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NO. COA09-580

NORTH CAROLINA COURT OF APPEALS

Filed: 20 October 2009

IN THE MATTER OF:

J.K.B.,
Minor Child.

Buncombe County
No. 07 J 388

Appeal by respondent-mother from an order entered 7 November 2008 by Judge Marvin P. Pope, Jr., in Buncombe County District Court. Heard in the Court of Appeals 14 September 2009.

Matthew J. Putnam for Buncombe County Department of Social Services petitioner-appellee.

Michael N. Tousey for Alice Schmitz guardian ad litem.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-mother appellant.

HUNTER, JR., Robert N., Judge.

Respondent-mother ("respondent") appeals from the trial court's review order giving custody of the minor child to the Buncombe County Department of Social Services ("DSS") and changing the permanent plan to guardianship with an approved caretaker and/or reunification. We dismiss one issue, remand to the trial court to address visitation, and otherwise affirm the order of the trial court.

I. Background

J.K.B. was born in June 1993. In 1996, a report that J.K.B. had been sexually abused by her father was made to the Dare County Department of Social Services where the family was then living. This report was "unsubstantiated." In the course of the Dare County Department of Social Services' investigation, the following concerns arose regarding respondent's mental health. Respondent contacted law enforcement on a regular basis giving elaborate accounts of satanic worship involving animal sacrifice and the murder of children occurring in the woods near her home. Respondent provided law enforcement with an audio recording in which respondent questioned the juvenile about these events. There was no evidence to support respondent's claims. Thereafter, respondent and juvenile moved from Dare County and relocated numerous times.

Buncombe County Department of Social Services ("DSS") became involved with this family in late 2006 when a report was made alleging that respondent had hit J.K.B., who was then thirteen years old. At that time the juvenile told investigators that she fabricated the allegation to get back at her mother. The case was closed and family assistance services were recommended. In February 2007, DSS received a report regarding behavioral problems the juvenile was having at school which had resulted in a series of suspensions. A Child and Family Team at DSS was created to work with the family.

In April 2007, a diagnostic assessment of respondent was completed. Respondent was diagnosed with delusional disorder and

Munchausen by Proxy, a form of child abuse in which a care giver exaggerates, fabricates or induces illness in a child in order to gain some form of attention for the perpetrator. Respondent had reported the juvenile as having numerous health issues including seizures and heart problems resulting in numerous tests for the juvenile; no medical problems were discovered. The doctor who assessed respondent expressed concerns regarding respondent's ability to provide accurate information about the juvenile's treatment, and recommended DSS keep the case open to monitor the juvenile's safety.

On 2 May 2007, the juvenile, then thirteen years old, jumped from the back of a moving bus with a boy and took off running. When a police officer arrived, the juvenile fought with the officer. Respondent went to the scene and insisted that the child was diabetic and that low blood sugar caused her to become agitated, even though she had never been diagnosed as a diabetic. DSS opened an in-home case on 10 May 2007.

On 25 May 2007, respondent signed an In Home Family Services Agreement, agreeing to follow numerous recommendations, including:

- (1) follow the juvenile's mental and emotional health treatment plans;
- (2) administer the juvenile's medications consistently;
- (3) schedule mental health appointments for the juvenile at appropriate times outside school hours;
- (4) comply with respondent's own mental health treatment plans and medication schedule;
- (5) refrain from discussing past abuse allegations with the juvenile outside a clinical setting;
- (6) provide basic needs for the family such as

housing, food, and clothing; and (7) seek assistance for obtaining employment and financial assistance as needed. On 23 July 2007, respondent agreed to place the juvenile in the day treatment program at Eliada Homes ("Eliada"), a level III residential treatment facility which serves high risk students with a history of emotional and/or behavioral problems who are in need of residential treatment. During the time the juvenile continued to act out, this behavior included: running away from respondent's home twice while visiting respondent, stealing respondent's car once, getting into "a scuffle" with police, and informing a neighbor that she was seeking a sperm donor in order to get pregnant. The juvenile also told a caseworker at Eliada that she was using alcohol and drugs. On 17 October 2007, respondent placed the juvenile in the residential program of Eliada full-time.

