NO. COA09-846

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

IN THE MATTER OF:

B.N.M. and T.M. Gaston County
Nos. 08 JA 36, 37

Appeal by Respondent from order entered 1 May 2009 by Judge Thomas G. Taylor in Gaston County District Court. Heard in the Court of Appeals 12 October 2009.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for appellee Gaston County Department of Social Services.

Pamela Newell Williams, for guardian ad litem.

Richard Croutharmel, for Respondent-appellant mother.

STEELMAN, Judge.

Based upon Respondent's history of drug abuse and her admission that she was not ready to resume custody of her children, the trial court properly designated the paternal aunt and uncle as the children's guardians and waived further reviews by the court. Where the trial court's other findings of fact are sufficient to support its order modifying the children's custody, the broad incorporation of DSS and guardian *ad litem* reports was not prejudicial. Where the trial court's order did not place the children in DSS's custody or vest placement responsibility with

DSS, the requirements of N.C. Gen. Stat. § 7B-507(b) are not applicable.

I. Factual and Procedural Background

B.N.M. was born in 2003 and T.M. was born in 2005. After their father died in April of 2007, the Gaston County Department of Social Services (DSS) became involved with the family because of their mother's (Respondent) drug abuse. On 16 January 2008, DSS filed a petition alleging that B.N.M. and T.M. were neglected and dependent juveniles based upon Respondent's continuing drug problem and an incident where Respondent left T.M. unattended for four days. The children were initially placed in foster care, but were subsequently placed with their paternal aunt and uncle. On 4 September 2008, the trial court held that both children were dependent juveniles as defined by N.C. Gen. Stat. § 7B-101(9). The trial court ordered Respondent to comply with her case plan and successfully complete substance abuse treatment before she could regain custody of the children.

Respondent failed to comply with the trial court's order, testing positive for various controlled substances throughout 2008. From 5 December 2008 through 2 January 2009, Respondent was incarcerated. After Respondent was released from jail on 2 January 2009, she immediately entered an inpatient drug treatment program. Respondent tested negative for drugs after she was released from jail. On 3 April 2009, the trial court granted Respondent's request for telephone contact with the children. On 13 April 2009,

a custody review and permanency planning hearing was held pursuant to N.C. Gen. Stat. §§ 7B-906 and -907. Respondent acknowledged that she was not prepared to take care of the children and that the children had formed a strong bond with their paternal aunt and uncle. On 1 May 2009, the trial court entered an order appointing the aunt and uncle as guardians and the children were released from DSS's custody. The trial court ordered that further reviews pursuant to N.C. Gen. Stat. § 7B-906 were waived and would only be scheduled "upon the filing of a motion for review by any party or on the court's own motion." Respondent appeals.[1]

II. Custody Review and Permanency Planning Order

In her first argument, Respondent contends that the trial court erred by granting guardianship to the children's paternal aunt and uncle "because the evidence, the findings, and the conclusions of law simply failed to support such an order." We disagree.

A. Standard of Review

An appellate court reviews permanency planning and review orders to determine whether competent evidence supports the trial court's findings of fact and whether the findings of fact support

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[1]Respondent asserts this Court is vested with jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. §§ 7A-27(c), 7B-1001(a)(4), and 7B-1002(4). N.C. Gen. Stat. § 7B-1001(a)(4) (2007) grants a parent the right to immediately appeal "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile." Because in this case, the trial court terminated DSS's custody and granted guardianship to the children's paternal aunt and uncle, this Court has jurisdiction to hear Respondent's appeal. *See In re J.V.*, ___ N.C. App. ___, ___, 679 S.E.2d 843, 844-45 (2009).

the conclusions of law. *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). The trial court's conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

B. Analysis

The trial court combined the permanency planning hearing with a custody review hearing pursuant to N.C. Gen. Stat. § 7B-906 as authorized by N.C. Gen. Stat. § 7B-907(a) (2007)[2]. With respect to combined hearings under N.C. Gen. Stat. §§ 7B-906 and -907, we have held that:

> both section 7B-906 and section 7B-907 provide trial courts with the authority to place a juvenile in the custody of a relative in accordance with section 7B-903, so long as it is in the best interest of the juvenile. However, prior to doing this, the court must make the necessary relevant findings mandated by sections 7B-906 and 7B-907 and continue to review the matter until either reunification, termination of parental rights, or other change in custody occurs.

