NO. COA08-323

NORTH CAROLINA COURT OF APPEALS

Filed: 2 September 2008

IN THE MATTER OF:

L.O.

Alleghany County
No. 07 JA 45

Appeal by Respondent from order entered 3 January 2008 by Judge Mitchell McLean in District Court, Alleghany County. Heard in the Court of Appeals 5 August 2008.

No brief for Petitioner-Appellee.

Janna D. Allison for Respondent-Appellant.

Tracie M. Jordan for Guardian ad Litem.

McGEE, Judge.

Respondent-Mother A.L. (Respondent) appeals from the trial court's consolidated adjudication and disposition order finding Respondent's minor child, L.O., to be neglected and directing that reunification efforts with Respondent cease. For the reasons set forth herein, we reverse and remand the dispositional portion of the trial court's order.

The Alleghany County Department of Social Services (DSS) filed a juvenile petition on 30 November 2007 alleging that four-month-old L.O. was a neglected juvenile in that he did not receive "proper care, supervision, or discipline from [his] parent[.]"

Specifically, the petition alleged that L.O. had been left home alone with no supervision, food, or diapering from 6:30 a.m. on Monday, 26 November 2007 until 7:30 p.m. on Tuesday, 27 November 2007. The trial court granted non-secure custody of L.O. to DSS and DSS placed L.O. in a foster home. Following the seven-day hearing, the trial court ordered supervised visitation of one hour per week between Respondent and L.O. The trial court also ordered Respondent to comply with a family services agreement, and it set the adjudication hearing for 18 December 2007.

DSS social worker Christy Johnson (Ms. Johnson) testified to the following at the adjudication hearing. On 28 November 2007 DSS received a report that L.O. had been left alone for thirty-seven hours with no adult present, no feeding, no diapering, and no comfort. Respondent explained to Ms. Johnson that Respondent's sister and brother-in-law had moved in with Respondent the Friday prior to the incident, and that they were supposed to watch L.O. while Respondent went to work. Respondent did not check to see that her sister and brother-in-law were in the house before she left for work at 6:30 a.m. on the morning of Monday, 26 November 2007. Respondent worked at a tree farm in Laurel Springs until midnight. Respondent stayed at a bunk house at the tree farm overnight because she had to be back at work early the next morning. Ms. Johnson did not know whether the bunk house had a telephone, but she knew the office at the tree farm had a telephone. Respondent did not have a telephone at her residence, but she lived in a trailer park with neighbors.

Ms. Johnson also testified that Respondent's sister told Ms. Johnson that she got mad at Respondent on the Sunday night before the incident in question, when Respondent came home from work around 10:00 p.m. Respondent's sister told Ms. Johnson that Respondent appeared to be high and that Respondent passed out on the floor asleep. Respondent's sister and brother-in-law left Respondent's house that night around 11:00 p.m. and saw L.O. lying asleep on the floor next to Respondent. Ms. Johnson also related that after Respondent left L.O. alone for thirty-seven hours, Respondent returned to her residence around 7:30 p.m. on Tuesday, 27 November 2007 to find L.O. "just lying there," and that it took Respondent two hours to get L.O. to take a bottle. Upon urging by Ms. Johnson, Respondent took L.O. to the emergency room on 28 November 2007 and L.O. was found to have no lasting negative health effects.

Ms. Johnson stated that Respondent's older child, M.O., had been removed from Respondent's home at four months of age due to abuse, and had been placed with a relative in South Carolina. M.O.'s father, who is also L.O.'s father, was convicted of felonious child abuse and served an active sentence. Respondent was charged with, and served time for, harboring a fugitive when she gave shelter to the father after he escaped from prison. Respondent was not charged with any crime with regard to the abuse of M.O. Ms. Johnson indicated that the father had moved back to Mexico.

