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NO. COA10-458

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

IN THE MATTER OF:
J.J., J.J.
Minor Children.

Gaston County
Nos. 02 J 122-23

Appeal by respondent-mother from order entered 26 October 2009 by Judge James A. Jackson in Gaston County District Court. Heard in the Court of Appeals 7 September 2010.

Jill Y. Sanchez for petitioner-appellee Gaston County Department of Social Services.

Richard E. Jester for respondent-appellant mother.

Kirkland & Ellis LLP, by Stephanie A. Brennan, for guardian ad litem on brief.

Deana K. Fleming, substituted after briefing, as counsel of record for guardian ad litem.

BRYANT, Judge.

Following a review and permanency planning hearing where the juveniles' respondent-mother, maternal grandmother, and proposed guardians of the person testified regarding the permanency plan, the trial court's findings of fact premised on such evidence, as well as reports from the Department of Social Services and other matters of record, are properly supported. Further, the trial court's findings of fact support its conclusions of law.

Therefore, we affirm the trial court's order.

On 30 April 2002, the Gaston County Department of Social Services ("DSS") filed a petition alleging that respondent-mother had neglected her three children: Jill, James, and Jake.¹ On 23 August 2002, an adjudicatory hearing was held, and respondent-mother admitted that the juveniles were dependent. Based on the admission, DSS moved to dismiss the allegation of neglect and accept the admission of dependency. The court amended the petition and adjudicated the children dependent juveniles. DSS was granted custody of the juveniles, and the children were placed with their maternal grandmother.

Following the adjudication of dependency, the initial plan for the juveniles was reunification with the respondent-mother. Thereafter, the trial court altered the permanency plan for the juveniles on three occasions: on 25 February 2003, the permanency plan of reunification was made concurrent with custody with a relative; on 29 April 2003, the plan of reunification was made concurrent with adoption; and on 24 March 2005, *nunc pro tunc* 31 August 2004, the permanency plan was changed to guardianship with a court approved caretaker. Jake was placed with paternal relatives. Jill and James were placed in foster homes. Respondent-mother appealed. This Court affirmed the decision of the trial court. *In Re J.J.*, 180 N.C. App. 344, 637 S.E.2d 258

¹ Jill, James, and Jake are pseudonyms used throughout this opinion for ease of reading and to protect the identity of the juveniles. However, Jake is not a party to this appeal.

(2006) (Tyson, J., dissenting), *aff'd in part, cert. dismissed in part*, 362 N.C. 172, 655 S.E.2d 712 (2008).

On remand, respondent-mother sought to have the guardianship of Jill and James granted first to herself, then to the juveniles' maternal grandmother, but DSS and the guardian *ad litem* for the juveniles objected. DSS recommended to the trial court that guardianship of both juveniles be given to the paternal aunt and uncle (Mr. and Mrs. S).

On 25 August 2009, the court held a joint "Review Hearing" pursuant to N.C. Gen. Stat. §7B-906(a) and "Permanency Planning Hearing" pursuant to N.C. Gen. Stat. §7B-907(a). At the hearing, the trial court heard testimony from respondent-mother, the juvenile's maternal grandmother, as well as the potential guardians, Ms. L – Jill's paternal aunt – and Mr. and Mrs. S. On 26 October 2009, the trial court entered an order appointing Mr. and Mrs. S guardians. Respondent-mother appeals.

On appeal, respondent-mother asserts that the trial court changed the custody and permanency plan for Jill and James without sufficient testimony to support such an action. We disagree.

At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian *ad litem*, and any other person or agency which will aid it in the court's review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-907(b) (2009); *see also* N.C. Gen. Stat. § 7B-906(c) ("The court may consider any evidence, including hearsay evidence[,] . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition."). Moreover, "[w]ithout hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child." *In re D.L.*, 166 N.C. App. 574, 581, 603 S.E.2d 376, 381 (2004) (citing *In re Shue*, 311 N.C. at 597, 319 S.E.2d at 574); *see also*, *In re M.N.C.*, 176 N.C. App. 114, 120-21, 625 S.E.2d 627, 632 (2006) (stating "[a] trial court may take judicial notice of earlier proceedings in the same cause" and it is not necessary for either party to offer the file into evidence) (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). However, where a trial court's findings of fact are premised solely on reports submitted by DSS and the guardian *ad litem*, such findings of fact are unsupported, and the trial court's conclusions of law are in error. *See In re D.Y.*, ___ N.C. App. ___, 688 S.E.2d 91 (2010).