In re J.B., ___ N.C. App. ___, ___, 677 S.E.2d 532, 537 (2009). In both a section 7B-907 permanency planning hearing and a section 7B-906 custody review hearing, the trial court considers the same evidence to determine the needs of the juvenile and the most appropriate disposition. *Id.* at ___, 677 S.E.2d at 537.

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[2]N.C. Gen. Stat. § 7B-907(a) (2007) provides that "[i]n any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody, and the hearing may be combined, if appropriate, with a review hearing required by G.S. 7B-906."

In a custody review hearing pursuant to section 7B-906, the trial court must consider the following criteria and enter written findings of fact regarding those that are relevant before appointing a guardian for the juvenile or entering any other disposition pursuant to N.C. Gen. Stat. § 7B-903:

> (1) Services which have been offered to reunite the family, or whether efforts to reunite the family clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time.
>
> (2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care.
>
> (3) Goals of the foster care placement and the appropriateness of the foster care plan.
>
> (4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile.
>
> (5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent, guardian, custodian, or caretaker.
>
> (6) An appropriate visitation plan.
>
> (7) If the juvenile is 16 or 17 years of age, a report on an independent living assessment of the juvenile and, if appropriate, an independent living plan developed for the juvenile.
>
> (8) When and if termination of parental rights should be considered.
>
> (9) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-906(c) and (d) (2007).

In a section 7B-907 permanency planning hearing, if the juvenile is not returned home, the trial court must consider the following factors and enter written findings of fact pertaining to the 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;
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> (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;
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> (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;
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> (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). At the conclusion of the permanency planning hearing, the trial court must make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile, which may include appointing a guardian for the juvenile pursuant to N.C. Gen. Stat. § 7B-600. N.C. Gen. Stat. § 7B-907(c) (2007).

1. Challenged Findings of Fact

In the instant case, the trial court made twenty-two findings of fact and eight conclusions of law to support its order modifying the children's permanent plan to guardianship and terminating DSS's custody. Respondent challenges the following findings of fact:

> 13. From March 4, 2009 until present Respondent/mother has lived in Asheville, North Carolina where she leased a three (3) bedroom home with two (2) women she met while in treatment at Black Mountain Treatment Center. This home was approved for visits only by the Buncombe County Department of Social Services.
>
> . . . .
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> 15. The court adopts into these Findings of Fact, as set forth herein verbatim, the "Amended Review and Permanency Planning Report" prepared by Julie Sobotka and filed the 15th day of January, 2009. The recommended plan for permanence is guardianship to [their paternal aunt and uncle].
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> 16. The court also adopts into these Findings of Fact, as if set forth verbatim herein, the Guardian *Ad Litem* Program's "Court Report" prepared by Melanie Richards and Linda Lunsford and filed the 9th day of April, 2009.
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> 17. The court finds, and the Respondent/mother admits, that it is not possible for the juveniles to be returned home immediately. The court further finds that it is unlikely that the juveniles could be returned to Respondent/mother within the next six (6) months.
>
> 18. The court[']s sole focus is the welfare and best interest of the juveniles.
>
> 19. The juveniles and Respondent/mother have a loving bond however the likelihood of a substance abuse relapse of the

> Respondent/mother would be devastating to the juveniles.
>
> . . . .
>
> 22. Neither the juveniles' best interest nor the rights of any party require that review hearings be held every twelve (12) months. All parties are aware that the matter may be brought before the court for review at any time by filing of a motion for review or on the court's own motion.

