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NO. COA10-678

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF:

K.M. and,  
J.M. III

Cumberland County  
Nos. 08 J 154  
08 J 155

Appeal by respondent father from order entered 30 March 2010 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 18 October 2010.

*Staff Attorney Christopher L. Carr, for petitioner-appellee Cumberland County Department of Social Services.*

*Assistant Appellate Defender Annick Lenoir-Peek, for respondent-appellant father.*

*Beth A. Hall, for guardian ad litem.*

HUNTER, Robert C., Judge.

Respondent father, J.M. ("respondent"), appeals from the trial court's permanency planning order changing the permanent plan of respondent's children, K.M. and J.M. III, from reunification with respondent to joint custody between the paternal grandmother and respondent. Respondent contends that the trial court's findings of fact are inconsistent and that the court erred in granting primary custody to the paternal grandmother and secondary custody to respondent, because the court essentially gave sole legal custody

to the grandmother, with no rights retained by respondent. After careful review, we remand for further proceedings.

Respondent is the father of J.M., born in 2005, and K.M., born in 2006.<sup>1</sup> The minor children's mother is N.M. On 19 March 2008, the Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging neglect and dependency of the minor children due to domestic violence issues between the parents, as well as substance abuse by the parents. The children were placed with DSS pursuant to a non-secure custody order. At the 8 July 2008 adjudication hearing, both parents stipulated to the adjudication of dependency of the minor children. The allegations of neglect were dismissed. In its order entered 4 August 2008, the trial court ordered respondent to: (1) enter a drug treatment program; (2) submit to random drug testing; (3) complete a parenting assessment and psychological evaluation; (4) complete domestic violence counseling; (5) participate in an anger management program; and (6) obtain and maintain safe and stable housing and stable employment. Similar requirements were set forth for N.M.. Both parents were granted supervised visitation with the children. The permanent plan was set as reunification.

At the next review hearing, held on 30 September 2008, the trial court determined that respondent was participating in drug court, his recent drug screens were negative, and he had two jobs. He had also attended one session of domestic violence counseling,

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<sup>1</sup> A third child, A.R., was also involved in these proceedings. Respondent is not the biological father of A.R., however, and therefore A.R. is not the subject of this appeal.

and was scheduled to attend another session. The trial court authorized respondent to have unsupervised visitation with the children.

On 6 January 2009, the trial court found that N.M. had tested positive for illegal drugs, and as a result she spent a week in jail and her visits with the children were suspended. Respondent continued to participate in drug court and domestic violence counseling. Subsequently, the court reinstated N.M.'s visitation, and directed that she could visit the children at respondent's home.

The next review took place on 28 April 2009. The minor children had been placed with respondent for a trial home visit on 15 January 2009, and the court found that the trial placement was going well and should continue. N.M. was also included in the trial home visit. The parents had moved into transitional housing together in March 2009. The court found that both parents were working "diligently" toward reunification, and continued the permanent plan of reunification.

The trial court held a review hearing on 22 June 2009 after receiving information that the parents had engaged in acts of domestic violence. At the hearing, both parents denied any domestic violence. The trial court ordered them to engage in joint counseling, to enroll in and complete family counseling, and to continue to comply with prior court orders.

On 7 July 2009, DSS filed a motion for review alleging that the parents "created disturbances in the community," that police

had been called to the home four times in the previous two days, and that domestic violence issues and intoxication by respondent created a situation where the children were not safe in the home. The children were placed in foster care and a hearing was held the next day 8 July 2009. The parents indicated that they had separated and that respondent had moved in with his mother. However, the social worker noted that when she made a home visit, both parents were present in the home. The court ordered the parents not to remove the children from their placements.

