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NO. COA09-319

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

IN RE:

T.M.S., J.M., Z.S. T.S., S.S., T.M., D.M. and R.M.	Harnett County Nos. 07 J 13-19, & 139

Appeal by respondent from order entered 21 November 2008 by Judge Resson O. Faircloth, District Court, Harnett County. Heard in the Court of Appeals 20 July 2009.

E. Marshall Woodall and Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Pamela Newell Williams, for guardian ad litem.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellant.

WYNN, Judge.

Respondent mother appeals from a 21 November 2008 permanency planning order, arguing the trial court erred by failing to consider the testimony of the juveniles' maternal grandmother, adopting and basing its order on guardian *ad litem* and social services reports, and making conclusions about the best interest of the juveniles that are not supported by the evidence. On review of the permanency planning order, we dismiss Respondent's appeal as to

T.M.S., Z.S., T.S., S.S., and R.M., and affirm as to J.M., T.M., and D.M.[1]

The record on appeal tends to show that on 23 January 2007, Respondent took T.M.S. to the hospital. T.M.S. was comatose as a result of "[a] profoundly high ingestion of sodium"; had an untreated broken right arm; and had approximately fifty markings on her body, including multiple burns, welts, and other scars, and a bite mark on one of her hands "resembling a human bite mark." Hospital staff cut T.M.S.'s hair to remove numerous knots, and blood testing revealed that she was malnourished.

At the hospital, Detective Regina Autry observed T.M.S. and her siblings, and interviewed Respondent. She noted that T.M.S.'s eyes were swollen, her hair was matted, and the skin around her lips was peeling away. Respondent revealed that T.M.S. had lived with another family approximately thirty days prior to the incident; when T.M.S. returned home, she had been disciplined for "talking ugly" and having "bathroom accidents"; Respondent had hit T.M.S. in the mouth; T.M.S. had sustained black eyes; and the other children hurt T.M.S.

Search warrants issued for Respondent's home revealed that the home was in an "unsanitary and filthy condition" with large piles of clothes littering the floor and old food and bugs in the kitchen. Respondent was criminally charged and convicted of felony

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[1] We note that in a separate appeal, COA09-372, Respondent challenges the 8 January 2009 order terminating her parental rights to five of the juveniles, T.M.S., Z.S., T.S., S.S., and R.M. We address those arguments in a companion opinion filed today.

child abuse inflicting serious injury. She is currently serving a ten- to thirteen-year sentence of imprisonment.

On 25 January 2007, the Harnett County Department of Social Services (DSS) filed petitions, alleging that T.M.S. was abused, and that she and her siblings, S.S., T.S., Z.S., J.M., and D.M., were neglected. On 17 July 2007, DSS filed a petition alleging that R.M., born while Respondent was incarcerated, was neglected and dependent. The adjudication hearings were held 17 August and 12 October 2007, and on 18 January 2008, the district court entered an order adjudicating T.M.S. abused and neglected, R.M. dependent, and the remaining juveniles neglected. In the disposition order, the district court awarded custody of the juveniles to DSS and ordered DSS to make inquiries about placement. Respondent appealed from the adjudication and disposition order, and this Court affirmed the order in an opinion filed 19 August 2008.

On 28 January 2008, DSS filed a motion to terminate Respondent's parental rights to T.M.S., Z.S., T.S., S.S., and R.M. The district court entered permanency planning orders on 29 April and 9 May 2008, determining that the plans for T.M.S., R.M., S.S., Z.S., and T.S. be adoption, and the plans for T.M., J.M., and D.M. be relative placement. Later, the court entered a permanency planning order on 21 November 2008, awarding custody of J.M., T.M., and D.M. to their respective fathers and continuing the permanent plan of adoption for the other five juveniles. Respondent filed a notice of appeal from the 21 November permanency planning order on 22 December 2008.

On appeal, Respondent argues that the trial court erred by adopting the guardian *ad litem* and DSS reports as findings of fact and basing its order on those findings, failing to consider testimony by the juveniles' maternal grandmother, and making conclusions about the best interest of the children that are not supported by the evidence. We dismiss these arguments as to the five juveniles subject to the termination of parental rights order, and affirm the permanency planning order as to the remaining three juveniles.

I.

Regarding Respondent's appeal from the permanency planning order for T.M.S., R.M., S.S., Z.S., and T.S., this Court's opinion in *In re V.L.B.* is instructive. 164 N.C. App. 743, 596 S.E.2d 896 (2004). In *In re V.L.B.*, a respondent mother appealed from a permanency planning order followed by an order terminating her parental rights. This Court dismissed the mother's appeal as moot because the subsequent termination order was based on section 7B-1111(a)(9), and did not rely on the permanency planning order which was the subject of her appeal. *Id.* at 745, 596 S.E.2d at 897. Specifically, this Court held:

> Indeed, the court, after hearing the testimony of witnesses and admitting the entire 'court file' into evidence, made independent findings and conclusions that do not rely on the permanency planning order. In the present case, like [*In re Stratton*, 159 N.C. App. 461, 463, 583 S.E.2d 323, 324, *appeal dismissed and disc. review denied*, 357 N.C. 506, 588 S.E.2d 472 (2003)], any findings in the permanency planning order that are also in the [Termination of Parental Rights] order are superceded by the latter.

Id. at 745, 596 S.E.2d at 897.

