

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA10-273

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

IN THE MATTER OF:

J.M., J.J. Robeson County
Nos. 02 J 6, 02 J 185

Appeal by respondent from order entered 23 November 2009 by Judge John B. Carter, Jr., in Robeson County District Court. Heard in the Court of Appeals 5 July 2010.

J. Hal Kinlaw, Jr., for Robeson County Department of Social Services, petitioner-appellee.

Pamela Newell for guardian ad litem.

Mary McCullers Reece for respondent-appellant.

ELMORE, Judge.

Respondent is the birth mother of five minor children. The youngest of the five children, J.J., is the subject of this appeal. On 5 September 2008, the Robeson County Department of Social Services (petitioner) filed a juvenile petition alleging that J.J. was a neglected juvenile in that he lived in an environment injurious to his welfare. By order filed 16 January 2009, the court adjudicated the juvenile neglected and placed him in the custody of petitioner. On 23 November 2009, following a permanency planning hearing, the court filed an order removing him from

petitioner's custody and awarding legal guardianship of him to his foster parents. That order also released petitioner and the guardian ad litem from further responsibility as to J.J. Respondent filed notice of appeal on 1 December 2009.

Petitioner filed a motion to dismiss the appeal on the ground that the notice of appeal fails to convey subject matter jurisdiction to this Court for the purpose of reviewing the order filed on 23 November 2009. The notice of appeal states that respondent "gives notice of this appeal to the North Carolina Court of Appeals from a hearing finding Judgment on October 21, 2009. This Judgment was filed on November 23, 2009." Petitioner argues that the notice of appeal does not appeal any order or judgment as required by Rule 3(d) of the North Carolina Rules of Appellate Procedure but instead appeals "from a hearing." See N.C.R. App. Proc. 3(d) (2010).

Except as otherwise specified in Rule 3.1 of the North Carolina Rules of Appellate Procedure, appeals in cases involving termination of parental rights and issues of juvenile dependency or juvenile abuse or neglect are governed by the Rules of Appellate Procedure applicable to appeals in general. N.C.R. App. Proc. 3.1(a) (2009). A juvenile dependency, abuse, or neglect proceeding is civil in nature. *In re Pittman*, 149 N.C. App. 756, 760, 561 S.E.2d 560, 564 (2002). Accordingly, as in any civil case, the notice of appeal in a juvenile proceeding "shall designate the judgment or order from which appeal is taken and the court to which appeal is taken" N.C.R. App. Proc. 3(d) (2010). "Failure

to comply with the requirements of Rule 3 of our Rules of Appellate Procedure requires the dismissal of [an] appeal as this rule is jurisdictional." *In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) (citations omitted). An appellant's failure to identify properly in the notice of appeal the order for which review is sought may result in dismissal of any arguments related to that order. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 157, 392 S.E.2d 422, 425 (1990). Nevertheless, we will construe a notice of appeal liberally in one of two ways to determine whether it provides jurisdiction: (1) we will examine a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, to determine whether the intent to appeal from a specific order or judgment can be fairly inferred from the notice of appeal, and (2) we will examine an appellant's technical failure to comply with a procedural requirement in filing papers with the court to determine whether the appellant accomplished the "functional equivalent" of the requirement. *Stephenson v. Bartlett*, 177 N.C. App. 239, 241, 628 S.E.2d 442, 443-44 (2006). In so construing the present notice of appeal, we find that it may reasonably be inferred from the notice that the judgment or order from which appeal is taken is the order filed on 23 November 2009. We therefore deny the motion to dismiss the appeal.

We now address the merits of the appeal. Respondent makes three arguments, all of which relate to the findings of fact made by the trial court.

Respondent first contends that the court erred by entering a permanency planning disposition without making the findings of fact required by N.C. Gen. Stat. § 7B-907(b). This statute provides that, at a permanency planning hearing, after considering information from various sources, the court is to consider and make findings of fact as to the following criteria if it decides that the juvenile is not to be returned home:

(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;

(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;

(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;

(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) (2009). This Court has noted that it is not necessary for the court's order to contain a formal listing of all of the factors as long as the order shows that the trial

court "did consider and make written findings regarding the relevant § 7B-907(b) factors." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004).

Respondent next contends that the court erred in closing J.J.'s case and releasing petitioner and the guardian ad litem from any further responsibility without making the findings of fact required by N.C. Gen. Stat. § 78-906(b). This statute allows the court to waive the holding of custody review hearings, to require written reports to the court by the agency or person holding custody in lieu of review hearings, or to order that review hearings be held less often than every six months,

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. § 7B-906(b) (2009).

Finally, respondent contends that the court's conclusion of law that guardianship is in J.J.'s best interests is not supported by the findings of fact or evidence.

In the order under review the trial court made only these ten findings of fact:

1. That this matter came on for a Permanency Planning Review pursuant to G.S. 7B-907.
2. That the Children, [J.M.] and [J.J.,] are currently in the legal care, custody and control of the Robeson County Department of Social Services, pursuant to a nonsecure custody Order entered on September 5, 2008, and subsequent Adjudication Order and a Disposition Order entered on December 17, 2008.
3. That the Children were adjudicated neglected pursuant to an Order entered on December 17, 2008 by the Honorable John B. Carter, Jr. . . . That the child, [J.J.,] is 7 years of age and is currently placed in a licensed foster home.
4. That the Children do not have any other relatives available for placement at this time that are known to the Robeson County Department of Social Services.
5. That the best plan to achieve a safe, permanent home for the Child within a reasonable period of time is as follows: . . . Award legal guardianship of [J.J.] to foster parents, Mr. and Mrs. Hill.
6. That a foster care timeline, marked as DSS Exhibit "G", was admitted into evidence.
7. That a Court Report on all children, marked as DSS Exhibit "H", was admitted into evidence.
8. That family assessment of strengths and needs, marked as DSS Exhibit "I", was admitted into evidence.

9. That a family reunification assessment, marked as DSS Exhibit "J", was admitted into evidence.

10. That a Guardian ad Litem Court Report, marked as GAL Exhibit "A", was admitted into evidence.

In one of its three conclusions of law, the court decreed that the best interests of the child required that guardianship of J.J. be granted to the foster parents. The court also ordered that the petitioner and the guardian ad litem be relieved from any further responsibility as to J.J.

Absent from these findings of fact are any findings as to the factors listed in N.C. Gen. Stat. § 7B-907(b), which are required to be considered when a court determines that a child is not to be returned to the parent's home. Also absent from these findings are findings as to the factors listed in N.C. Gen. Stat. § 7B-906(b). The absence of these findings calls into question the evidentiary and factual support for the conclusion of law that guardianship is in the best interest of the child. The guardian ad litem and petitioner concede that the findings are deficient and that remand to the Robeson County District Court for the making of additional findings is necessary. The order is therefore vacated and the matter remanded for further proceedings and findings. *See In re Z.J.T.B., Z.J.W., E.R.L.B.*, 183 N.C. App. 380, 388, 645 S.E.2d 206, 212 (2007).

Vacated and remanded.

Judges WYNN and HUNTER, Robert N., Jr., concur.

Report per Rule 30(e).