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NO. COA10-302

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

IN THE MATTER OF:

L.R.,
A Minor Child.

Pamlico County
Nos. 07 CVD 240
09 JA 07

Appeal by mother from orders entered 6 January 2010 by Judge Karen Alexander in Pamlico County District Court. Heard in the Court of Appeals 2 August 2010.

Cynthia Y. Carroll for appellee Pamlico County Department of Social Services.

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

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

STEELMAN, Judge.

Mother's amended notice of appeal was timely filed as to the 6 January 2010 permanency planning order, and the Department of Social Services motion to dismiss is denied. Since mother provides no reason as to why she failed to enter timely notice of appeal from the 7 July 2009 adjudication order, and offers no explanation as to why she waited until April 2010 to seek review of the order by petition for writ of *certiorari*, that petition is denied. Where the juvenile petition contained factual allegations supporting a finding of dependency, and mother and father admitted to

dependency, the trial court had subject matter jurisdiction to adjudicate L.R. dependent. Where the trial court made specific findings of fact based on written reports, rather than broadly adopting these reports, we find no error in this portion of the trial court's permanency planning order. Where the custody order made findings and a conclusion of law that there was a change in circumstances affecting the interests of the child, the trial court complied with the provisions of N.C. Gen. Stat. § 50-13.7. Where the trial court improperly delegated mother's visitation rights to the discretion of father, this portion of the trial court's order must be reversed.

I. Factual and Procedural Background

S.S. ("mother") and D.R. ("father," collectively "parents") are the biological parents of the minor child L.R. Parents are separated and shared custody of L.R. pursuant to a civil custody order entered on 10 November 2008. On 24 March 2009, the Pamlico County Department of Social Services ("DSS") filed a juvenile petition alleging L.R. was an abused and neglected juvenile. The petition alleged L.R. had been sexually molested by a cousin, C.S., while visiting in mother's home. DSS further alleged C.S. had molested three other children in the home and that mother had been aware of the sexual abuse but took no steps to prevent C.S. from abusing L.R. DSS took nonsecure custody of L.R. and eventually placed L.R. with father.

After a hearing on 6 May 2009, the trial court entered an adjudication order on 7 July 2009. The court found that both

mother and father admitted L.R. was dependent. The trial court concluded that L.R. was a dependent juvenile. The court entered a separate juvenile disposition order on 21 July 2009, setting the permanent plan as reunification with parents. The court ordered custody of L.R. continued with DSS, and that placement of L.R. continue with father. The court also ordered mother to continue to follow all treatment recommendations stated in her psychological assessment, continue attending therapy sessions, and complete parenting classes. Neither parent appealed from these orders.

After a hearing on 16 December 2009, the trial court entered a permanency planning order on 6 January 2010 returning custody of L.R. to father. The court found mother had not made sufficient progress in addressing the issues which led to DSS taking custody of L.R. and that restoring mother's full legal custodial rights to L.R. was not appropriate at that time. The court further ordered L.R.'s case be closed, the court's jurisdiction terminated, and a Chapter 50 order modifying custody be entered in parent's civil custody case, awarding sole custody of L.R. to father. An order modifying custody was entered that same day.

On 8 January 2010, mother filed notice of appeal in the juvenile case. The notice of appeal states mother gave notice of appeal from the "Adjudication Judgment and Dispositional Order that was filed on January 6, 2010" Mother filed amended notices of appeal on 21 January 2010. The amended notices of appeal were filed in both the juvenile case (file number 09 JA 07) and in the civil custody case (file number 07 CVD 240), and both notices state

mother gave notice of appeal from the "Review Order changing custody of the above minor child that was filed on January 6, 2010"

II. Motion to Dismiss

Mother filed untimely appeals as to the 7 July 2009 juvenile adjudication order and the 21 July 2009 juvenile disposition order. We decline to consider the issues raised therein. Mother's amended notice of appeal of 21 January 2010 was timely as to the 6 January 2010 permanency planning and civil custody modification orders; and the issues therein will be considered below.