In *In re D.Y.*, the trial court received no testimony from any witness. ___ N.C. App. at ___, 688 S.E.2d at 93. The respondent-mother was given the opportunity to testify, but she did not take the stand. The trial court's order was based solely on the written reports of DSS and the guardian *ad litem* and the oral arguments of the attorneys. *Id.* This Court held that "because no evidence was presented, the trial court's findings of fact are unsupported, and

its conclusions of law are in error." *Id.*; see also, *In re D.L.*, 166 N.C. App. 574, 584, 603 S.E.2d 376, 382 (2004) (holding the trial court's findings of fact were unsupported by competent evidence and its conclusions of law in error where DSS presented only a summary of its previous reports and the respondent-mother testified but offered no evidence regarding the permanency plan).

Here, on 25 August 2009, the trial court conducted a review and permanency planning hearing. During the hearing, the trial court heard testimony from respondent-mother, the juveniles' maternal grandmother, Ms. L, and Mr. and Mrs. S. Further, the trial court received into evidence letters written by Jill and a police report regarding allegations against Jill's foster father. Respondent-mother testified that she had addressed the issues that led to the removal of the juveniles, that Mr. and Mrs. S lived too far away, and that she was concerned about their ability to provide for Jill and James. The juveniles' maternal grandmother likewise testified that she did not know Mr. and Mrs. S, but the distance to their residence would make visiting the juveniles difficult. On direct examination, Ms. L testified that she believed her home would be a suitable place for the juveniles to live. Ms. L also testified that she had the financial resources to take care of the juveniles. On cross-examination by the attorney for DSS, Ms. L testified that she would have room for the juveniles after the house built for her by Habitat for Humanity was completed; however, construction on the house had yet to begin. The trial court also examined Mr. and Mrs. S.

THE COURT: Q. Now how long have [the juveniles] been in your home?

. . .

[Mr. S]: A. . . [Jill] came like [sic] in May . [James] came in June.

THE COURT: Q. And if you would, just describe your residence for me.

[Mr. S]: A. . . We have four bedrooms, we just paid the house off in September. And, ah, we have a big yard, its fenced in; and we have the inside of the yard is fenced in and we also have a play area in the fence . . .

THE COURT: Q. Are you financially capable of carrying for their needs . . . ?

[Mr. S]: A. Ah, yes, sir.

THE COURT: Q. For [Jill] and [James]?

[Mr. S]: A. Ah, yes, sir.

. . .

THE COURT: Q. All right, ah, [Mr. and Mrs. S], is, ah - you understand that if guardianship was granted that, ah, you have the same responsibility for these children, children as if you were their, like their parent?

[Mrs. S]: A. Yes.

[Mr. S]: A. Yes.

THE COURT: Q. You understand that you have to provide for all their medical care, all their, their food, shelter and all their needs, you understand that?

[Mr. S]: A. Yes, sir.

[Mrs. S]: A. Yes.

THE COURT: Q. And also, you have to provide all their financial, ah, things that they need, may need, you understand that?

[Mr. S]: A. Yes, sir.

[Mrs. S]: A. Yes.

THE COURT: Q. And are both of you willing to take on that responsibility?

[Mr. S]: A. Yes.

[Mrs. S]: A. Yes.

In its 26 February 2009 order, the trial court stated that it has "considered matters of record, report(s) submitted for th[e] hearing and all evidence, testimony and statements of the parties or proffered by the parties." Furthermore, the trial court made the following findings of fact:

28) [Ms. L], the paternal aunt of [Jill], lives in Gastonia and testified she would be willing to provide placement for the juveniles. [Ms. L] has had little involvement with the juveniles, Respondent/Mother or the maternal Grandmother. [Ms. L] first contacted the Department in March of 2009 for placement of [Jill] not [James]. [Ms. L] is having a "Habitat" home built and will have room for both juveniles when it is built around September of 2009.

. . .

31) [Mr. and Mrs. S] are present and are aware of the duties and responsibilities of the Guardians of the Person. They are willing and able to undertake these duties and responsibilities. They are financially able to provide for the juveniles. They are willing to become Guardians of the Person for the juveniles [Jill] and [James]. [Mr. and Mrs. S] informed the Court that they have enjoyed having the juveniles in their home and

want to see them happy.

The trial court made the following conclusion:

- 4) It is in the best interest of the above referenced juveniles, [Jill] and [James], that the Court appoints [Mr. and Mrs. S] as Guardians of the Person for the juveniles.

After careful review the record on appeal, we hold the trial court's findings of fact in its 26 October 2009 juvenile order were properly supported by competent evidence, which consisted not only of reports submitted by DSS and the juveniles' guardian *ad litem* but also testimonial evidence presented at the 25 August 2009 review and permanency planning hearing. *Compare In re D.Y.*, ___ N.C. App. ___, 688 S.E.2d 91. Accordingly, respondent-mother's argument is overruled.

Affirmed.

Judges McGee and GEER concur.

Report per Rule 30(e).