the Mother and father agreed to temporary joint custody of N.N., with his father having physical custody of the child for the first eight weeks, subject to several weekend visitations in Maryland for the Mother. The memorandum further provided that the Mother would eventually share custody equally with N.N.'s father on a month-on-month-off basis until the initial six months expired. The memorandum also stated that the order was the final disposition order, that North Carolina no longer had emergency jurisdiction, that North Carolina's jurisdiction over the matter would terminate after six months from entry of the order, and that Maryland was N.N.'s home state.

The Mother appeals from the adjudication and disposition orders arguing that the trial court: (I) made insufficient

findings of fact to support the conclusion that A.N. was neglected; (II) lacked subject-matter jurisdiction to enter the disposition orders; and (III) committed prejudicial error by failing to comply with statutory time lines.

I.

The Mother first contends that the findings of fact do not support the conclusion that A.N. was a neglected juvenile. We agree.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2007). The role of this Court in reviewing an initial adjudication of neglect and abuse is to determine "(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 Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted).

A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2007). The statute further states:

In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse

or neglect by an adult who regularly lives in the home.

*Id.*

The trial court made the following unchallenged findings of fact in its adjudication order:

7. That on December 26 2006, the juvenile, N.N. was seen at Onslow Memorial Hospital. That (sic) juvenile was subsequently transported to Pitt County Memorial Hospital on December 26, 2006. The juvenile was diagnosed with subdural hematomas and retinal hemorrhages to both eyes.

8. The respondent mother testified that N.[N.] was injured as a result of his five-year-old sister, A.N., dropping him on the floor while holding him.

9. The injuries sustained by N.[N.] are not consistent with the respondent mother's account of how the juvenile was injured.

10. Medical providers indicated that the injuries sustained by N.[N.] were a result of non-accidental trauma.

11. That the injuries sustained by N.[N.] were inflicted by non-accidental means.

12. That the juveniles were in the care of the respondent mother at the time that N.[N.] sustained the injuries.

13. That A.N. has been residing with Vanessa Mearday in Onslow County since September 2006.

Based on these findings, the trial court concluded that A.N. is "within the juvenile jurisdiction of the Court as neglected and that the same has been proven by clear, cogent and convincing evidence."

Here, the trial court found that N.N. suffered physical injuries other than by accidental means while in the Mother's care.

The trial court, however, did not find that A.N. lived in an environment injurious to her welfare in that she lived in a home where N.N. had been subjected to abuse. See N.C. Gen. Stat. § 7B-101(15). The evidence shows that A.N. was not residing with the Mother and N.N. at the time of N.N.'s injuries. Indeed, the only finding of fact the trial court made regarding A.N. was that "A.N. has been residing with Vanessa Mearday in Onslow County since September 2006." Accordingly, the findings of fact do not support an adjudication of neglect as to A.N.

## II.

Next, the Mother contends the trial court lacked subject-matter jurisdiction to enter the 7 April and 5 June 2008 disposition orders because it no longer had temporary emergency jurisdiction and the children's home state of Maryland had expressly retained jurisdiction for purposes of disposition. We agree.

The North Carolina Juvenile Code grants our district courts "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2007). However, the jurisdictional requirements of the Uniform Child Custody Jurisdiction Enforcement Act and the Parental Kidnapping Prevention Act must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code. *In re Brode*, 151 N.C. App. 690, 692, 566 S.E.2d 858, 860 (2002).

A district court in North Carolina can exercise jurisdiction to make child custody determinations under the Uniform Child Custody Jurisdiction Enforcement Act if: (1) this State is the home state of the child when the proceeding is commenced; (2) it is in the best interest of the child for this State to assume jurisdiction because the child and the child's parents had a significant connection with this State and substantial relevant evidence is available in this State; (3) the child is physically present in this State and it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse; or (4) it appears that no other state would have jurisdiction or another state has declined to exercise jurisdiction. See *In re Malone*, 129 N.C. App. 338, 343, 498 S.E.2d 836, 839 (1998); see also *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999).

Under N.C. Gen. Stat. § 50A-204(a), temporary emergency jurisdiction may be invoked by a court if a "child is present in this State and . . . it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a) (2007). The statute further provides:

(c) If there is a previous child-custody determination that is entitled to be enforced under this Article, . . . any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction . . . . The order issued in this State remains in effect until an order

is obtained from the other state within the period specified or the period expires.

(d) A court of this State which has been asked to make a child-custody determination under this section, upon being informed that a . . . child-custody determination has been made by, a court of [another] state . . . shall immediately communicate with the other court.

N.C. Gen. Stat. § 50A-204(c)-(d) (2007). When the court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only. See *In re Brode*, 151 N.C. App. at 693, 566 S.E.2d at 860 (citations omitted).

The Parental Kidnapping Prevention Act provides that "every State shall enforce . . . and shall not modify . . . any custody determination or visitation determination made . . . by a court of another State." 28 U.S.C.A. § 1738A(a) (2007). The Act further provides that "the jurisdiction of a court of a State which has made a child custody or visitation determination . . . continues as long as . . . such State remains the residence of the child or of any contestant." 28 U.S.C.A. § 1738A(d) (2007). Modifications of another state's custody determination may only be made if the modifying state "has jurisdiction to make such a child custody determination; and [] the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 U.S.C.A. § 1738A(f) (2007).

Here, after conferring with the Maryland court, the trial court entered its 15 February 2007 order finding that "the State of Maryland retains jurisdiction of this matter, but has agreed to allow adjudication of this Petition in North Carolina." The trial

court then held an adjudicatory hearing in October 2007. In its 29 January 2008 order, the trial court adjudicated the children neglected and N.N. abused, and made a finding that "disposition of this matter shall be heard in the State of Maryland." However, the trial court's order did not specify a period of time within which the order would remain in effect as required by N.C. Gen. Stat. § 50A-204(c) ("any order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction").

Furthermore, there is no order, or any other indication in the record, showing that the Maryland court had opted not to exercise its jurisdiction for purposes of disposition. Thus, the trial court's emergency jurisdiction ended upon entry of the 29 January 2008 order. Accordingly, the dispositional orders entered 7 April 2008 and 5 June 2008 are vacated.

### III.

Finally, the Mother contends the trial court erred by failing to conduct the adjudicatory hearing within sixty days from the filing of the petition as required by N.C. Gen. Stat. § 7B-801(c), and by failing to file its adjudicatory order within thirty days of the adjudicatory hearing as required by N.C. Gen. Stat. § 7B-807(b). The Mother is correct that the trial court failed to meet the statutory deadlines set out in N.C. Gen. Stat. § 7B-801(c) and -807(b). Our Supreme Court recently held, however, that when a trial court fails to adhere to statutory timelines, mandamus is an

appropriate and more timely alternative than an appeal. See *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008) ("Mandamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute.").

Furthermore, "such error arises subsequent to the hearing and therefore does not affect the integrity of the hearing itself. Thus, a new hearing serves no legitimate purpose and does not remedy the error." *Id.* at 456, 665 S.E.2d at 61. Accordingly, the Mother's assignments of error regarding delay during the adjudicatory phase are dismissed.

In sum, the trial court's adjudication of A.N. as neglected is reversed, its dispositional orders are vacated, and its orders are otherwise affirmed.

Adjudicatory order entered 29 January 2008, reversed in part and affirmed in part; dispositional orders entered 7 April and 5 June 2008, vacated.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).