The 7 and 21 July 2009 adjudication and disposition orders were final orders, and were appealable pursuant to N.C. Gen. Stat. § 7B-1001(a) and (b) (2009) "within 30 days after entry and service of the order in accordance with G.S. 1A-1, Rule 58." The 8 January 2010 notice of appeal was filed 185 days after the entry of the adjudication order and 171 days after the entry of the disposition order, and does not reference either the permanency planning order or the civil custody order entered on 6 January 2010. The 8 January 2010 notice of appeal failed to preserve for appellate review the adjudication or disposition orders, and did not specifically designate that mother sought to appeal from the permanency planning or civil custody orders. See N.C.R. App. P. 3.1(a) ("Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take

appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the general Statutes of North Carolina."); *In re D.R.F.*, ___ N.C. App. ___, ___, 693 S.E.2d 235, 238 (2010) (declining to review arguments presented on appeal regarding an adjudication order in a termination of parental rights proceeding where the parents' notice of appeal only stated they were appealing from the disposition order). Mother's appeal of the 7 and 21 July 2009 adjudication and disposition orders is dismissed.

However, we hold the amended notices of appeal filed by mother on 21 January 2010 were sufficient to bring the 6 January 2010 permanency planning and civil custody modification orders properly before this Court. While the amended notices of appeal do not specifically state the titles of the orders at issue, the notices of appeal state mother was appealing from orders entered 6 January 2010 "changing custody" of L.R. The amended notices of appeal were timely filed within thirty days of entry of the permanency planning and civil custody modification orders, were properly signed by both mother and her attorney, and were filed in both the juvenile and civil case files. Accordingly, we deny DSS's motion to dismiss mother's appeal as to the orders of 6 January 2010.

III. Writ of Certiorari

Mother gives no reason as to why she failed to enter timely notice of appeal from the 7 July 2009 adjudication order, and offers no explanation as to why she waited until April 2010 to seek

review of the order through a petition for writ of *certiorari*. We deny that petition.

It is within the appellate court's discretion whether or not to grant a writ of *certiorari*. "However, N.C.R. App. P. 21(c) provides that a party's 'petition [for writ of certiorari] shall be filed without unreasonable delay[.]'" *Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 426, 667 S.E.2d 309, 313 (2008). The "Rules of Appellate Procedure do not set forth a specific time period in which a defendant must file a petition for *writ of certiorari*," but the court must in its discretion determine what constitutes an unreasonable delay in relation to the circumstances in each case. *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 38-39 (2003). In our discretion, we decline to review the adjudication order of 7 July 2009 because mother has not shown any reason for her delay in appealing that order and her failure to timely assert her right of appeal. Mother waited ten months after the 7 July 2009 adjudication order before filing a petition for writ of *certiorari*. Mother gives no reason for this long delay. Therefore, the 7 July 2009 order remains valid and final, and we do not address mother's arguments regarding that order.

IV. Subject Matter Jurisdiction

In her first argument, mother contends that the trial court lacked subject matter jurisdiction to adjudicate L.R. dependent, because "[t]he Petition contained no factual allegations in support of the condition of dependency." We disagree. Even though we have held that mother's appeal of the adjudication order was untimely,

since lack of jurisdiction can be raised at any time, even for the first time on appeal, we address this argument. *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009).

In *In re D.C., C.C.*, the case cited by mother, this court held that merely failing to check the box in the petition for the condition (abuse, neglect, dependency) on which the adjudication is based is not fatal. 183 N.C. App. 344, 350, 644 S.E.2d 640, 643 (2007). "[I]f the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." *Id.* In the instant case, in the juvenile petition in the "condition alleged" section, "dependent" was in fact marked. Under section four of the petition, dependency was not checked or specifically addressed. However, the factual allegations under the abuse and neglect section were sufficient to put mother on notice of the conditions that gave rise to the trial court's adjudication of dependency.

N.C. Gen. Stat. § 7B-101(9) (2009) defines a dependent juvenile as "[a] juvenile in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juveniles's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." The factual allegations in the neglect portion of the petition specifically state that the juveniles's mother was aware of prior incidents of child molestation by C.S., but

continued to allow C.S. to be around L.R. without supervision. The petition further alleged that "mother has shown she is unwilling and unable to provide child protection while visiting in her home." These factual allegations in support of the allegations of neglect also support the lack of supervision by mother under the dependency portions of the statute.