While visiting the juvenile, respondent did not comply with Eliada's rules. She showed up to Eliada unannounced, allowed the juvenile to use her cell phone causing a "run risk," and did not participate meaningfully in counseling sessions. When a Child and Family Team meeting was held in November 2007, respondent was argumentative and told the team members that the juvenile had "to let her hair down once in a while." On 23 July 2007, the juvenile began mental health treatment with a psychiatrist at Eliada Homes; however, in December 2007, respondent attempted to change the juvenile's psychiatrist to someone outside of Eliada, stating that she wanted a doctor that would listen to her. Also in December 2007, when the juvenile returned to Eliada after visiting

respondent's home on a pass, J.K.B.'s behavior escalated to the point where she needed physical restraints. While being restrained, the juvenile attempted to break out of the bathroom by punching out the bathroom window screen. At this time, the juvenile also indicated that she intended to commit suicide and had a plan to do so. Moreover, J.K.B. stated that she had previously attempted suicide after respondent told the juvenile she did not love her anymore. DSS decided that all contact between respondent and the juvenile would be supervised. Respondent continued to act inappropriately, including talking with the juvenile about past abuse allegations outside of a clinical setting.

DSS filed a juvenile petition alleging neglect of the minor child, then fourteen years old, on 14 February 2008. A guardian *ad litem* was appointed for respondent. Respondent stipulated to the findings underlying the petition, and on 3 April 2008 the trial court adjudicated the juvenile neglected. DSS did not obtain nonsecure custody of the juvenile; rather, respondent voluntarily placed the juvenile at Eliada Homes.

The first review hearing was held on 5 June 2008. The trial court found that, although the juvenile was making progress at Eliada, she continued her attempts to become pregnant in an effort to find unconditional love. The court found that the juvenile had become sexually active at the age of twelve and has had sexual intercourse with about five partners. The juvenile told the court that she uses protection and is on birth control. The Child and Family Team expressed concerns about respondent's supervision of

the juvenile while off campus. The court stated its concern "about the minor child's desire to get pregnant and . . . about the respondent mother being able to stand up to the minor child and not give in to the minor child." The court ordered that the permanent plan was reunification, and ordered respondent to continue to comply with all recommendations regarding mental health treatment for the juvenile, as well as continuing with her own case management.

Another review hearing was held on 3 July 2008. Despite the juvenile's attendance in court-ordered classes on teen sexual awareness and teen pregnancy, the court found that "[t]he minor child still does not seem to believe that getting pregnant is a big deal." The court found that respondent was making progress, but by her own admission she still needed help to get ready to have the juvenile returned to her home. There was an incident of respondent creating paranoia in the juvenile by telling the juvenile a "crazy man" had stolen respondent's car and that this person might try to harm or kill respondent and the juvenile. Further, respondent did not fully comply with Eliada's rules by bringing the juvenile back to Eliada late, and by allowing the juvenile to bring a cell phone back to Eliada against the rules. Respondent and the juvenile sought from Eliada a visitation pass intending to violate the previously agreed upon safety restrictions, including prohibiting the use of cell phones, unsupervised computer access, and contact with boyfriends. An assessment by Access Family Services noted "significant supervision concerns and behaviors exhibited at pre-

reunification visits" and recommended that intensive in-home services were not appropriate yet. The court adopted the recommendations of DSS and the juvenile's guardian *ad litem* that the juvenile should have a "step down" placement into therapeutic foster care as a transition before returning to respondent's home, and that respondent should participate in shared parenting to that end.

The next review hearing was held on 24 September 2008. The evidence presented to the trial court consisted of: (1) a report submitted by DSS; (2) a report submitted by the juvenile's guardian *ad litem* ("GAL"); (3) a letter from the juvenile addressed to DSS and the GAL; (4) a report from Eliada Homes; (5) a letter from the juvenile's therapist, Tina Hazelman; and (6) a psychiatric evaluation of respondent by Dr. Michael S. Grandis. In its report, DSS related that the juvenile admitted having unprotected sex while at respondent's home on an off-campus pass on 3 August 2008, and that her mother had given her permission to do so. Respondent allowed the juvenile's eighteen-year-old boyfriend to live at her house for an unspecified amount of time, and kept this information from staff at Eliada. Respondent told DSS that she kept certain information from DSS and Eliada so as to prevent the juvenile from getting into trouble. The juvenile indicated to staff at Eliada her intent to get pregnant so that she would not feel empty inside, that respondent supports her intent, and that she and respondent want to raise the child together and had picked out names. DSS indicated several risk factors for the juvenile, stated its

concerns about respondent's cooperation with the juvenile's mental health treatment as well as lack of supervision/structure, and requested that custody of the juvenile be placed with DSS. DSS stated that reunification should remain as the permanent plan.

