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NO. COA09-796

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN THE MATTER OF:

N.T.,
A Minor Child.

Mecklenburg County
No. 06 J 1028

Appeal by Respondent-mother from order entered 9 March 2009 by Judge Regan A. Miller in District Court, Mecklenburg County. Heard in the Court of Appeals 19 October 2009.

Kathleen Arundell Widelski for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Annick Lenoir-Peek for respondent-appellee father.

Michael E. Casterline for respondent-appellant mother.

Pamela Newell Williams for the Guardian ad Litem to the respondent-appellee minor child.

WYNN, Judge.

In this appeal, Respondent-mother argues that the district court erred in granting custody of the minor child, N.T., to Respondent-father and terminating its jurisdiction over the juvenile case without establishing a civil custody action pursuant to N.C. Gen. Stat. § 7B-911. We disagree and therefore affirm the holding of the district court.

N.T. ("the juvenile") was born in the fall of 2006 to A.T. ("Respondent-mother") and J.M.L. ("Respondent-father").

Respondent-mother was seventeen-years-old at the time of the birth, and was herself living in a foster home in the custody of the Youth and Family Services Division of the Mecklenburg County Department of Social Services ("DSS"). Respondent-father, a citizen of Mexico and an undocumented alien living in the United States, was twenty years old at the time of the birth of the juvenile. On 1 September 2006, shortly after the juvenile's birth, DSS filed a petition alleging that the juvenile was neglected and dependent and took custody of the juvenile. The juvenile was placed in the same foster home as Respondent-mother, and the foster parents helped Respondent-mother care for the juvenile.

On 1 December 2006, after a hearing on 1 November 2006, the trial court entered an adjudication and disposition order finding that the juvenile was a dependent juvenile. The trial court continued custody of the juvenile with DSS, ordered Respondents to comply with their family services agreements, and set the goal for the juvenile as reunification with both parents. During the initial review hearings, the trial court found that Respondents were complying with their family services agreements, and the court kept the plan for the juvenile as reunification with both parents.

Respondent-mother turned eighteen in the Spring of 2007 and moved into an apartment with Respondent-father. Respondent-parents had overnight and weekend visits with the juvenile. In May 2007, Respondent-father was arrested on misdemeanor charges and detained by U.S. Immigration and Customs Enforcement. Respondent-father subsequently voluntarily returned to his home in Puebla, Mexico.

After a review hearing held in June 2007, the trial court entered an order on 27 August 2007 directing DSS to explore placing the juvenile with paternal relatives in Mexico and requiring DSS to obtain a passport for the juvenile. The trial court conducted a permanency planning hearing on 11 September 2007 and entered an order stemming from this hearing on 13 September 2007. The court found that Respondent-mother had not submitted to random urinalyses and had not addressed the court's domestic violence and mental health concerns. The trial court held another permanency planning hearing on 29 November 2007 and entered its order from that hearing the same day. The court found Respondent-mother was not complying with her case plan and that Respondent-father was in Mexico.

In a permanency planning order filed 18 January 2008, the trial court concluded that it was in the juvenile's best interest to be placed in the legal and physical custody of Respondent-father. The court did not grant custody of the juvenile to Respondent-father, but rather ordered DSS to "provide for reunification with [Respondent-father] as soon as possible and practical" and ordered "that legal custody be placed with [Respondent-father] as soon as possible[.]" Respondent-mother filed notice of appeal from this order on 13 February 2008. On appeal, this Court held the trial court's conclusions were not supported by its findings of fact and reversed the order of the trial court. *In re N.M.T.*, ___ N.C. App. ___, 666 S.E.2d 217 (2008) (unpublished).

On 12 and 16 through 18 December 2008, the trial court held another permanency planning review hearing. The trial court entered its order from that hearing on 9 January 2009. The court found Respondent-mother had not completed all of her required plan services, had not maintained consistent employment, and had not established a level of stability that would allow her to assume primary custody of the juvenile. The court further found that it was in the best interests of the juvenile to be reunified with Respondent-father and ordered DSS to make all necessary travel arrangements so that the juvenile could be transported to Respondent-father in Mexico. On 30 January 2009, the juvenile was placed with Respondent-father and flown to Mexico.

On 9 March 2009, the trial court held a permanency planning review hearing. Neither Respondent-mother nor her attorney appeared at this hearing. The trial court filed its order from this hearing that same day and gave custody of the juvenile to Respondent-father, denied Respondent-mother visitation with the juvenile, and terminated its jurisdiction in this matter. Respondent-mother filed notice of appeal from this order on 2 April 2009.

Respondent-mother now argues that the trial court erred in granting custody of the juvenile to Respondent-father and terminating its jurisdiction over the juvenile case without establishing a civil custody action pursuant to N.C. Gen. Stat. § 7B-911. Respondent mother argues that a proper interpretation of the North Carolina Juvenile Code requires that a trial court comply

with Section 7B-911 prior to terminating jurisdiction if the court is modifying the legal status of the juvenile or the custodial rights of the parents that existed prior to the filing of the juvenile action. Respondent-mother's argument is misplaced.

Section 7B-911 of the North Carolina Juvenile Code provides in part:

After making proper findings at a dispositional hearing or any subsequent hearing, the court on its own motion or the motion of a party *may award custody* of the juvenile to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7, as provided in this section, and terminate the court's jurisdiction in the juvenile proceeding.