Respondent argues that findings 17, 19, and 22 are not supported by competent evidence. Respondent also argues that the trial court applied an incorrect legal standard in findings 13, 17, 18, and 19.

a. Competent Evidence

Respondent first argues that record evidence does not support the trial court's finding number 17 that it was unlikely that the children could be returned to her home within the next six months. Within this argument, Respondent also contends that record evidence does not support finding 19. There was plenary evidence presented at the hearing chronicling Respondent's extensive drug use, relapses, and unsuccessful substance abuse treatment programs while the children were in the custody of DSS. Respondent admitted that she had used cocaine for five years. Respondent attempted to resolve her addiction on several occasions, but relapsed and continued to use cocaine. At the time of the hearing, Respondent had been sober for only forty-five days without the supervision of a drug treatment program. After she completed her inpatient treatment at Black Mountain, she entered outpatient treatment at the Oxford House, which she did not successfully complete because

she moved to Asheville. This relocation moved Respondent away from her family and the family of the children's father. In Asheville, Respondent attended Narcotics Anonymous/Alcoholics Anonymous meetings, but was not participating in any other substance abuse treatment or counseling. Respondent freely admitted that in order for the children to be returned to her custody, the process would have to be "transitional." Respondent was currently living with two other recovering addicts in a three-bedroom home. Based upon this evidence, the trial court correctly found that "it is unlikely that the juveniles could be returned to Respondent/mother within the next six (6) months." The trial court also made a specific finding that although "[t]he juveniles and Respondent/mother have a loving bond . . . the likelihood of a substance abuse relapse . . . would be devastating to the juveniles." There is competent evidence in the record supporting findings of fact 17 and 19.

Respondent next challenges finding of fact 22. Based upon our analysis above, this contention is without merit. Respondent correctly notes that the trial court misread N.C. Gen. Stat. § 7B-906(b)[3] when it found that "Neither the juvenile's best interest

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[3]N.C. Gen. Stat. § 7B-906(b) permits a trial court to waive the holding of review hearings 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." N.C. Gen. Stat. §

nor the rights of any party require that review hearings be held *every twelve (12) months*." (Emphasis added). N.C. Gen. Stat. § 7B-906(b) requires that review hearings be held every six months, not twelve. However, this error has no bearing on whether this finding is supported by competent evidence. We hold findings of fact 17, 19, and 22 are supported by competent evidence.

b. Correct Legal Standards

Respondent also argues that the trial court did not apply the correct legal standards in findings 13, 17, 18, and 19. We disagree.

Respondent contends finding 13 is erroneous as a matter of law because it failed to show whether the DSS-approved visits were defined as "unsupervised, overnight" visits and whether DSS assessed Respondent's home for visits only or for permanent placement for the children. Respondent failed to cite any authority in support of this contention. Thus, this argument is deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2009) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *In re N.A.L.*, ___ N.C. App. ___, ___, 666 S.E.2d 768, 773 (2008) (holding that because "respondent-father has failed to cite any legal authority in support of his argument" pertaining to the trial court's cessation of reunification efforts, "this assignment of error must be dismissed." (citation omitted)).

7B-906(b)(1)-(5) (2007).

Respondent argues that the trial court failed to apply the correct legal standard in finding 17 because the trial court found that the children's return to the home was "unlikely." Respondent contends that there is a distinction in the use of the word "unlikely" as opposed to the mandated language in section 7B-907(b)(1) that the trial court find whether the return of the child is "possible." We rejected a similar argument in *In re T.R.M.*, 188 N.C. App. 773, 656 S.E.2d 626 (2008). In *In re T.R.M.*, the respondent argued that the trial court failed to make the required finding pursuant to N.C. Gen. Stat § 7B-907(b)(1) because the trial court found that the juvenile's return to the respondent's home within six months was "improbable." *Id.* at 778-79, 656 S.E.2d at 630. We stated: "While it is better practice to use the words of the statute, we decline to hold that the trial court's use of language of probability—as opposed to language of possibility—requires remand. This Court previously has not required such a strict interpretation of section 7B-907(b)(1)." *Id.* at 779, 656 S.E.2d at 630 (internal citation and footnote omitted). The finding of fact in *In re T.R.M.* is materially indistinguishable from finding 17 in the instant case. The trial court did not err by finding that the children's return to the home was "unlikely."

