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NO. COA10-819

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

IN THE MATTER OF:

Granville County
No. 09 J 55

H.M.H.,
A Juvenile

Appeal by respondent-mother from order entered 1 April 2010 by Judge Daniel F. Finch in Granville County District Court. Heard in the Court of Appeals 30 November 2010.

Hopper, Hicks & Wrenn, PLLC, by N. Kyle Hicks, for petitioner-appellee Granville County Department of Social Services.

Pamela Newell, for the guardian ad litem.

Sydney Batch, for respondent-appellant mother.

CALABRIA, Judge.

Respondent-mother appeals from the trial court's 1 April 2010 Review Order placing juvenile H.M.H. ("Hannah") in the temporary legal and physical custody of a paternal aunt and uncle (hereinafter the "Bakers").¹ Respondent-father did not appeal from the trial court's order, and therefore is not a party to the instant appeal. We affirm in part and vacate and remand in part

¹We will use pseudonyms to protect the child's identity and for ease of reading.

for additional findings of fact related to the court's improper delegation of the terms for the supervised visitation to the Bakers.

I. BACKGROUND

On or about 2 July 2009, the Granville County Department of Social Services ("DSS") received a report that respondent-father had stabbed respondent-mother (collectively "respondents") with a steak knife. Hannah's paternal grandmother informed the investigating social worker that respondent-mother had a history of substance abuse, violent and irate behavior, and misused resources to the extent that the home had no electrical service. Respondent-mother took Hannah and fled the home.

On 6 July 2009, DSS filed a petition alleging that Hannah was neglected and dependent. On the same date, the district court entered a nonsecure custody order placing Hannah in the care of the Bakers. DSS reached an out of home services agreement requiring respondent-mother to complete a mental health assessment, substance abuse assessment, random drug screens, domestic violence education, and parenting classes. In addition, she was to obtain employment and stable housing.

In July and August of 2009, respondent-mother submitted positive drug screens. In September of 2009, respondents married, then separated three weeks later. After an adjudication hearing, on 14 October 2009, the court ordered that Hannah was a dependent juvenile. The court further ordered respondents to submit to mental health assessments and to follow all recommendations,

including domestic violence counseling and random drug tests. The court concluded that it was in Hannah's best interest to remain in DSS custody, and ordered supervised visitation for respondents.

On 3 November 2009, all parties were invited to attend a permanency planning meeting. Respondent-mother did not attend the meeting, nor did she inquire about the decisions made at the meeting. Later, respondent-mother failed to appear at scheduled visitations with Hannah and at a November 2009 drug screening. On 11 December 2009, the district court entered an order ceasing visitation with respondent-mother until she complied with her out of home services agreement.

Respondent-mother failed to attend another planning meeting on 31 December 2009. Therefore, between October 2009 and January 2010, respondent-mother had no contact with DSS. In January of 2010, DSS recommended that reunification efforts cease with respondent-mother due to her lack of progress. On 16 February and 9 March 2010, the district court denied DSS's request to cease reunification efforts with respondent-mother. By March of 2010, respondent-mother lived with her mother, but also stayed in her father's home some nights. Although respondent-mother attended domestic violence classes, she continued to have a relationship with respondent-father and had a verbal confrontation with him. Respondent-mother also submitted three negative drug screens.

At the review hearing on 11 March 2010, both respondents and social worker Delorise Cooke ("Cooke") testified. On 1 April 2010, the trial court's order placed Hannah in the Bakers' temporary

legal and physical custody, ordered respondent-mother to have supervised visitation with Hannah, and designated the maternal grandfather to supervise the visitation. However, the court's approval of him was conditional. He was ordered to comply with drug screens, a home assessment, and assessment of his work schedule. Although the trial court ordered supervised visitation for respondent-mother, the court included in the order that if the schedule could not be arranged, that the case was to be calendared for the court. The schedule was left open to be arranged among the parties, DSS, and the Guardian Ad Litem. DSS was not supervising the visitation, but it was ordered to continue to monitor the case for the next six months. Respondent-mother appeals.

II. CUSTODY OF THE JUVENILE

Respondent-mother contends that the trial court failed to make adequate findings pursuant to N.C. Gen. Stat. § 7B-906(c) and (g) (2009). We disagree.