The next permanency planning review hearing was held on 4 August 2009. The trial court found that N.M.'s behavior was becoming increasingly erratic and defiant, and that she had indicated to a social worker that she was not going to comply with her case requirements. She did not show up to the hearing, and her location was unknown. The parents' contract at their transitional housing complex had been cancelled due to nonpayment of rent and for creating disturbances with the neighbors. Respondent was still living with his parents, and although he had been offered unsupervised visitation with the children at that residence, he was concerned that N.M. would show up. The court found that respondent was cooperative with DSS and in compliance with court orders. The court ordered DSS to cease reunification efforts and visitation with regard to N.M., and authorized a permanent plan of reunification with respondent. DSS was ordered to conduct a home study of the paternal grandparents and the maternal grandmother. Respondent was granted unsupervised weekend visitation with the

children. However, he was ordered not to have any contact with N.M.

At a subsequent hearing, held on 29 September 2009, the trial court approved a recommendation by DSS and the guardian *ad litem* to begin another trial home visit with respondent, who continued to reside with his parents. Although N.M. appeared and asked to reengage in services, the trial court determined that she had "developed a pattern" of being compliant at times, and being defiant at times. The court did not change its previous order relieving DSS of reunification efforts with N.M., but ordered that if N.M. sought services from DSS, DSS must assist her.

No changes were made at the 24 November 2009 hearing. At a hearing held on 4 February 2010, the trial court expressed concern regarding information from the paternal grandmother that respondent allowed N.M. to have contact by telephone with one of the children, and that respondent was spending a significant amount of time with N.M. Both parents denied that N.M. had any contact with the children. The paternal grandmother was not at the hearing, however, and the trial court determined that it needed more information from her, and ordered that she appear at the following scheduled hearing.

The matter was reviewed on 4 March 2010. The trial judge spoke with one of the minor children in chambers. DSS and the guardian *ad litem* presented written reports indicating that respondent had violated court orders by allowing the children to see their mother. Both DSS and the guardian *ad litem* expressed

concerns about respondent's ability and willingness to protect the children from N.M.'s influence, and asked that the court consider granting custody of the minor children to the paternal grandparents.

In addition to the reports introduced into evidence, testimony was elicited from both parents, who denied that N.M. had any contact with the minor children. Respondent stated that sometimes when he was on the phone with N.M., the children might be in the room, but he denied that they ever talked to her over the phone. The paternal grandmother testified that around Christmas in 2009, J.M. ran into the house and told her excitedly that his father had taken him to see his mother. She said that when she asked respondent about it, he denied that he had taken the children to see their mother.

The court entered its written order on 30 March 2010 with the following relevant findings of fact from the hearing:

4. That since the hearing on November 24, 2009, the juveniles have remained placed with the Respondent Father in the home of the paternal grandparents on a trial home visit. They have been in the continual care of the Cumberland County Department of Social Services since March, 2008.

5. The Respondent Father has successfully completed the Family Treatment Drug Court Program. He did an admirable job and had zero sanctions to be imposed. He was one of only two or three that have been able to do that. He is gainfully employed and works on a regular and consistent basis.

6. The Respondent Mother failed to complete the Family Treatment Drug Court Program and failed to alleviate the conditions which led to the removal of the juveniles from the home.

She has also failed to follow the previous orders of the Court and address the issues to include substance abuse and other issues including domestic violence which brought the juveniles into care. The Cumberland County Department of Social Services was previously relieved of reunification and visitation efforts with her on August 4, 2009.

7. The Court had ordered the Respondent Father not to allow the juveniles to have any access to the Respondent Mother. The Court finds that he has violated the order of the Court as it relates to that at a minimum, on at least one occasion shortly after Christmas, 2009. [Respondent] allowed the juvenile [J.M.] to have access and visitation with the Respondent Mother. The Court additionally finds that the Respondent Mother has had contact with the juveniles [K.M.] and [A.R.] in contravention and violation of the Court's orders. The Respondent Mother's refusal to abide by the orders of the Court and address the issues which led to the removal of the juveniles from the home poses a significant threat to the stability of the juveniles. In so long as the Respondent Father remains unable to continually comply with the no-contact order, the Court determines that reunification with him would be inappropriate.

8. The paternal grandmother has been very vigilant in the matter and has provided a safe and nurturing environment for each of the juveniles. . . .