Respondent next contends that the trial court used the incorrect legal standard in determining the ultimate issues of this case because in finding 18 the trial court found that its "sole focus" was the welfare and best interests of the juveniles.

Respondent argues that the trial court failed to consider her constitutional right to raise her children. A review of the transcript reveals that Respondent did not make such an argument to the trial court as a basis to deny the modification of the children's permanent plan to guardianship with the paternal aunt and uncle. It is well-established that constitutional issues not raised before the lower court will not be considered for the first time on appeal. *In re S.C.R.*, ___ N.C. App. ___, ___, 679 S.E.2d 905, 908 (2009). Thus, this issue is not properly before us.

Respondent challenges finding 19 on the basis that the trial court erred by considering the "possibility of future harm" to the children in a juvenile proceeding. Respondent cites *In re Evans*, 81 N.C. App. 449, 344 S.E.2d 325 (1986) and *In re Phifer*, 67 N.C. App. 16, 312 S.E.2d 684 (1984) to support this proposition. However, the language cited in these cases focuses upon what evidence is sufficient to support a termination of parental rights order and is therefore inapposite to our analysis. *In re Evans*, 81 N.C. App. at 452, 344 S.E.2d at 327; *In re Phifer*, 67 N.C. App. at 26, 312 S.E.2d at 690. Respondent argues that "[a] permanent plan of guardianship with a relative is nearly as final as terminating parental rights." Respondent's argument is incorrect in that a guardianship does not have the permanence of termination of parental rights since it can be altered pursuant to N.C. Gen. Stat. § 7B-600(b). In determining whether it is possible for the children to return to Respondent's home in the six months *after* the review hearing, the trial court must consider future circumstances.

The likelihood of a drug relapse is particularly relevant to this determination.

We hold that the arguments advanced pertaining to finding 13 and 18 are not properly before us, and that the trial court did not apply the wrong legal standards in findings of fact 17 and 19.

2. Challenged Conclusions of Law

We must next consider whether the trial court's findings of fact support its conclusions of law. Respondent challenges the following conclusions:

> 2. It is in the best interest of the juvenile that the court appoints a guardian of the person for the juveniles.
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> 3. Reasonable efforts have been made but it is not in the best interest of the above referenced juveniles that said juveniles be returned to the custody of the Respondent/mother.
>
> 4. The juveniles have been placed with the same relatives for a continuous period of at least one year.
>
> 5. It is not possible for the juveniles to be returned home immediately or within the next six months.

Respondent states that "Respondent-Mother has already argued extensively on why she believes the evidence and the findings failed to support these conclusions." We have held that findings of fact 17, 19, and 22 are supported by competent evidence and that 17 and 19 do not contain errors of law. The unchallenged findings of fact establish that the children have been living with their paternal aunt and uncle for approximately fourteen months; that this placement was "stable"; and that DSS and the guardian *ad litem*

recommended that the trial court appoint the paternal aunt and uncle as guardians. The unchallenged findings of fact also establish that Respondent failed to participate in a Dependency Mediation session on 8 April 2008 because her whereabouts were unknown; Respondent failed to comply with her case plan by testing positive for cocaine, marijuana, opiates, and barbiturates for the fifteen months that the children were in DSS's custody; Respondent was incarcerated due to Family Treatment Court sanctions and other criminal charges; Respondent was living with two other recovering addicts; and that Respondent had only been sober for forty-five days without the supervision of an organized drug treatment program.