Other witnesses testified regarding the three one-hour visits

between Respondent and L.O. Guardian ad litem Allen Williams (Mr. Williams) witnessed the third visit only, and he reported that when he arrived for the visit, L.O. was in a good mood. However, within five minutes of handing L.O. to Respondent, L.O. was "yelling and screaming pretty violently," and it continued for about fifteen minutes before the director of the facility, Pam Sizemore (Ms. Sizemore), went in to help calm L.O. down. From that point on, Respondent carried L.O. facing outward away from Respondent, and L.O. did not actively cry for the last twenty minutes of the visit. Mr. Williams testified that L.O. was afraid of Respondent. Although this was the only interaction observed by Mr. Williams, who had only been involved in the case for a few days at the time of the hearing, he agreed with DSS's recommendation to terminate visitation.

Ms. Sizemore, the director of the Alleghany County Children's Resource Center (the Center), testified regarding her interactions with Respondent and L.O. Her first contact with them occurred several weeks before the incident at issue, when Respondent went to the Center to sign up for parenting classes in her efforts to regain custody of M.O. Ms. Sizemore next testified regarding her observations of the three visits between Respondent and L.O., and she recalled the following from those visits:

> [L.O.] was okay with me. After [Respondent] arrived, [L.O.] did begin crying. [L.O.] actually slept for about forty minutes of that first visit; I think just wore out. And so [L.O.] was awake for about 20 minutes. [Respondent] did feed [L.O.], diaper-change during the time he was awake, but he was very fussy, cried. Second visit was more or less a

> repeat of the first visit. [L.O.] slept for about 40 minutes of the second visit also. Yesterday was the first time [L.O.] actually stayed awake for the entire hour-long visit.

Ms. Sizemore further testified that with regard to the third visit, held the day before the hearing, "there were two points in time that [Ms. Sizemore] observed that [Respondent] was actually able to stop [L.O.'s] crying on her own for brief periods of time, which to [Ms. Sizemore] was a little bit of an improvement over what had been." Ms. Sizemore testified that although she did not hold the opinion that L.O. was afraid of Respondent, she felt that L.O. did not trust Respondent, and that L.O. had been traumatized to the point where the trauma had a profound effect on him.

L.O.'s foster mother, Amanda Miller (Ms. Miller), testified that L.O. is generally happy before he visits with Respondent, but that after visits it takes several days for L.O. to get back to a routine, and that L.O. resists nurturing and feeding. Ms. Miller also stated that L.O. exhibited "classic" symptoms of attachment disorder, based on her observations of other foster children that she had cared for over time.

At the conclusion of the adjudication hearing, the trial court determined that L.O. was a neglected juvenile. Following arguments related to disposition, the trial court determined that it was in L.O.'s best interest to be removed from Respondent's home. The trial court ordered DSS to retain custody of L.O. and relieved DSS of its obligation to pursue further reasonable efforts to reunite L.O. with Respondent. The trial court also ordered visitation to cease due to "the obvious trauma experienced by [L.O.] on all prior

visits." A permanency planning hearing was set for 18 January 2008. Respondent appeals.

We first recognize that Respondent did not assign error to the trial court's third conclusion of law that "[L.O.] is a neglected juvenile as defined by N.C.G.S. [§] 7B-101(15)." Moreover, Respondent expressly abandoned her only assignment of error that dealt with the trial court's adjudication of L.O. as a neglected juvenile. Therefore, our review is limited to the dispositional portion of the trial court's order. *See* N.C.R. App. P. 10(a) (stating that the "scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal").

In challenging the dispositional portion of the order, Respondent assigned error to several findings of fact. "'All dispositional orders of the trial court in abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing.'" *In re K.S.*, 183 N.C. App. 315, 323, 646 S.E.2d 541, 545 (2007) (quoting *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841, *remanded on other grounds*, 354 N.C. 362, 556 S.E.2d 299 (2001)). "'[W]here the trial court's findings are supported by competent evidence, they are binding on appeal, *even if there is evidence which would support a finding to the contrary*.'" *Id.* (quoting *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004)). "The standard of review that applies to an assignment [of error] challenging a dispositional finding is whether the finding is supported by

competent evidence." *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007).

First, Respondent contests the finding that "[Respondent] testified that she thought her sister was in the home and would look after [L.O.]" on the ground that Respondent never testified at the hearing. Although it is clear from the transcript of the proceedings that Respondent did not testify, the transcript reflects that the substance of the finding is supported by the evidence. Ms. Johnson testified regarding Respondent's explanation for why L.O. was left unattended. We do not find that the trial court's mistaken use of the word "testified" subverts the basic information contained therein. This assignment of error is overruled.