9. Return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interest of the juveniles. The permanent plan had been reunification with the Respondent Father for the juveniles [K.M.] and [J.M.]. The Court approved of this plan and finds that the Cumberland County Department of Social Services is making reasonable efforts, as required by N.C.G.S. §§ 7B-507 and 7B-907, to implement the permanent plan. Those efforts include, but are not limited to, coordinating services for the juveniles, monitoring placement and ensuring that the needs of the juveniles are being met.

10. [Respondent] does reside with his parents. The Court determines that on his own he is not capable of resisting the influence of the Respondent Mother, and therefore the Court determines that as it relates to the juveniles [K.M.] and [J.M.] that the plan at this point should be changed to joint custody with the paternal grandmother and the Respondent Father. She will be the primary custodian. The Respondent Father will be the secondary custodian. He lives within the home so there will not be any need to set a visitation schedule.

11. There should continue to be no contact directly or indirectly between the juveniles and the Respondent Mother.

12. The permanent plan for the juveniles [J.M.] and [K.M.] is now relative placement and joint custody with the Respondent Father .

. . .

Based on these findings of fact, the trial court then made the following conclusion of law:

4. That it is in the best interests of the juveniles [J.M.] and [K.M.], joint legal and physical custody of the juveniles should be with the paternal grandmother Jannie [M.] and the Respondent Father [], with the paternal grandmother having primary custody and the Respondent Father having secondary custody.

From the order entered, respondent appeals.

Respondent first contends that the trial court was inconsistent throughout its order, in that the court first stated that reunification with respondent is not possible, but then granted joint custody to respondent along with the paternal grandmother. Respondent argues that findings of fact 7 and 9 are contradictory to findings of fact 10 and 12, and should therefore be stricken, or the matter remanded for clarification. We disagree.



Our review of a permanency planning review order “is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.” *In re R.A.H.*, 182 N.C. App. 52, 58, 641 S.E.2d 404, 408 (2007) (citing *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004)). Here, respondent does not contest findings 7 and 9 on the basis they are unsupported by competent evidence, and our review reveals that the findings are supported by competent evidence. Rather, respondent argues that the court’s findings are inconsistent, because he interprets the court’s findings as first ceasing reunification efforts and then granting custody to respondent.

The purpose of a permanency planning hearing is to determine “a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.” N.C. Gen. Stat. § 7B-907(a) (2009). Once the trial court develops a permanent plan for a juvenile, the plan may be changed if necessary at a subsequent permanency planning review hearing. *Id.*

In the instant case, the trial court specifically stated at the hearing that it was not ceasing reunification efforts with respondent, that instead,

[A]ctually, I placed custody with him. I just made Grandma the primary custodian. I have put her in charge is what I have done, because he is still in the home and I’m not taking him out of the home. But he has a weakness. His weakness is [respondent mother], and she has not done what she needs to do. And the likelihood is, they will get back together and we’ll go back through this cycle, so I’m going to stop that cycle because I believe Grandma will do what she needs to do and I won’t have to see this case again.

When asked for clarification regarding primary versus secondary custody, the trial court stated to the paternal grandmother, "I have placed your two grandchildren in your custody. You are the person first and foremost responsible for them."

We find that the trial court's decision to alter the permanent plan from reunification with respondent to relative placement and joint custody was authorized by N.C. Gen. Stat. § 7B-907. We are not persuaded by respondent's arguments that the trial court was inconsistent in making its decision. The trial court did not order the cessation of reunification efforts. Rather, the court determined that respondent's inability to prevent contact between N.M. and the minor children was the obstacle to reunification at the time the hearing was held. The court reasoned that if the paternal grandmother was involved in a custodial capacity, contact between N.M. and the children would be prevented, thereby ensuring permanency for the children in a reasonable amount of time. The trial court had the authority to change the permanent plan and we see no reason to disturb its decision.

By his second, related argument, respondent contends that the trial court effectively granted the paternal grandmother sole custody, by giving her primary custody of the children. He asserts that such a disposition is inappropriate without delineating the authority of each custodian to make decisions about the minor children. We agree that the matter requires further findings to clarify this custodial arrangement.

