NO. COA08-993

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

IN THE MATTER OF: Robeson County
No. 99 JA 330

T.L.

Appeal by respondent father from order entered 16 May 2008 by Judge John B. Carter, Jr., in Robeson County District Court. Heard in the Court of Appeals 15 December 2008.

North Carolina Administrative Office of the Courts, by Associate Legal Counsel Pamela Newell Williams, for appellee guardian ad litem.

Duncan B. McCormick, for respondent-appellant.

CALABRIA, Judge.

Respondent father appeals from an order transferring legal guardianship of T.L. from C.C., one of T.L.'s aunts, to E.B., another aunt. We affirm in part, reverse in part, and remand for additional findings.

T.L. was born in 1994. The Robeson County Department of Social Services ("DSS") first became involved with T.L.'s family in November of 1996, because of her mother's drug abuse. In 1999, after T.L.'s mother was admitted to a residential drug treatment program, she agreed to place two of T.L.'s older siblings with E.B., their aunt, while T.L. and one of her siblings were placed

with non-relatives. In August of 1999, DSS filed a petition alleging that T.L. was neglected, based on her mother's drug abuse.

On 22 September 1999, Judge John B. Carter, Jr., entered a consent order in which he found that T.L. was neglected and ordered guardianship of T.L. be transferred to Harold and Edna Jacobs, who are not related to T.L.. Respondent was identified as T.L.'s biological father in the order. T.L. was four years old at the time. On 19 August 2003, Harold Jacobs filed a motion to have T.L. removed from the home, and in an order entered 14 October 2003, Judge Carter transferred legal guardianship to T.L.'s grandfather, M.B., in an order entered on 14 October 2003. On 3 June 2004, M.B. filed a motion to have T.L. removed from his home. On 1 September 2004, Judge Carter entered an order transferring legal guardianship of T.L. to C.C. and M.C., her aunt and uncle.

In 2005, respondent was convicted of first-degree murder and sentenced to death. Respondent is currently incarcerated in Central Prison.

On 1 February 2008, C.C. moved to relinquish her guardianship of T.L. to E.B. On 20 February 2008, Judge Carter entered an order denying respondent's request to appear at the guardianship hearing, but specifically recognized respondent's right to offer evidence through witness testimony or home study reports. On 3 March 2008, respondent wrote a letter to Judge Carter repeating his request to appear at the hearing. Respondent also wrote that he had "no problem" with E.B.'s guardianship of T.L.. In response, Judge Carter wrote that respondent would not be permitted to attend the

hearing, but that T.L. would be permitted to contact him by letter, and that he would be allowed to attend future court dates if his conviction was overturned.

At the time of the hearing on 16 April 2008, T.L.'s mother was deceased. Respondent was not present, but was represented by counsel. Social worker Tammy Smith testified that T.L. was already living with E.B., and had been for approximately six months. E.B. was willing to care for T.L., and T.L. wanted to continue living with E.B. and her siblings who were in E.B.'s care. Smith was satisfied with E.B.'s home after conducting a home study, but could not recommend placement with E.B. as a guardian because of her criminal record and because Smith was not certain if E.B. allowed anyone other than the children she cared for to live in the home. Smith, however, did not object to transferring guardianship to E.B.

DSS's home study report, prepared by Smith and introduced into evidence during her testimony, indicated that E.B. and three children, two of which were T.L.'s siblings, lived in a four-bedroom, two-bathroom, double-wide mobile home, which was "nicely furnished and well kept." T.L. had her own bedroom in the home. E.B. was unemployed, but received $200.00 per month in child support, $216.00 per month in social security payments, and $634.00 per month in food stamps. E.B.'s monthly house payment was $240.00 and her utilities were $140.00. E.B.'s references all agreed she had no problems with drugs or alcohol within her home, and that they had no concerns about T.L. staying in the home.

Respondent's counsel told the trial court that respondent had sent her a letter on 10 April 2008, in which he informed her that he "wishes to remain a part of [T.L.'s] life." Counsel also told the trial court that E.B. was not opposed to respondent contacting T.L. through letters.

E.B. signed a certification that she would assume guardianship of T.L.. E.B. agreed "to the best of my knowledge and belief that all-medical care, and other issues related to the named juvenile that all needs will be handled to the best of my ability without the assistance of [DSS] . . . This document releases [DSS] from all responsibility related to the case mentioned on this date. All responsibility of the juvenile is given to the Guardian mentioned above."

In an order entered 16 May 2008, Judge Carter found that E.B. was able to provide for the "care, custody, and control" of T.L., and able "to accept and provide for the legal guardianship" of T.L.. Judge Carter also found that it was in T.L.'s best interests for guardianship to be transferred to E.B. Judge Carter incorporated by reference the home study report and the guardian ad litem report.