The trial court noted that it had accepted into evidence Respondent's salon license, her certificate of completion of the Black Mountain Treatment Program, and her applications for two Buncombe County schools that the children could attend. The trial court found that it was not possible for the children to be returned to Respondent's home at the present time based upon her own admissions at the hearing and that the paternal aunt and uncle were willing to become the children's guardians.

We hold the trial court's findings of fact support its conclusions of law that it was in the best interest of the children that a guardian be appointed and that the children not be returned to the custody of Respondent.

3. Incorporation of Reports

Respondent contends the trial court erred by incorporating the 15 January 2009 DSS report and 9 April 2009 court report submitted by the guardian *ad litem* program into its order.

This Court has stated: "In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. Despite this authority, the trial court may not delegate its fact finding duty." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (citation omitted); *see also In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004) ("[A]lthough the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review."), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

In the instant case, although the trial court incorporated these two reports into its order, it also made twenty other independent findings of fact, of which only five were challenged. These findings have already been discussed. Even assuming *arguendo* that it was error for the trial court to incorporate the 15 January 2009 DSS report and 9 April 2009 court report into its order, the trial court's other findings of fact are sufficient to support its conclusions of law and its order modifying the children's custody arrangements. *See Black Horse Run Ppty. Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) (stating "[w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not

affect the conclusions." (citations omitted)), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

These arguments are without merit.

III. Cessation of Reunification Efforts

In her second argument, Respondent contends the trial court erred by failing to make a statutorily required finding of fact pertaining to the cessation of reunification efforts between her and the children. We disagree.

Respondent cites N.C. Gen. Stat. §§ 7B-507(b)(1) and -906(f) in support of this proposition. N.C. Gen. Stat. § 7B-906(f) (2007) provides that "[t]he provisions of G.S. 7B-507 shall apply to any order entered under this section." N.C. Gen. Stat. § 7B-507(b) provides that:

> *In any order placing a juvenile in the custody or placement responsibility of a county department of social services*, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such 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) (emphasis added).

In *In re Padgett*, 156 N.C. App. 644, 577 S.E.2d 337 (2003), this Court addressed whether the trial court's custody review order violated N.C. Gen. Stat. § 7B-507 because it failed to make any finding of fact as to whether DSS should continue to make

reasonable efforts to prevent or eliminate the need for placement of the juveniles. This Court held:

> The clear language of section 7B-507, . . . states such a finding must be made in any order "placing or continuing the placement of a juvenile in the custody or placement responsibility of DSS." N.C.G.S. § 7B-507(a) (2001). In this case, the Order on Review did not place or continue the placement of the children with DSS, nor did it continue placement responsibility with DSS. To the contrary, the order granted custody to the children's grandparents and specifically released DSS "from all duties over the minor children." Thus, section 7B-507 was not applicable, and the trial court did not err in awarding custody of the children to their grandparents in the Order on Review.

Id. at 649, 577 S.E.2d at 341 (alteration omitted).

Although the holding in *In re Padgett* is based upon the statutory language of N.C. Gen. Stat. § 7B-507(a), the analysis is relevant to this appeal as both subsection (a) and (b) apply only to orders placing a juvenile in the custody or placement responsibility of a county department of social services. N.C. Gen. Stat. § 7B-507(a) and (b). In the instant case, the trial court's order did not place the children in DSS's custody or vest placement responsibility with DSS. The trial court terminated DSS's custody; appointed the paternal aunt and uncle as guardians until such time as the guardianship is terminated by the court, the children are emancipated, or reach the age of majority; and relieved the guardian *ad litem*, attorney advocate, and Respondent's attorney of record. Therefore, the provisions of N.C. Gen. Stat. § 7B-507(b) are not applicable to the trial court's order. This argument is without merit.

The trial court made all of the statutorily required findings of fact pursuant to N.C. Gen. Stat. §§ 7B-906 and -907, and those findings support its conclusions of law that it was in the best interest of the children to modify the permanent plan to guardianship with their paternal aunt and uncle.

AFFIRMED.

Judges WYNN and ERVIN concur.

Report per Rule 30(e).