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NO. COA08-685

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

IN THE MATTER OF:

G.T., H.T. & C.M.

Cumberland County  
Nos. 06 JA 24-26

Appeal by respondent from order entered 10 April 2008 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 29 September 2008.

*John F. Campbell for petitioner-appellant Cumberland County Department of Social Services.*

*Pamela Newell Williams Attorney for appellee Guardian Ad Litem.*

*Susan J. Hall for guardian-appellee.*

*Richard Croutharmel for respondent-appellant.*

ELMORE, Judge.

Respondent mother (respondent) appeals from a permanency planning review order that awarded guardianship of her children to their maternal grandmother. For the reasons set forth below, we affirm in part and vacate and remand in part.

I.

Respondent and her boyfriend are the parents of G.T., H.T., and C.M. In June 2005, Harnett County Department of Social Services (HCDSS) substantiated reports of neglect due to improper

supervision of two-year-old C.M. HCDSS extended services to respondent and her boyfriend, who were subsequently evicted from their home. In September 2005, HCDSS took nonsecure custody of the children based upon allegations of neglect and dependency.

The trial court adjudicated the children neglected and dependent juveniles on 17 November 2005 based upon the consent of both parents. The trial court transferred the case to Cumberland County for disposition, as the parents were now residents of Cumberland County, and entered a temporary dispositional order awarding Cumberland County Department of Social Services (CCDSS) full custody of the children and allowing supervised visitation. In the meantime, respondent moved in with her mother, Barbara Hall, who lived in Onslow County. Cumberland County District Court held a final disposition hearing in February 2006. The trial court found that the children had been placed in licensed foster homes in Cumberland County and that the maternal grandmother and step-grandfather had requested placement of the children. The trial court ordered a home study of the maternal grandmother and step-grandfather. Respondent was ordered to complete a psychological evaluation, complete a parenting assessment, and submit to random drug testing.

Over the next two years, the trial court held several permanency planning hearings. In its first permanency planning order, the trial court found that the permanent plan was reunification and ordered legal and physical custody to CCDSS with placement in foster care or with the maternal grandmother, whose

home study was approved. By permanency planning review order filed 15 December 2006, the trial court found that the children were currently residing with the maternal grandmother. The trial court further found that while respondent had completed her GED, had employment at a restaurant, and had her own place of residence, return of the children to her would not be in the children's best interest. The trial court found reunification as the permanent plan and allowed unsupervised visits by respondent upon two consecutive negative drug and alcohol screens. The trial court filed another order on 5 February 2007 in which it found that the children were currently residing with the maternal grandmother and step-grandfather; that the placement was going well; that adoption should not be pursued as respondent was making efforts towards reunification; that it was not possible for the children to return home within six months; and that the permanent plan remained reunification.

After conducting a permanency planning hearing on 10 April 2007, the trial court entered an order finding that placement with the maternal grandmother and step-grandfather "[was] going well"; that the children were "appropriately bonded to the maternal grandmother and step-grandfather"; that respondent's unsupervised visits with the children had "gone well"; that respondent had not been able to maintain stable employment; that respondent was not able to take care of the children independently; and that the maternal grandmother was willing to care for the minor children on a long term basis. The trial court adopted "items 1-7 under

Permanency Planning Issues" from the Court Report. The court ordered joint legal and physical custody be with the maternal grandmother and respondent mother, with maternal grandmother having primary custody and respondent mother having secondary custody. Respondent was to have visitation every other weekend. The trial court further ordered "if there are any problems associated with the visitation, a Motion for Review shall be filed." The trial court allowed respondent's attorney to withdraw and ordered CCDSS to close its files.