The GAL's report noted the juvenile's wish to be placed in a foster home so that she can return to public school and eventually be reunified with respondent. The GAL stated her own commitment to reaching the goal of reunification, but also gave her concerns regarding respondent's inconsistent behavior and uneven progress toward correcting the conditions that led to DSS's involvement. She recommended that the juvenile remain at Eliada Homes until her treatment is satisfactorily completed, that the juvenile continue with individual therapy, that respondent continue with her case plan, and that visitation be supervised and evaluated on a regular basis.

A report from Eliada Homes dated 20 August 2008 related the 3 August 2008 incident of sexual intercourse between the juvenile and her boyfriend at respondent's home, and noted that the boyfriend stated that respondent, as well as the juvenile, wanted the juvenile to get pregnant. The report states that the juvenile had been regressing for the previous two weeks, she did not want to talk with anyone, and she was not focused on working on her issues in therapy. The juvenile met with a prospective foster mother, but it was not a "fit." Another meeting was postponed upon news of the juvenile's promiscuity, and therapeutic foster care was on hold until the juvenile's behavior stabilized.

Therapist Tina Hazelman submitted a letter to DSS dated 15 September 2008 in which she stated that due to respondent's inappropriate behavior in family counseling sessions, the therapist suspended family therapy in December 2007. She opined that contact with respondent was causing "severe instability" with the juvenile, and respondent was too erratic to continue with therapy. Ms. Hazelman stated her belief that a foster home would not be appropriate for the juvenile, and supported DSS's recommendation that it take custody of the juvenile, in part because of respondent's repeated poor judgment and decision-making. The juvenile wrote a letter to the court seeking to "step down" from Eliada Homes to therapeutic foster care, in the hopes of eventually being reunited with her mother.

The trial court signed an immediate non-secure custody order the day of the hearing granting custody to DSS. The court noted the juvenile's intent to become pregnant, and found "[t]he minor child's promiscuous behavior is very concerning to the court." The court also considered DSS's assertion that Eliada has concerns about respondent's disruption of the juvenile's treatment, and that Eliada has the right to refuse treatment to the juvenile due to respondent's behavior. The court specifically found Eliada's reports to be credible, and that respondent "has had ample opportunity and time to cooperate with the minor child's treatment." Based on its findings, the trial court determined that custody of the juvenile should be given to DSS, and changed the permanent plan from family permanency to guardianship with a court

approved caretaker, with a concurrent plan of reunification. Despite the concurrent plan, the trial court also determined that DSS had made reasonable efforts to prevent the removal of the child from the home, but that reunification efforts were futile, and ordered DSS to cease reunification efforts. The trial court stated that visitation would be supervised by DSS. The order from this hearing was entered on 7 November 2008. From the order entered, respondent appeals.

II. Issues on Appeal

A. Lack of Visitation Plan

Respondent first argues that the trial court erred by failing to establish an appropriate visitation plan in its review order pursuant to N.C. Gen. Stat. § 7B-906 (2007). We agree.

Sections 7B-905(c) and 7B-906(c) (6) require the trial court to specify "an appropriate visitation plan" when the juvenile is removed from the parent's custody and at later review hearings. Pursuant to section 7B-905(c), if the juvenile is placed in the custody of a county department of social services, the court may direct the department to "arrange, facilitate, and supervise a visitation plan expressly approved by the court." N.C. Gen. Stat. § 7B-905(c) (2007). The director of the department has some discretion to temporarily suspend visitation, but only upon "a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety." *Id.* "In the absence of findings that the parent has forfeited their 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 E.C.*, 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Here, the trial court failed to include an appropriate visitation plan in its order. The court made the following limited finding about visitation:

30. . . . The respondent mother's visitation with the minor child will remain supervised by the Department and the minor child will remain at Eliada.

The court stated in the decretal portion of the order that "visitation with the minor child shall be supervised by the Buncombe County Department of Social Services, until further order of the court." Pursuant to section 7B-906 and *In re E.C.*, these statements are insufficient to establish a proper visitation plan. We therefore remand to the trial court for additional proceedings to address the issue of supervised visitation consistent with this opinion.

B. Order of Nonsecure Custody

Respondent next argues that the trial court erred in giving DSS nonsecure custody of the juvenile. Respondent contends that although the trial court had the authority to place the juvenile in the custody of DSS, nonsecure custody is a "special and distinct" remedy not available in a review hearing, particularly since the requirements of N.C. Gen. Stat. § 7B-503 have not been met.