We further note that both mother and father admitted to dependency at the adjudication hearing. Mother was unquestionably on notice as to this "alleged ground for adjudication." *In re D.C. C.C.*, 183 N.C. App. at 350, 644 S.E.2d at 643. Because mother clearly had notice of facts underlying the adjudication of dependency, and also agreed to the adjudication, we find the trial court had subject matter jurisdiction at the adjudication hearing.

IV. Permanency Planning Order

In her first argument pertaining to the permanency planning order of 6 January 2010, mother contends that the trial court erred because "it heard no evidence from any party and merely adopted a DSS report in lieu of its own specific findings." We disagree.

"[I]f the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). In *In re A.S.*, the Court held that

[i]n 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. Consequently, the trial court should not broadly incorporate

these written reports from outside sources as its findings of fact.

190 N.C. App. 679, 693, 661 S.E.2d 313, 322 (2008) (citing *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004)). The trial court's order in *In re A.S.* was vacated because the trial court did not make specific findings of fact based upon the written reports. However, the opinion makes it clear that it is permissible for the trial court to rely on written reports as evidence so long as specific findings of fact are made based on the reports and the reports are not broadly adopted.

The trial court in the instant case did not broadly adopt or incorporate the written reports, but rather made specific findings of fact based on the reports in question. The trial court did not impermissibly incorporate or adopt the written reports in their entirety, but rather used logical reasoning to make specific findings of fact based upon the reports before it. The trial court did not err in relying on the DSS reports in making its findings of fact.

This argument is without merit.

V. Custody Modification

In her second argument as to the permanency planning order, mother contends that the trial court erred because its modification of the custody order therein did not comport with the requirements for custody orders under N.C. Gen. Stat. Chapter 50. We disagree.

N.C. Gen. Stat. § 7B-911(a) (2009) states that

[a]fter 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.

The statute goes on to state in § 7B-911(c) that

[t]he court may enter a civil custody order under this section and terminate the court's jurisdiction in the juvenile proceedings only if:

(1) In the civil custody order the court makes findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7.

L.R. was the subject of a prior civil custody order entered on 10 November 2008. N.C. Gen. Stat. § 50-13.7 (2009) provides ". . . an order of a court of this State for custody of a minor child may be modified or vacated at anytime, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." The trial court followed the directives of this statute. In its permanency planning order the trial court stated "[a] civil custody order pursuant to a N.C.G.S. §7B-911 shall be entered in Pamlico County file 07-CVD-240" On 6 January 2010, the trial court entered an order modifying custody in file 07-CVD-240 stating in its findings of fact that "[s]ince the entry of [the 10 November 2008] order, a sufficient change in circumstances affecting the best interests of the child exists to warrant a modification thereof. Specifically, the minor child was

the victim of sexual abuse when she was in the care, custody, and control of [mother]." The trial court's order also contained the conclusion of law that "[a] sufficient change in circumstances affecting the best interest of the child exists to warrant the modification of the previous order." Contrary to mother's argument, the trial court complied with both N.C. Gen. Stat. §§ 7B-911 and 50-13.7 when entering the civil custody order of 6 January 2010.

This argument is without merit.

VI. Custody Order

In her third argument as to the permanency planning order, mother contends that the trial court erred in delegating its judicial function by leaving visitation rights of mother in the discretion of father. We agree.

"The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) (citation omitted). "An appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." *Id.* at 523, 621 S.E.2d at 652 (citation omitted). The 6 January 2010 order stated that "[v]isitation with the respondent mother shall be supervised by [father] at such times and places as the parties may agree." The trial court erred in delegating discretion to L.R.'s parents to determine the visitation

schedule. We reverse and remand this case to the trial court so that it can establish a schedule for mother's visitation with L.R.

09 JA 07--Affirmed.

07 CVD 240--Affirmed in part, Reversed and Remanded in part.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).