On 2 August 2007, the maternal grandmother filed a "Motion for Review" to review the April 2007 custody and visitation order. CCDSS was ordered to reopen its files and was allowed time to investigate the maternal grandmother's concerns for the children's safety. The maternal grandmother's Motion for Review was dismissed for failure to state a claim for relief, and the trial court allowed CCDSS time to "prepare an appropriate Motion for Review." On 8 January 2008, CCDSS filed a Motion for Review asserting that CCDSS joined the maternal grandmother in her concern for the children's safety during respondent's unsupervised visitation; that respondent had been arrested in May of 2007 and released in August of 2007; and that respondent had been charged with felony larceny, two counts of making false police reports, two counts of perjury, and two counts of property damages.

A week after CCDSS filed its Motion for Review, respondent filed a Motion for Contempt, alleging that the maternal grandmother had failed to comply with court-ordered visitation. The trial

court ordered the maternal grandmother to show cause as to why she had failed to follow the visitation order. The maternal grandmother requested court-appointed counsel for the contempt matter. The trial court appointed counsel to represent the maternal grandmother and did not limit the representation to the show cause motion. Specifically, the trial court ordered "Susan Hall to represent Barbara Hall on a neglect/dependency/abuse/termination of parental rights petition filed on 1-8-08." The trial court subsequently dismissed the civil contempt proceeding.

The trial court held a hearing upon CCDSS's motion to review the April 2007 custody and visitation order. Susan Hall continued to represent the maternal grandmother at the review hearing. The trial court entered an order on 10 April 2008 and found: (1) respondent had not complied with previous orders; (2) respondent continued to make bad decisions, and while she did comply with the services provided she was unable to implement the suggested behavior; (3) respondent had another baby and that child was removed from respondent's care by another jurisdiction; and (4) respondent had criminal charges filed against her. The trial court concluded that it was in the best interest of the children to be placed in the guardianship of their maternal grandmother and ordered "visitation between the juveniles be in the discretion of the Maternal grandmother." The trial court allowed CCDSS to close the file and for the withdrawal of counsel. From this order, respondent appeals.

II.

Respondent first contends that the trial court failed to make sufficient findings of fact pursuant to North Carolina General Statutes, section 7B-907. Specifically, she contends that the trial court erred because (1) the court failed to find that it would not be possible to return the juvenile to the home within six months and (2) the court failed to address the rights and responsibilities accorded to respondent.

Permanency planning hearings are held for the purpose of "develop[ing] a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2007). A court may designate guardianship as the permanent plan for a juvenile, but the court must comply with N.C. Gen. Stat. § 7B-907(b) by considering the following criteria and making written findings regarding these relevant factors:

(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.

N.C. Gen. Stat. § 7B-907(b) (2007). As this Court has recently held, N.C. Gen. Stat. § 7B-907(b) "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), superceded by statute as stated in *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006)).

In the present case, the trial court found:

6. That the Respondent Mother has not complied with the previous orders of this Court. Her lifestyle remains unstable. She has had another baby and that child has been removed from her care by another jurisdiction. The Respondent Mother continues to make bad decisions, to include [sic] one that led to criminal charges being filed against her.

7. That in an attempt to achieve permanence for the juveniles and considering the best interests of the juveniles, the Court finds that legal and physical custody and Guardianship of the juveniles should be placed with the Maternal Grandmother, Barbara Hall.

8. Return of the juvenile to the Respondents would be contrary to the welfare and best interest of the juveniles.

Although the above findings do not specifically reference a six-month period, the findings demonstrate that return to respondent would not be possible and that awarding legal guardianship of the children to the maternal mother was in their best interest.

However, respondent argues, and CCDSS agrees, that the trial court erred regarding respondent's rights and responsibilities when it made the following visitation decision:

2. That visitation between the juveniles and Respondent Mother shall be at the discretion of the Maternal Grandmother. The Court urges the Maternal Grandmother to do visits on the Onslow County Department of Social Services schedule, and to notify the Respondent Mother as far in advance as possible, in the event that a scheduled visit will have to be canceled.

We agree and therefore remand this case to the trial court to amend the order.

