NO. COA08-149

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

IN THE MATTER OF:

	Durham County
B.G.	Nos. 05 J 288
B.D.G.	05 J 289
C.D.	05 J 290
C.D.2	05 J 291

Appeal by respondent father from order entered 11 October 2007 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 21 May 2008.

County Attorney Chuck Kitchen, by Deputy County Attorney Thomas W. Jordan, Jr., for petitioner-appellee.

Annick Lenoir-Peek for respondent-appellant.

Poyner & Spruill, LLP, by John Ward O'Hale, for guardian ad litem.

GEER, Judge.

Respondent father appeals from a permanency planning order granting joint legal custody of his minor child, B.G. ("Beth"),[1] to respondent and Beth's maternal aunt and uncle, but granting physical custody to the aunt and uncle. Respondent argues that the trial court's findings of fact were insufficient under N.C. Gen. Stat. § 7B-907 (2007). We agree and, therefore, reverse the trial

[1]The pseudonym "Beth" will be used throughout this opinion to protect the child's privacy and for ease of reading.

court's order and remand for further proceedings in accordance with this opinion.

Facts

In 2005, Beth's mother gave birth prematurely to twins who tested positive for cocaine at birth. The mother also tested positive for cocaine and was reported to have used cocaine on the day of the delivery. She delivered the first baby at Genesis House, while the second baby was delivered at Duke University Medical Center. On 5 October 2005, the Durham County Department of Social Services ("DSS") filed a petition alleging that Beth, a second daughter, and the twins were neglected based primarily on the mother's drug use and her unstable housing.[2] DSS did not, in this petition, seek nonsecure custody because the mother was allowing the two older children to live with their maternal aunt, Monica Edwards, and the twins to live with Rose Jones. Previously, Beth and her sister were living with their mother at Genesis House.

On 18 October 2005, as a result of changed circumstances, DSS filed a motion for nonsecure custody, seeking an order granting DSS custody with placement to be with the mother so long as she remained drug and alcohol free, maintained stable housing, continued individual therapy, and accepted mental health services for herself and her two older daughters. On the same date, the trial court entered an order granting the relief sought by DSS. On

[2]Beth and the other children have different fathers. Respondent, Beth's father, is the only appellant in this case. We, therefore, only discuss the facts as they are relevant to Beth.

27 October 2005, the trial court granted respondent visitation with Beth to be arranged by DSS.

On 27 January 2006, all four children were adjudicated neglected "in that the children do not receive proper care from their mother" and "live in an environment injurious to the children's welfare in the care of the mother." With respect to respondent, the trial court found that respondent was interested in obtaining custody or extensive visitation with Beth. The court noted that it had previously ordered that respondent have visitation with Beth, but "the mother choose [sic] not to comply with the court's order" and "[s]he did not have an acceptable reason for her willful noncompliance with" the order. The trial court further found that the fact respondent had "little recent contact" with Beth led to or contributed to the court's decision to remove custody from respondent, but added that "[t]he mother has had custody and has willfully refused to allow visits."

The trial court ordered that it was in the best interests of the children that they be placed in the custody of DSS with authorization for a trial placement with the mother so long as she complied with specified conditions. The trial court ordered unsupervised visitation between respondent and Beth and directed respondent to develop a plan of care for Beth.

On 24 March 2006, however, the trial court approved temporary placement of Beth with her maternal aunt and uncle, Daniel and Monica Edwards, because the mother had been incarcerated. Following additional review and permanency planning hearings, the

trial court continued Beth's placement with Daniel and Monica Edwards, but provided for additional visitation with respondent.

Following a review hearing on 23 May 2006, the trial court entered an order on 25 July 2006, finding that although Beth desired to continue to live with Mr. and Mrs. Edwards, DSS' permanent plan for Beth was reunification with respondent. The trial court noted that there had been a positive home study on respondent's home and "[n]ow is the best time to attempt a transition into the home of the [respondent.]" Accordingly, the trial court ordered that respondent have weekend visitation every other weekend and periods of two-week visitation during Beth's summer vacation.