Respondent next challenges the trial court's finding regarding the existence of a telephone at her place of work and at her home. The trial court found that "[a]lthough there is no telephone in the bunkhouse nor in [Respondent's] home, there is a telephone on the tree lot and [Respondent] does have neighbors who have telephones." Respondent contends the evidence at the hearing did not show that her neighbors had telephones. We agree with Respondent that this finding is not supported by the evidence. There was no testimony that any of Respondent's neighbors had a telephone. Since the evidence was clear that Respondent herself did not have a telephone at her own residence where L.O. was located, and no evidence showed that she could have reached a neighbor, the trial court's finding of fact that Respondent could have checked on her child but did not

do so is not supported by the evidence.

By her next argument, Respondent contends the trial court erred by finding certain facts based on improper opinions made by several witnesses in violation of N.C. Gen. Stat. § 8C-1, Rule 701. Rule 701 provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue

N.C. Gen. Stat. § 8C-1, Rule 701 (2007).

Respondent challenges the finding that "Ms. Sizemore's lay opinion is that [L.O.] has no trust with [Respondent]." Respondent argues that no evidence was presented to show that Ms. Sizemore had any specialized training or experience to have an opinion of whether or not a child trusted a parent. Lay opinion is admissible where it constitutes a "'shorthand statement of fact,'" which is an "'"instantaneous conclusion[] of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time."'" *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) (citations omitted), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). In this case, Ms. Sizemore's opinion that L.O. did not trust Respondent was nothing more than a shorthand statement of fact, derived from Ms. Sizemore's experience observing L.O. *See id.* Therefore, the trial court's finding of fact was not in error.

Respondent also argues the trial court erred in finding that Mr. Williams' opinion was that "[L.O.] appears to be afraid of [Respondent]," where no evidence was presented showing that Mr. Williams had specialized training to make such a determination, particularly after observing the interaction between L.O. and Respondent for only one hour. We find, however, that the challenged testimony was a shorthand statement of fact of L.O.'s state of mind derived from Mr. Williams' personal observation. Therefore, the statement was properly admitted and the trial court's finding of fact was not in error. *See id.*

Respondent further argues the trial court erred by finding that "[Ms. Miller] explained that she [was] very familiar with attachment disorder from other children she ha[d] had in foster care and [L.O.] display[ed] all the symptoms of profound attachment disorder." We agree with Respondent. Such a statement goes beyond a mere shorthand statement of fact, and amounts to a medical diagnosis which should not have been allowed without a proper foundation establishing Ms. Miller as an expert witness. We therefore hold the trial court erred in making this finding of fact.

Respondent next argues the trial court erred by finding the following:

> [The] finding [that Respondent's actions constitute gross neglect], in conjunction with [Respondent's] history of physical abuse and neglect of another child and her inability to interact with [L.O.] in a way which indicates that the situation will be improved leads the Court to find as a fact and Conclude as a matter of law that reunification efforts

> should be terminated, a Permanency Planning hearing should be scheduled and [Respondent's] parental rights should be terminated if the Permanency Planning hearing so recommends.

Respondent contends that no evidence was presented that Respondent abused another child. Rather, Respondent argues, the evidence reflected that L.O.'s father was convicted of felonious child abuse of M.O. and was imprisoned for that offense. Respondent also argues that the evidence showed that Respondent made progress by the third and final visit with L.O., which contradicts the finding that she was unable to interact with L.O. We agree.