The guardian *ad litem* notes that respondent's notice of appeal does not reference the nonsecure custody order, which was entered on 30 September 2008, and that the issue is not reviewable by this Court. We agree that the nonsecure custody order is not properly before us, albeit for a different reason.

Section 7B-1001 prescribes which orders may be appealed in juvenile cases. Subsection (a)(4) allows for appeal from "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile." N.C. Gen. Stat. § 7B-1001(a)(4)(2007). Nonsecure custody orders are excluded from the categories of orders from which a respondent may appeal. See *In re A.T.*, 191 N.C. App. 372, 375, 662 S.E.2d 917, 918-19 (2008). Thus, respondent has no right of appeal from the trial court's nonsecure custody order. Nevertheless, we feel compelled to note that respondent concedes the trial court had authority to grant custody of the juvenile to DSS pursuant to N.C. Gen. Stat. § 7B-903(a)(2)(c) (2007). Therefore, even without the nonsecure custody order, the trial court properly granted custody of J.K.B. to DSS in the review order filed 7 November 2008. This assignment of error is dismissed.

C. Abuse of Discretion

By respondent's last argument, she asserts the trial court abused its discretion in removing custody of the juvenile from respondent and in ordering that DSS may cease reunification efforts. She argues that these actions are not in the best interests of the juvenile, and she challenges several findings of

fact and conclusions of law as being unsupported by the evidence and/or findings of fact. We do not agree.

In analyzing a review order on appeal, we must "determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). A dispositional order must be based on the best interests of the child and the dispositional alternatives are left within the discretion of the trial court, which are not reversible absent an abuse of discretion. N.C. Gen. Stat. § 7B-903 (2007); *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). "'An abuse of discretion occurs when the trial court's ruling "is so arbitrary that it could not have been the result of a reasoned decision.'" *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations omitted). Further, a court may order the cessation of reunification efforts upon finding that "[s]uch 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." N.C. Gen. Stat. § 7B-507(b)(1) (2007).

Respondent challenges the following findings of fact made by the trial court regarding the best interest of the juvenile:

30. It is in the best interest of the minor child that the court adopts the

recommendations of the Department and the GAL with the addition that the Department is relieved of reunification efforts with the respondent mother, and the permanent plan for the minor child is changed from family permanency to guardianship with a court approved caretaker with a concurrent plan of reunification. The respondent mother's visitation with the minor child will remain supervised by the Department and the minor child will remain placed at Eliada.

31. It is in the best interest of the minor child that she is placed in the custody of the Buncombe County Department of Social Services with placement in the discretion of the Department to provide or arrange for foster care or other placement, and with the authority to authorize necessary medical, dental, psychological and psychiatric services for the minor child. A Non-Secure Custody Order was entered on this date by the court.

32. The minor child's placement and care are now the responsibility of the Buncombe County Department of Social Services, and the Department is to provide for foster care or other placement for the minor child.

33. The best plan to achieve a safe, permanent home for the minor child within a reasonable period of time is hereby changed from family permanency and reunification to guardianship with a court approved caretaker with a concurrent plan of reunification.

. . . .

35. Pursuant to N.C.G.S. § 7B-507, the Buncombe County Department of Social Services made reasonable efforts to prevent removal of the minor child from the home, the Buncombe County Department of Social Services worked with the respondent mother to provide services to ensure that the respondent mother's home is a safe and appropriate home, and the Buncombe County Department of Social Services has made reasonable efforts to end further state involvement with the family.

36. It is not possible for the minor child to be returned to the respondent mother's care

and custody within the next six months, as the respondent mother has not made significant progress or efforts to comply with court order and reduce the risk to the minor child. Efforts towards reunification with the respondent mother would clearly be futile and would not be in the best interest of the minor child.

37. The conditions that led to the Department's involvement with this family and no custody of the minor child to the Buncombe County Department of Social Services and removal from the home continue to exist, and the return of the minor child to the home would be contrary to the welfare of the minor child.

Respondent challenges these findings as being unsupported by competent evidence. She also challenges the trial court's conclusions of law numbered 2 through 10, which state:

2. That it is in the best interest of the minor child that the court adopts the recommendations of the Department and the minor child's guardian ad litem, as specified and as modified above.

