

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-448

NORTH CAROLINA COURT OF APPEALS

Filed: 16 September 2008

IN THE MATTER OF:

S.T.

Stanly County
No. 07 J 75

Appeal by respondent-mother from an order entered 25 January 2008 by Judge Scott Prosser in Stanly County District Court. Heard in the Court of Appeals 25 August 2008.

Court of Appeals

No brief for petitioner appellee.

Janet K. Leebetter for respondent-mother appellant.

Vita A. Pastorelli for Guardian ad Litem.

No brief for respondent-father.

Slip Opinion

McCULLOUGH, Judge.

Respondent-mother ("respondent") appeals from a nonsecure custody review hearing order placing legal and physical custody of the minor child, "S.T.," with his father and dismissing the juvenile petition. Respondent argues the trial court erred by transferring permanent custody of the child to his father and dismissing the juvenile petition without an adjudication hearing. We agree and vacate the order of the trial court.

On 10 December 2007, Stanly County Department of Social Services ("DSS") filed a juvenile petition, alleging S.T. was

neglected and dependent in that he had not been provided proper care, supervision and discipline; he lived in an injurious environment due to domestic violence; and he was not provided necessary medical care. Specifically, the petition alleged the following: DSS received the first Child Protective Service ("CPS") referral on 14 August 2007. Upon initiation, DSS found that S.T. and his brother had run away from Stanly County to Anson County using stolen bikes. The second CPS referral was accepted on 21 October 2007. The report indicated that respondent had kicked S.T. out of the home and would not allow him to return. Another CPS referral was taken on 31 October 2007, indicating that there was evidence of domestic violence as respondent's boyfriend had punched her in the eye which left her with a bruised eye and swollen face. Lastly, on 5 December 2007, CPS was informed that S.T. and his brother were starting fires and committing other property damage in Anson County.

On 14 December 2007, the trial court held a nonsecure custody hearing. Respondent and respondent-father did not testify at the hearing. The only testimony offered at the hearing was that of the CPS worker. The CPS worker testified that prior to filing the juvenile petition, nothing was done to contact or locate respondent-father, as respondent had stated that the father was not involved. Respondent-father was at the hearing because S.T. called him and told him there was a hearing on 14 December 2007. The afternoon session of the hearing consisted of attorneys' arguments. Respondent-father argued that S.T. should be placed with him. The

guardian ad litem argued against placement with respondent-father, while DSS recommended that S.T. be placed with respondent-father on a temporary basis. The CPS worker testified that S.T. had informed DSS the day of the hearing that he did not want to live with his father. Following the hearing, the trial court found "[t]hat it is in the best interest of the Juvenile S.T. that he be placed in the legal and physical custody of his father and that the petition in regards to that juvenile is dismissed[,]” and entered an order accordingly.

Respondent argues the trial court lacked statutory authority to transfer permanent legal and physical custody to respondent-father without an adjudication or disposition of the juvenile petition. We agree that the trial court was without authority to enter the custody order at issue.

Section 7B-506 of the North Carolina General Statutes provides for nonsecure custody hearings in pertinent part as follows:

(a) No juvenile shall be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody. . . .

(b) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker the right to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court

shall not be bound by the usual rules of evidence at such hearings.

* * * *

(d) If the court determines that the juvenile meets the criteria in G.S. 7B-503 and should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact and signed and entered within 30 days of the completion of the hearing. The findings of fact shall include the evidence relied upon in reaching the decision and purposes which continued custody is to achieve.

N.C. Gen. Stat. § 7B-506 (2007). Section 7B-506 contains no provision authorizing the trial court to determine permanent legal custody of a juvenile before adjudication of the petition.

We find the case of *In re O.S.*, 175 N.C. App. 745, 625 S.E.2d 606 (2006), instructive in the instant case. In *O.S.*, Union County DSS was contacted by a family with whom respondent-mother and O.S. had been living. *Id.* at 746, 625 S.E.2d at 607. The family reported that respondent-mother had left her child with them and failed to return. *Id.* Union County DSS filed a juvenile petition alleging O.S. was a neglected and dependent child. *Id.* A nonsecure custody order was issued on 27 September 2004, and the trial court held a nonsecure custody hearing the following day. *Id.* Respondent-mother did not attend the hearing; however, respondent-father was in attendance. *Id.* The respondent-father expressed his desire to have custody of the child; however, paternity had not been established at the time, and the trial court continued legal custody of the child with Union County DSS with physical placement

in foster care. *Id.* The trial court continued to hold nonsecure custody review hearings pending eventual adjudication. *Id.* Subsequently, paternity testing confirmed respondent-father to be the biological father and after investigation, Union County DSS recommended O.S. be placed with respondent-father. *Id.* On 17 November 2004, the trial court conducted a further nonsecure custody review hearing. *Id.* At this hearing, no testimony was given. The trial court reviewed only the juvenile petition and a report prepared by Union County DSS. *Id.* Following the hearing, the trial court concluded that it was in the best interest of O.S. to place legal custody with respondent-father and entered an order accordingly. *Id.* at 746-47, 625 S.E.2d at 607. The trial court noted that Union County DSS would take a voluntary dismissal of the juvenile petition. *Id.* at 747, 625 S.E.2d at 607. The trial court advised respondent-mother that visitation with O.S. was now in the discretion of respondent-father and that if she wanted to regain custody, she would have to file a civil suit. *Id.* Respondent-mother appealed from the nonsecure custody review hearing order placing legal custody of O.S. with respondent-father. *Id.* On appeal, respondent-mother argued that the trial court lacked jurisdiction to grant legal custody to respondent-father without an adjudication or disposition of the juvenile petition. *Id.* Relying on our decision in *In re Guarante*, 109 N.C. App. 598, 427 S.E.2d 883 (1993), we vacated the trial court's order holding that the trial court lacked authority to permanently remove legal custody of the minor child from respondent-mother before adjudication on the

merits of the allegations in the juvenile petition. *O.S.*, 175 N.C. App. at 749-50, 625 S.E.2d at 608-09.

In *O.S.*, we noted that the trial court evaluated the merits of the case during the informal nonsecure custody hearing stage and that none of the allegations in the juvenile petition were ever proven by the clear, cogent, and convincing evidence standard utilized at an adjudication hearing. *Id.* at 749-50, 625 S.E.2d at 609. "The purpose of the nonsecure custody hearing is to determine whether continued nonsecure custody of the juvenile is necessary pending adjudication on the merits of the case." *Id.* at 749, 625 S.E.2d at 608 (citation omitted). In continuing custody, the trial court may only place the child in the *temporary* custody of a relative pending adjudication unless such placement would be contrary to the child's best interest. N.C. Gen. Stat. § 7B-506(h) (2) (2007) (emphasis added).

In the instant case, the trial court evaluated the merits of the case without ever receiving direct evidence in the case. The allegations in the juvenile petition were not proven by clear, cogent, and convincing evidence. Here, as in *O.S.*, we find respondent lost custody of her child without any of the allegations against her having been proven. We hold that the trial court lacked the authority to permanently remove legal custody of the minor child from respondent before adjudication of juvenile petition. Therefore, we vacate the order of the trial court.

Because we find the trial court lacked authority to transfer

permanent custody to the father, we need not address respondent's remaining assignment of error.

Vacated.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).