Regarding the type of disposition chosen by the trial court, N.C. Gen. Stat. § 7B-907 (c) provides in relevant part:

(c) At the conclusion of the hearing, the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time. The judge may appoint a guardian of the person for the juvenile pursuant to G.S. 7B-600 or make any disposition authorized by G.S. 7B-903 including the authority to place the child in the custody of either parent or any relative found by the court to be suitable and found by the court to be in the best interest of the juvenile.

Moreover, this Court has previously found that a permanent plan of joint custody between a parent and a non-parent is not prohibited by the Juvenile Code, and is therefore an appropriate disposition. *In re B.G.*, 197 N.C. App. 570, \_\_\_, 677 S.E.2d 549, 554 (2009). Where a trial court determines that the juveniles should not be returned to the parent or parents, the court must consider certain enumerated criteria, including, "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[.]" N.C. Gen. Stat. § 7B-907(b)(2).

Here, at the conclusion of the permanency planning review hearing, the trial court established the permanent plan as joint physical custody between respondent and the paternal grandmother and joint legal custody between respondent and the paternal grandmother, with the grandmother having primary custody and the

father having secondary custody. In explaining its decision, the trial court stated:

[Respondent] does live with his parents. I determine that on his own, he is not capable of resisting the influence of the respondent-mother and, therefore, I determine that as it relates to [K.M.] and [J.M., III], that the plan at this point should be changed to a plan of joint custody with the paternal grandmother, and she will be the primary custodian. I will make [respondent] the secondary. He lives within the home, so there will not be any need to set a visitation schedule.

While the custodial arrangement is itself appropriate, the trial court nevertheless failed to establish the specific rights and responsibilities of respondent as required by N.C. Gen. Stat. § 7B-907(b) (2) .

The case of *Diehl v. Diehl*, 177 N.C. App. 642, 630 S.E.2d 25 (2006), is instructive in this matter. There, the trial court awarded Mr. and Mrs. Diehl joint legal custody of their children, but then granted "primary decision making authority" to Mrs. Diehl. *Id.* at 645, 630 S.E.2d at 27. This Court held that "the trial court simultaneously awarded), both parties joint legal custody, but stripped Mr. Diehl of all decision-making authority . . . ." *Id.* at 646, 630 S.E.2d at 28. We concluded "that this approach suggests an award of 'sole legal custody' to Mrs. Diehl, as opposed to an award of joint legal custody to the parties." *Id.* We then held that "[o]n remand, the trial court may identify specific areas in which Mrs. Diehl is granted decision-making authority upon finding appropriate facts to justify the allocation." *Id.* at 648, 630 S.E.2d at 29.

In the present case, the trial court awarded joint legal custody to respondent and the children's grandmother, but then informed the grandmother that she had primary custody and was "first and foremost responsible for [the children]." "[O]ur case law employs the term 'legal custody' to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Id.* at 646, 630 S.E.2d at 27; see *Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000) (explaining that legal custody refers to the right to make decisions regarding "the child's education, health care, religious training, and the like"). While it is clear from the trial court's oral statements at the hearing that the grandmother was charged with ensuring that respondent does not take his children around N.M., it is unclear whether respondent has any right as the secondary custodian to make long-term decisions for his children, or whether he must adhere to the decisions of the primary custodian. As seen in *Diehl*, if respondent must abide by his mother's decisions pertaining to the children, then he does not have joint legal custody. It is true that the trial court has latitude "to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case." *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28. The trial court in this case did not distribute certain decision-making authority to respondent or his mother; rather, the trial court gave them joint legal custody and then

stated that the children's grandmother was the primary decision-maker.

In sum, since the trial court did not address respondent's specific rights and responsibilities as to the minor children, the matter must be remanded to make suitable findings of fact to address this deficiency. See *R.A.H.*, 182 N.C. App. at 61, 641 S.E.2d at 409-410 (remanding the case for further findings where trial court failed to make written findings of fact as to "rights and responsibilities that would remain with the mother").

Reversed and Remanded.

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

Report per Rule 30(e).