First, we address respondent's contention that the trial court erred when it transferred guardianship to E.B. without verifying that E.B. had adequate resources to care for T.L. or that E.B. understood the legal consequences of guardianship. We disagree.

A court may appoint a guardian for a minor child when it finds doing so is in the minor child's best interests. N.C. Gen. Stat.

§ 7B-600 (2008). "If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c). The statute does not require the court to "make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73, *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007).

Here, DSS's home study report, incorporated into the trial court's order transferring guardianship to E.B., showed that E.B. had a four-bedroom home and that T.L. had her own bedroom in that home. The home was "nicely furnished and well kept." Further, E.B.'s parents, brother, and sister all lived nearby, and were available to support E.B. Although E.B. was unemployed, she received child support, social security payments, and food stamps. All of E.B.'s references believed that E.B. would be able to care for T.L.. In addition, social worker Tammy Smith testified that E.B. was willing to care for T.L., and had been caring for T.L. for more than six months by the time of the hearing, without incident.

E.B. signed a certification that she agreed to provide for T.L.'s needs to the best of her abilities and released DSS from any further responsibility for T.L.. During the hearing, E.B. also requested that the trial court make her T.L.'s guardian. Thus, we find that the trial court sufficiently verified that E.B. had adequate resources to care for T.L., and that E.B. understood the

consequences of becoming T.L.'s legal guardian. This assignment of error is overruled.

Next, respondent contends that the trial court erred when it released DSS and the guardian ad litem from "further responsibility" in this case. We agree.

"In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." N.C. Gen. Stat. § 7B-906(a)(2008). The trial court may dispense with review hearings only if it finds by clear, cogent, and convincing evidence:

> (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.

N.C. Gen. Stat. § 7B-906(b)(2008). "[T]he trial court must make written findings of fact satisfying each of the enumerated criteria in section 7B-906(b)." *In re L.B.*, 184 N.C. App. 442, 447, 646

S.E.2d 411, 414 (2007); *See also*, *In re R.A.H.*, 182 N.C. App. 52, 61, 641 S.E.2d 404, 409 (2007). .

Here, the trial court failed to make any written findings related to factors one, three, and four listed in N.C. Gen. Stat. § 7B-906(b). It is also not apparent from the trial court's order that it considered all of the factors. Even after incorporating the home study and guardian ad litem reports, the trial court's order addressed only factors two and five: that the placement with one of T.L.'s relatives as her new guardian was stable and in T.L.'s best interests, and that the trial court had designated E.B. as T.L.'s new guardian. In fact, the home study report and the testimony at the hearing indicates that T.L. lived with E.B. for only six months, not a year, which precludes a finding of factor number one. Accordingly, because the evidence could not support a finding that T.L. resided with E.B. for more than one year, we vacate the portion of the trial court's order releasing DSS and the guardian ad litem from further responsibility.

Next, we address respondent's contention that the trial court abused its discretion when it failed to provide a visitation plan for respondent. We agree.

"Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905(c)(2008). "[I]n the absence

of findings that a parent has forfeited her right to visitation or that it is in the child's best interest to deny visitation, 'the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised.'" *In re C.P.*, 181 N.C. App. 698, 706, 641 S.E.2d 13, 18 (2007)(quoting *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Here, the trial court's order does not contain any findings relating to visitation. In spite of the fact that he is currently incarcerated, there is no evidence in the record that respondent's visitation rights were previously terminated or that he was found to have forfeited those rights. Through counsel, respondent expressed an interest in remaining in contact with T.L.. By failing to make a finding about respondent's visitation rights, it appears the trial court gave T.L's guardian discretion to determine whether or not T.L. would visit respondent. This is an impermissible delegation of the court's authority under N.C. Gen. Stat. § 7B-905. Accordingly, we remand to the trial court for appropriate findings concerning whether visitation is consistent with T.L.'s best interests in this case.

Finally, we address respondent's contention that the trial court abused its discretion by denying his request to attend the hearing. We disagree.

Respondent's argument rests on his interpretation of N.C. Gen. Stat. § 7B-901, which provides that, "juvenile and the juvenile's

parent, guardian, or custodian shall have the right to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-901 (2008).

Here, Judge Carter's order specifically provides respondent with the opportunity to present witness testimony and home study reports at the hearing, as required by N.C. Gen. Stat. § 7B-901. Respondent's attorney was present and advocated for his interests. Respondent cites no authority to support his contention that the statute also provides him the right to be present for dispositional hearings, nor can we find any such authority. Accordingly, this assignment of error is overruled.

Affirmed in part, vacated in part, and remanded for further findings.

Judges WYNN and BRYANT concur.

Reported per Rule 30(e).