In custody review hearings conducted pursuant to N.C. Gen. Stat. § 7B-906(c), the trial court "shall consider the following criteria and make written findings regarding those that are relevant:"

- (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).

"If the court determines that the juvenile shall be placed in the custody of an individual other than the parents . . . the court shall verify that the person receiving custody . . . understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile."

N.C. Gen. Stat. § 7B-906(g).

"The trial court's findings of fact are conclusive on appeal if they are supported by ample, competent evidence, even if there is evidence to the contrary." *In re Y.Y.E.T.*, ___ N.C. App. ___, ___, 695 S.E.2d 517, 521 (2010) (internal quotations and citations omitted). Where a respondent-parent does not challenge findings of

fact "made by the trial court as lacking adequate evidentiary support . . . these findings of fact are deemed to be supported by sufficient evidence and are binding on appeal." *In re M.D.*, ___ N.C. App. ___, ___, 682 S.E.2d 780, 785 (2009). When a trial court sits without a jury, "[i]t is the 'judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.'" *In re N.G.*, 186 N.C. App. 1, 7, 650 S.E.2d 45, 49 (2007) (quoting *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted)). "The trial court's 'conclusions of law are reviewable *de novo* on appeal.'" *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (quoting *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996)).

Here, the trial court's findings demonstrate that the relevant criteria listed in N.C. Gen. Stat. § 7B-906(c) were considered:

8. That [Hannah] is currently placed in the legal and physical custody of [DSS] with placement with the paternal aunt and uncle, [the Bakers].
9. That [DSS], by and through Delorise Cooke, and the Guardian Ad Litem Program, [] both submitted reports to the Court which should be accepted into the record.
10. That Barbara Durant, on behalf of the Respondent Mother, submitted a Parent Report.

15. That the Respondent Mother has failed to establish a stable living environment, maintain stable employment and to

demonstrate that she can provide the same.

. . . .

18. That since [Hannah] has been in the placement with the [Bakers], [Hannah] has been well adjusted and has demonstrated consistent and appropriate development, both physical and social development.
 19. That it would be in [Hannah's] best interest to be placed in the temporary legal and physical custody of the [Bakers].
 20. That the [Bakers] are fit and suitable persons to have the legal and physical custody of [Hannah] and have been providing a stable and loving environment for [Hannah] over the past 8 months.
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23. That [DSS] has made reasonable efforts to eliminate the need for placement through in home services, medical appointments, transportation and child protective services.

The trial court's findings address the services DSS offered respondent-mother, respondent-mother's failure to take advantage of those services that were designed to help her make adequate progress toward completing her case plan, and the appropriateness of Hannah's foster placement.

Respondent-mother argues that "[t]here was little to no competent evidence" supporting these findings. We disagree.

Respondent-mother testified that she had been staying at her father's house, but respondent-mother admitted that she had also been staying occasionally at her mother's house. She also testified that she had not finished high school and had not

completed her GED. She further testified that she had not found employment, although she had submitted an application at Dollar General.

Respondent-mother also submitted a Parent Report ("the report"). In the report, respondent-mother stated that she: (1) attended domestic violence counseling; (2) was drug-free; (3) was looking for employment; and (4) was working toward completing her case plan. Respondent-mother also stated in the report that she was concerned that she did not have "regular and satisfactory visitation" with Hannah and would like Hannah placed with her family. Respondent-mother contended that Hannah needed to be reunited with her as soon as possible, and that it was in Hannah's best interest to be returned to her care. Cooke testified that Hannah had been placed with the Bakers since 7 July 2009. Cooke stated that since Hannah was placed with the Bakers, she talked in complete sentences and was in the process of toilet training. Cooke added that Hannah had "grown tremendously" while in the Bakers' care, and had a "very close relationship" with the Bakers' two other school-age children. At the Bakers' home, Hannah had her own bed in her own bedroom, and the Bakers planned to enroll Hannah in preschool. Cooke also testified that, in her opinion, the Bakers were providing "a good and appropriate place" for Hannah. Cooke recommended cessation of reunification efforts with respondents, and recommended placing Hannah in the Bakers' custody.

Furthermore, at the hearing, both Cooke and the Guardian Ad Litem submitted reports to the trial court, which were received into evidence. DSS's court report indicated that the Bakers "provided excellent care to [Hannah]."