3. That pursuant to N.C.G.S. § 7B-507, the Buncombe County Department of Social Services made reasonable efforts to prevent removal of the minor child from the home, to reunify this family, and to implement a permanent plan for the minor child; however, out of home and kinship placement for the minor child was necessary to protect the safety and health of the minor child, and the Department continues to make reasonable efforts to assist the respondent mother in correcting the conditions that led to the minor child being placed in kinship care.

4. That it is in the best interest of the minor child that she be placed in the custody of the Buncombe County Department of Social Services with placement in the discretion of the Department to provide or arrange for foster care or other placement, and with the authority to authorize necessary medical,

dental, psychological and psychiatric services for the minor child.

5. That the minor child's placement and care should be the responsibility of the Buncombe County Department of Social Services, and the Department should provide for foster care or other placement for the minor child.

6. That the best plan to achieve a safe, permanent home for the minor child within a reasonable period of time is hereby changed from family permanency and reunification to guardianship with a court approved caretaker with a concurrent plan of reunification.

7. That the Buncombe County Department of Social Services should make reasonable efforts to place the minor child in accordance with the permanent plan specified above, should make efforts to achieve the permanent plan specified above, and the Department should document those actions in the minor child's case plan.

8. That the conditions that led to the Department's involvement with this family and now custody of the minor child to the Buncombe County Department of Social Services and removal from the home continue to exist, and the return of the minor child to the home would be contrary to the welfare of the minor child.

9. That it is not possible for the minor child to be returned to the respondent mother's care and custody within the next six months, as the respondent mother has not made significant progress or efforts to comply with court order and reduce the risk to the minor child.

10. That pursuant to N.C.G.S. § 7B-507(b), the Department should be relieved of making any further efforts towards reunification with the respondent mother. That efforts towards reunification with the respondent mother would clearly be futile and would not be in the best interest of the minor child.

Respondent contends that the court did not have to take custody away from her, since the juvenile was placed at Eliada Homes. She points out that neither DSS nor the GAL requested an order ceasing reunification efforts and both seemed to recognize that the family needed more assistance in order to be able to successfully reunify. Respondent contends that neither changing legal custody nor ceasing reunification efforts is in the juvenile's best interests.

In addition to the findings challenged by respondent listed above, the trial court made numerous other findings of fact, undisputed by respondent, which contain the following information: (1) respondent failed to properly supervise the juvenile when the juvenile visited her on off-campus passes; (2) respondent made poor decisions by allowing the juvenile's boyfriend to stay at her house and by keeping that information from Eliada; (3) the juvenile stated respondent supported the juvenile's wish to get pregnant; (4) the juvenile wants a baby because she "feels empty inside"; (5) the juvenile's psychological evaluation recommends that she have a structured and stable environment after completing the Eliada program; (6) DSS and the Child and Family Team have concerns about respondent's ability to provide a stable environment; and (7) respondent has not maintained a united front with Eliada for support of the juvenile's treatment. These findings, unchallenged by respondent, are deemed supported by competent evidence, and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991); *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). Further, these findings, along with the

reports by DSS, the GAL, Eliada, and the letter from the therapist all provide sufficient evidence to support the challenged findings regarding the juvenile's best interests.

With regard to the conclusions of law changing custody and the permanent plan, we are not persuaded that the trial court abused its discretion by fashioning a disposition intended to prevent further harm to the juvenile, particularly in light of the poor choices made by respondent and respondent's diagnosis of Munchausen by Proxy which are jeopardizing the juvenile's health. Despite respondent's impassioned argument regarding the bond she and the juvenile share, we find the trial court's findings are more than sufficient to support its conclusions. The findings show that respondent damaged the juvenile in making inappropriate decisions when supervising the juvenile; she repeatedly undermined the juvenile's therapeutic progress whether intended or not; the juvenile continued to act out as well as to insist on her intent to become pregnant; and respondent imperiled the juvenile's placement at Eliada Homes by failure to comply with the facility's rules. These findings support the decision of the trial court to grant custody to DSS and to change the permanent plan to guardianship with a caretaker concurrent with reunification. Moreover, the trial court's determination that "efforts towards reunification with the respondent mother would clearly be futile and would not be in the best interest of the minor child" is supported by the findings of fact, and is sufficient to satisfy section 7B-507(b)(1) in ceasing reunification. Therefore, we find that the trial court

did not abuse its discretion in granting custody of the juvenile to DSS, nor in relieving DSS of its pursuit of reunification.

III. Conclusion

The court's order is hereby affirmed, subject only to clarification on remand with regard to respondent's visitation rights as discussed above.

Remanded in part, affirmed in part.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).