N.C. Gen. Stat. § 7B-911(a) (2007) (emphasis added). Section 7B-911 does not require the trial court to enter a civil custody order when it gives custody of the juvenile to one parent and terminates the court's jurisdiction over the juvenile case, but merely permits the trial court to do so and establishes the requirements which must be met and procedures to be followed in so doing.

Section 7B-906 of the Juvenile Code provides that, in a custody review order, when a trial court restores custody to a parent, "the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-906(d) (2007). Similarly, in an order from a permanency planning hearing, "[i]f at any time custody is restored to a parent, or findings are made in accordance with G.S. 7B-906(b), the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-907(c) (2007). In

interpreting the language used in these sections, our case law clearly supports the ability of the trial court to return custody of the juvenile to one or both of the parents and close a juvenile case where the court finds that it is in the best interest of the juvenile to do so. See *In re H.S.F.*, 177 N.C. App. 193, 199, 628 S.E.2d 416, 420 (citing *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984) (holding the trial court may, but is not required to, terminate its jurisdiction over a juvenile case where the trial court restores custody of the juvenile to a parent), *disc. review denied*, 360 N.C. 534, 633 S.E.2d 817 (2006). Further, where a trial court grants custody of a juvenile to one parent in a custody review or permanency planning order and also terminates the court's jurisdiction over the case, the court "return[s] the parents to their pre-petition status." *In re A.P.*, 179 N.C. App. 425, 429, 634 S.E.2d 561, 563 (2006) (Levinson, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 361 N.C. 344, 643 S.E.2d 588 (2007).

Here, the district court did not award custody of the juvenile to Respondent-father pursuant to any provision of Chapter 50 of the North Carolina General Statutes. The trial court entered a permanency planning and custody review order pursuant to N.C. Gen. Stat. §§ 7B-906, -907 (2007). The trial court found that reunification with Respondent-father was in the best interest of the juvenile, awarded custody of the juvenile to Respondent-father, set reunification with the Respondent-father as the permanent plan for the juvenile, found reunification with Respondent-father had

already occurred, and denied Respondent-mother visitation with the juvenile. With the return of the juvenile to Respondent-father and the termination of the court's jurisdiction over the juvenile matter, the parents have returned to the same status they held prior to the filing of the juvenile petition in this matter and may, if they desire, pursue custody and visitation rights in a civil action filed in a court of competent jurisdiction. The language in the trial court's order referring to a 'permanent plan' of reunification with Respondent-father, granting him legal custody of the juvenile, and authorizing no visitation with Respondent-mother is "simply ineffectual" with respect to the legal rights of Respondent-parents to the juvenile. *Id.* This assignment of error is overruled.

Respondent-mother also argues the trial court erred in proceeding with the permanency planning review hearing when neither Respondent-mother nor her attorney were present in court. Respondent-mother contends that the trial court's proceeding with the hearing without establishing whether she waived her right to an attorney violated her right to counsel as provided by N.C. Gen. Stat. § 7B-602. We disagree.

Section 7B-602 of the Juvenile Code, provides in part, "In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C. Gen. Stat. § 7B-602(a) (2007). Here, the trial court appointed Ms. Chiege Okwara to represent

Respondent-mother on the same day that the juvenile petition was filed, and Ms. Okwara represented Respondent-mother in district court through the entirety of the juvenile matter. However, neither Respondent-mother nor her appointed counsel were present at the 9 March 2009 permanency planning review hearing.

At the hearing, the following exchange occurred regarding the presence of Respondent-mother and her attorney:

MR. SMITH [attorney for petitioner]: Good morning. This matter does appear on for a permanency planning hearing. I'm not sure if Ms. Okwara or her client will be here this morning

. . . .

THE COURT: All right. No one's heard from Ms. Okwara this morning?

Okay. Of course you know the summary says March 10th, so I'm not sure whether she looked at that and thought we were going to do it tomorrow morning.

MR. SMITH: But I think the last order that Ms. Zupanec [attorney for Respondent-father] prepared had the actual date, March 9th at 9:00 a.m., and I believe Ms. Okwara was present at the last hearing as well.

THE COURT: Okay. All right. The Court will incorporate the information that's contained in the court summary and make findings of fact consistent therewith and will adopt the recommendations of the Department. We will be divesting custody to the father and will note that it is -- it would be inappropriate to establish a regular visitation schedule for mom because her whereabouts are presently unknown, and she has not showed the stability that the Court had sought previously.

The order from the previous hearing referenced by DSS's attorney set the date and time for the next permanency planning

hearing as "March 9, 2009 at 9:00 a.m., unless a motion is filed by any party requesting an earlier review." Respondent-mother does not argue that she did not receive notice of the hearing or defective service of the order. There is nothing in the record before this Court tending to show that any party requested an earlier review, and Respondent-mother and her attorney were on notice of the 9 March 2009 permanency planning hearing. Respondent puts forth no legal argument that the trial court must inquire as to the whereabouts of a respondent-parent's attorney before proceeding with a hearing and that failing to make such an inquiry violates the respondent-parent's right to counsel. Had the absence of Respondent-mother or her appointed counsel been the result of an accident or excusable neglect, Respondent-mother could have filed a motion for a new trial or a motion for relief from the permanency planning review order under Rules 59 and 60 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rules 59 & 60 (2007).

Respondent-mother did not file a motion under Rule 59 or Rule 60 and instead, with the aid of her appointed counsel, she filed Notice of Appeal to this Court. Respondent has failed to make any showing as to how the trial court's proceeding with a hearing, of which she had notice, somehow implied that she had waived her right to counsel pursuant to N.C. Gen. Stat. § 7B-602. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).