Following a permanency planning hearing on 17 July 2007, the trial court entered an order on 11 October 2007, concluding that it was in the best interests of Beth that she continue in the physical custody of Mr. and Mrs. Edwards, that she be placed in the joint legal custody of respondent and the Edwardses, that Beth have a structured plan of visitation with respondent, and that DSS be relieved of reunification efforts with the mother. The trial court ordered that DSS and Beth's guardian ad litem be relieved of their duties as to Beth and that the case be closed and removed from the active juvenile docket. Respondent timely appealed from this order.

Discussion

Respondent contends that the trial court failed to make adequate findings of fact as required by N.C. Gen. Stat. § 7B-907(b). That statute provides:

> At the conclusion of the [permanency planning] hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:
>
> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
>
> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
>
> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
>
> (6) Any other criteria the court deems necessary.

Id. In addition, the trial court must "make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c).

This Court has previously held "that this section of the Juvenile Code does not require a permanency planning order to contain a formal listing of the § 7B-907(b)(1)-(6) factors, 'as long as the trial court makes findings of fact on the relevant § 7B-907(b) factors [.]'" *In re L.B.*, 181 N.C. App. 174, 190, 639 S.E.2d 23, 31 (2007) (quoting *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004), *overruled on other grounds by In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005)). In this case, the trial court did not make the necessary findings.

First, the order contained no finding, under N.C. Gen. Stat. § 7B-907(b)(1), whether it was possible for Beth to return to respondent's care within six months. DSS, however, points to the court's finding that it was "tak[ing] judicial notice of its prior orders and proceedings in rendering the decision herein." Even if a prior order had addressed this issue at the time of that prior order, the trial court's taking judicial notice of that order cannot constitute a finding that Beth could or could not be returned to respondent's care within six months of this permanency planning hearing.

Second, by entering an order transferring custody from DSS to respondent and the Edwardses jointly, with the Edwardses having physical custody, the trial court apparently concluded that Beth

should be "placed in another permanent living arrangement," as set out in N.C. Gen. Stat. § 7B-907(b)(4). That subsection, however, requires the trial court to explain "why" — something the trial court did not do in its findings of fact. The trial court made findings regarding the nature of the relationships among all the parties and Beth's visitation with her father, but never specifically made findings as to why physical custody with the Edwardses was in Beth's best interest.

Third, while the trial court appears to have acted under N.C. Gen. Stat. § 7B-907(b)(2) by establishing "custody with a relative," it did not then set out "the rights and responsibilities which should remain with the parents," as required by that subsection. The trial court did specify that respondent had joint legal custody, which incorporates that applicable law, and set out a visitation plan for respondent. The trial court, however, also included a finding that "Monica Edwards testified that it is her intention to return [Beth] to her mother's care when she gets herself together." The trial court did not clarify (1) what should occur with respect to the mother, (2) whether Monica Edwards had any "right" to act on her intentions, or (3) whether respondent had "rights" with respect to that intention — a particular concern in light of the trial court's finding that when the mother had custody, she "willfully refused to allow visits" between Beth and her father.

Because the trial court failed to make the findings required by the statute, we must reverse the order and remand for further

findings of fact. *See In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (vacating permanency planning order and remanding for further findings when trial court made no findings under the criteria provided in § 7B-907(b)); *In re Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003) (reversing and remanding to trial court for failure to consider § 7B-907(b) factors); *In re Weiler*, 158 N.C. App. 473, 478, 581 S.E.2d 134, 138 (2003) (reversing permanency planning order because trial court failed to make findings regarding § 7B-907(b) factors).

Respondent also argues that the trial court's conclusions are inconsistent with his "constitutionally protected interest in the companionship, custody, care, and control of [his] children." *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). Our Supreme Court has held that "a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

We cannot, however, determine whether this issue was raised below. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). The recording device at the trial of this case malfunctioned and did not record the hearing. The parties prepared a narration of the proceedings that recited the testimony of each witness, but did not

reflect the arguments of counsel. While neither of the appellees has argued that respondent failed to make his constitutional argument at trial, the trial court did not address the issue in its order. We, therefore, leave the issue to be addressed in the first instance by the trial court on remand.

Reversed and remanded.

Judges McGEE and STEELMAN concur.

Report per Rule 30(e).