Here, as in *In re V.L.B.*, the order terminating Respondent's parental rights to T.M.S., Z.S., T.S., S.S., and R.M. was based upon N.C. Gen. Stat. § 7B-1111(a)(1) and -1111(a)(2) (2007), and did not rely on the permanency planning order. At the termination of parental rights hearing, the trial court heard testimony and "made independent findings and conclusions that do not rely on the permanency planning order." *In re V.L.B.*, 164 N.C. App. at 745, 596 S.E.2d at 897. Accordingly, we dismiss as moot Respondent's appeal from the permanency planning order as to the five juveniles subject to the termination order.

II.

Regarding T.M., J.M., and D.M., Respondent argues the trial court erred by failing to consider the testimony of Respondent's mother, adopting reports by the guardian *ad litem* and DSS as the basis for its order, and making conclusions contrary to the best interest of the juveniles. We disagree.

At a permanency planning hearing, "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-907(b) (2007). Such evidence may include "written reports and materials" submitted in connection with the hearing. *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003) (citation omitted). The court may incorporate the reports into its findings but may not simply recite

the allegations set forth by DSS or guardian *ad litem* nor may the report be the sole basis of the trial court's findings of fact. *In re D.L.*, 166 N.C. App. 574, 583, 603 S.E.2d 376, 382 (2004) (adoption of DSS written summary insufficient); *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (adoption of DSS and GAL reports and single evidentiary fact insufficient).

Here, the trial court considered and made findings of fact based on the DSS and guardian *ad litem* reports, but also articulated numerous independent findings of fact addressing the criteria set forth in N.C. Gen. Stat. §§ 7B-907 and -507 (2007). Specifically, the trial court found that the juveniles were adjusting well to their placements; reunification efforts with Respondent ceased on 12 October 2007 and there was no evidence to support a return of the children to the mother; Respondent "plead guilty to felony child abuse and is currently serving 10-13 years" in a correctional facility; and DSS "made reasonable efforts in formulating permanent plans for the juveniles and in attempting to prevent the continued need for placement of these children in foster care."

Further, section 7B-907 requires the trial court to consider evidence and make findings where it finds the evidence to be "relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition" and make written findings "whether legal guardianship or custody with a relative or some other suitable person should be established[.]" N.C. Gen. Stat. § 7B-907(b). However, a court is not required to make

specific findings of fact regarding the testimony of any particular witness but rather only "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).

Here, contrary to Respondent's contention, the trial court made the following finding of fact regarding the juveniles' maternal grandmother:

> e. At the court's permanency planning hearing on November 30, 2007, the court directed that the maternal grandmother . . . not be considered for placement of the juveniles herein. The court, at that session of court made the following finding: ". . . the maternal grandmother has expressed an interest in the placement of all the children with her. She did live in Arizona; when these proceedings were filed, she quit her job there and returned to NC. She now lives in Bunnlevel, NC. Recently, she suffered a minor stroke which has left her temporarily debilitated to the point that she lost her job. There is concern about her health and her financial ability to care for the juveniles. Previously, [she] has refused to believe the serious nature of the injuries to juvenile T[.S.] stating further that "T[.S.] can tell a story". [She] violated the court's order that provided only supervised visits. DSS and the GAL recommend against placement of any of the juveniles with the maternal grandmother."

This finding demonstrates that the court considered juveniles' maternal grandmother as a placement for the juveniles as required by section 7B-907(b). Accordingly, we find no error.

Finally, Respondent argues the trial court's conclusion that it was in the best interest of the juveniles D.M., J.M., and T.M. to be in the custody of their respective fathers was not supported by competent evidence or sufficient findings of fact. "Appellate

review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings [of fact] and the findings [of fact] support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). Further, findings supported by competent evidence are binding on appeal, "even if there is evidence which would support a finding to the contrary." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (citation omitted).

Here, the trial court made the following findings of fact, supported by the DSS and guardian *ad litem* reports:

> b. . . . Juvenile T[.]M[.] is currently placed with his father . . . ; he has adjusted well to the placement.
>
> . . .
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> f. Juvenile T[.]M[.]'s placement with his father should continue as the juvenile's permanent plan. Custody of the juvenile should be awarded to his father.
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> g. Juvenile J[.]M[.]'s placement in the home of his parental grandparents since March 30, 2007 has been successful. The father lived near the grandparents but was not able to take the care and custody of the juvenile. He requested that the grandparents be allowed to keep the child in their home. The grandparents agreed to keep the child and the court has previously determined that they had the means and desire to care for the juvenile. Unsupervised visits by the father with the juvenile were allowed. The juvenile's father has had the primary responsibility for the juvenile by paying support and visiting regularly with the child. He is now able to take the juvenile into his home. The permanent plan for this juvenile should be custody with his father.
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> h. Juvenile D[.]M[.] is currently in a group home . . . This placement is his sixth; DSS

> reports that he has adjusted well and is doing well in school. The father desires for his son to be returned to his custody. The juvenile wants to return to his father's home. He is now 16 years of age and has made progress. It would be in his best interest for his custody to be returned to his father.

Because we find that the trial court's findings of fact are supported by competent evidence, and that these findings support the conclusion that it is in the best interest for the juveniles' permanent plan to be custody with their respective fathers, we affirm the trial court's permanency planning order as to juveniles T.M., J.M., and D.M.

In sum, we dismiss Respondent's appeal from the permanency planning order as to T.M.S., Z.S., T.S., S.S., and R.M., and affirm the permanency planning order as to T.M., J.M., and D.M.

Dismissed in part; affirmed in part.

Judges BRYANT and STEELMAN concur.

Reported per Rule 30(e).