A trial court exercises a judicial function when it awards custody of a child and when it awards visitation rights. *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). These judicial functions may not be delegated to the custodian of a child. *Id.* Here, the trial court gave the children's guardian sole discretion to determine when or if respondent could visit with her children, delegating its judicial power to the guardian.

Accordingly, we vacate that portion of the court's permanency planning order and remand this case to the trial court to issue a



new order on visitation between respondent and G.T., H.T., and C.M. consistent with this opinion and the *Stancil* holding.

III.

Respondent also assigns error to that part of the trial court's order relieving all parties and attorneys of further responsibility.

The general rule is that, following a permanency planning hearing, "[s]ubsequent permanency planning hearings shall be held at least every six months thereafter . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-907(a) (2007). These hearings may be combined with review hearings under N.C. Gen. Stat. § 7B-906. N.C. Gen. Stat. § 7B-907 (2007). The trial court may dispense with these hearings under certain circumstances. Section 7B-906 provides:

[T]he court may waive the holding of review hearings required by subsection (a) of this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months, if the court finds by clear, cogent, and convincing evidence that:

- (1) The juvenile has resided with a relative or has been in the custody of another suitable person for a period of at least one year;
- (2) The placement is stable and continuation of the placement is in the juvenile's best interests;
- (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months;

(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and

(5) The court order has designated the relative or other suitable person as the juvenile's permanent caretaker or guardian of the person.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with G.S. 7B-907 that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

N.C. Gen. Stat. § 7B-906(b) (2007).

As noted above, finding of fact number seven of the trial court's order stated that it was in the best interest of the children to award guardianship to the maternal grandmother. In addition, the trial court's order specifically incorporated its April 2007 findings of fact, which included:

5. That the minor children are currently residing with the maternal grandmother and step-grandfather; placement is going well.

6. The minor children are appropriately bonded to the maternal grandmother and step-grandfather, Mr. and Mrs. Hall.

\* \* \*

8. That the respondent mother is not currently employed. That since the last court date, she has had a few jobs; however she has not been able to maintain stable employment.

9. That the respondent mother has a deep love for her children; however, she is not able at this time to care for her children independently.

10. That the maternal grandmother is willing to care for the minor children on a long term basis.

11. That return of the minor children to the respondents' custody would be contrary to the welfare and best interest of the minor children.

12. That Mrs. Hall is a fit and proper persons [sic] for the care, custody and control of the minor children.

Respondent acknowledges that the court complied with sections 7B-906(b)(1), (2), and (5), but argues that the trial court's order failed to address subsections (3) and (4). We agree.

Here, the trial court did not make a written finding that neither the juveniles' best interests nor the rights of any other party, including respondent, require the continued holding of review hearings every six months under section 7B-906(b)(3). Further, the trial court's orders are devoid of any finding that she was entitled to another review hearing by filing a motion for review under section 7B-906(b)(4). As the trial court's order fails to satisfy the requirements of sections 7B-906(b)(3), and (4), we reverse on this issue and remand the case to the trial court to issue a new order with written findings of fact consistent with this opinion and the requirements of section 7B-906(b).

#### IV.

Finally, respondent contends that the trial court erred when it allowed Susan Hall's representation of the maternal grandmother "to continue over into the Chapter 7B review hearing." Respondent argues that she was prejudiced by the representation because she "convinced the trial court to give [the maternal grandmother]

guardianship of the children and close the case.” Respondent is correct that Chapter 7B does not authorize the trial court to order court-appointed counsel for anyone other than an indigent parent. See N.C. Gen. Stat. § 7B-602 (2007). Under the facts of this case, however, we do not conclude that respondent was prejudiced by the appointment. CCDSS and the guardian ad litem both recommended and argued for awarding guardianship of the children to the maternal grandmother. Further, respondent had not corrected the conditions which led to the removal of the children. In fact, respondent was arrested for arson and had another baby taken from her. Finally, the children are doing well living with the maternal grandmother. Accordingly, we overrule this assignment of error.

Affirmed in part, vacated and remanded in part.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).