No evidence was presented that Respondent abused or neglected another child. Instead, evidence was presented that Respondent's older child, M.O., was removed from the home at four months of age due to abuse, that the father was convicted of child abuse, and that M.O. is currently placed with a relative. The only evidence of Respondent's involvement in that matter was that Respondent was charged with harboring the father and not cooperating with the criminal investigation, and that Respondent was convicted of harboring a fugitive and was given an active sentence. We also hold that no evidence was presented to support the finding that Respondent was unable to interact with L.O. in a way which would indicate future progress. Evidence was presented that L.O. slept for forty minutes of the hour-long visit for each of the first two visits. Respondent's interaction was thus limited to twenty minutes for each of those visits. The evidence showed that Respondent fed L.O. and changed his diaper at the first visit, that Respondent was able to stop L.O. from crying on her own at two

different points in time, and that the third visit appeared to Ms. Sizemore to be an improvement over the first two visits. Although evidence was also presented that L.O. cried and was upset during the visits, which necessitated intervention by Ms. Sizemore, we find the evidence overall is insufficient to support the finding that Respondent showed an inability to interact with L.O. to the extent that improvement would be unlikely. Evidence from three short visits over three weeks with no other indication that Respondent could not make progress with L.O. is simply inadequate. The trial court therefore erred in making these findings.

In her next assignment of error, Respondent argues the trial court erred by allowing DSS to cease reasonable efforts toward reunification without making the necessary statutory findings pursuant to N.C. Gen. Stat. § 7B-507(b). A trial court may order DSS to cease reasonable efforts to reunify a parent with a juvenile as long as the trial court makes at least one of the following findings of fact:

> (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) (2007).

In the case before us, the trial court failed to make the necessary findings of fact to support its order allowing DSS to cease reasonable efforts. Although the trial court found that Respondent's neglect constituted "gross neglect," the trial court did not specifically find that Respondent subjected L.O. to aggravated circumstances as defined in N.C. Gen. Stat. § 7B-101(2) (2007). Therefore, the requirement of N.C.G.S. § 7B-507(b)(2) has not been met. Nor do the circumstances outlined in subsections (b)(3) and (b)(4) exist here. Therefore, we must determine whether the trial court made findings pursuant to subsection (b)(1) that reasonable efforts would clearly be futile or inconsistent with L.O.'s health and safety. The trial court did not make such findings, and instead based its decision on the finding that Respondent's actions constituted gross neglect, along with the findings regarding Respondent's history of physical abuse and neglect of another child and her inability to interact with L.O. in a way indicating future improvement. We have already held that the last two findings were made in error. Moreover, the finding of gross neglect is not an acceptable substitute for the statutorily-required finding that further reunification efforts "would be futile or would be inconsistent with [L.O.'s] health, safety, and

need for a safe, permanent home within a reasonable period of time." *See In re Everett*, 161 N.C. App. 475, 479-80, 588 S.E.2d 579, 582-83 (2003) (where the trial court found that "'[the respondent's] limitations prevent him from being a placement resource for these children' due to their special needs," our Court held that "[w]hile this reasoning most closely relates to a finding that '[reunification] efforts clearly would be futile,' the [trial] court made no such finding and therefore failed to comport with N.C. Gen. Stat. § 7B-507(b)"). Therefore, the trial court erred in ordering DSS to cease reunification efforts.

Finally, Respondent argues the trial court erred in ordering visitation to cease "because of the obvious trauma experienced by [L.O.] on all prior visits" and in ordering that Respondent had no obligation to comply with the family services case plan "because reunification efforts are to be terminated." In general, "the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). We have already determined that the trial court erred in making its finding of fact that Respondent was unable to interact with L.O. in a way that would indicate the likelihood of future improvement. We have also held that the trial court erred by allowing DSS to cease reunification efforts without making the necessary findings. Similarly, the trial court failed to make the necessary

determination that visitation would not be in the best interest and welfare of L.O. before ordering visitation to cease. Since the trial court's decisions to disallow reunification efforts and visitation are without support, its decision to relieve Respondent of an opportunity to comply with a case plan is also without support and needs to be reconsidered.

In sum, because Respondent did not assign error to the trial court's conclusion of law that L.O. is a neglected juvenile, our review is limited to the dispositional portion of the trial court's order. As to disposition, the trial court made several findings of fact that are not supported by competent evidence and failed to make the necessary findings to support its conclusion that DSS may cease reunification efforts. The trial court also erred in ordering Respondent's visitation to cease and by eliminating Respondent's obligation to comply with a family services case plan. Accordingly, the dispositional portion of the order is reversed, and the matter is remanded for further proceedings.

Reversed and remanded.

Judges HUNTER and STROUD concur.

Report per Rule 30(e).