This is competent evidence to support the trial court's findings that the Bakers were "fit and suitable persons" to have custody of Hannah, and that the Bakers had provided a "stable and loving environment" for Hannah. The trial court's findings of fact, along with the evidence that the Bakers understood their obligations to Hannah and had the ability to fulfill those obligations, satisfy the requirements of N.C. Gen. Stat. § 7B-906(g). Therefore, we hold that the trial court properly addressed N.C. Gen. Stat. § 7B-906(g).

III. BEST INTEREST

Respondent-mother argues that the evidence does not support the trial court's conclusion that it was in Hannah's best interest to be placed with the Bakers. We disagree.

"[B]est interest determinations are conclusions of law because they require the exercise of judgment." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The decision of a trial court regarding best interest is within the trial court's discretion and will not be overturned absent an abuse of discretion. *See In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

In the instant case, the trial court found that although DSS provided services to help respondent-mother comply with her case

plan, respondent-mother failed to take advantage of those services. While respondent-mother attempted to stabilize her living situation, the Bakers provided an appropriate alternative placement for Hannah. Although, as the trial court found, there was some evidence introduced at the hearing that respondent-mother had recently begun to address some of her problems, the trial court's findings are supported by competent evidence and are properly based on ongoing concerns raised by the testimony at the hearing and the reports from DSS and the guardian ad litem. These findings, along with the findings that the Bakers were "fit and suitable persons" to have custody of Hannah and that the Bakers had provided a "stable and loving environment" for Hannah, support the trial court's conclusion that it was in Hannah's best interest to be placed in the temporary custody of the Bakers. Therefore, the trial court did not abuse its discretion in concluding that it was in Hannah's best interest to be placed in the temporary custody of the Bakers.

IV. VISITATION

Respondent-mother argues that the trial court failed to sufficiently address visitation in its order. We agree.

"In any case where custody is removed from a parent, guardian, custodian, or caretaker the court shall conduct a review hearing within 90 days from the date of the dispositional hearing" N.C. Gen. Stat. § 7B-906(a) (2009). N.C. Gen. Stat. § 7B-906(c) states, in pertinent part:

- (c) At every review hearing, 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 in its review.

In each case the court shall consider the following criteria and make written findings regarding those that are relevant:

(6) An appropriate visitation plan.

N.C. Gen. Stat. § 7B-906(c); see also *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 651 (2005) ("At the review hearing, the court must consider and make relevant findings of fact regarding an appropriate visitation plan.").

N.C. Gen. Stat. § 7B-905(c) states in pertinent part:

Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety.

N.C. Gen. Stat. § 7B-905(c).

When the custody of a child is awarded by the court, it is the exercise of a judicial function. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any

event would be delegating a judicial function to the custodian.

In re Custody of Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971) (internal citation omitted); see also *In re E.C.*, 174 N.C. App. at 522, 621 S.E.2d at 652 ("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."). "If the court does award visitation to a parent, the order must include an appropriate visitation plan that sets out at least a minimum outline, such as the time, place, and conditions under which visitation may be exercised." *In re W.V.*, ___ N.C. App. ___, ___, 693 S.E.2d 383, 387 (2010). N.C. Gen. Stat. § 7B-905(c) further provides, in pertinent part:

If the juvenile is placed *in the custody or placement responsibility of a county department of social services*, the court may order the director to arrange, facilitate, and supervise a visitation plan *expressly approved by the court*. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan.

N.C. Gen. Stat. § 7B-905(c) (emphases added).

In the instant case, the trial court placed Hannah in the temporary legal and physical custody of the Bakers. However, the trial court's order failed to include the terms for respondent-mother's visitation. Instead, the trial court made only one finding regarding visitation:

22. That it would be in the best interest of [Hannah] to have supervised visits with the Respondent Parents as follows:
 - b. The Respondent Mother shall have supervised visits through the maternal grandfather . . . once he has been approved through appropriate drug screens and assessment of his home and approval of work schedule.
 - c. That a schedule of visitation shall be arranged [among] the parties and [DSS] and the Guardian Ad Litem program. In the event[] a schedule can not be arranged, the matter should be calendared back before the Court.

The trial court then concluded as a matter of law:

3. That it would be in the best interest of [Hannah] to have visitation with the Respondent Parents as set out hereinabove in the findings of fact.

The trial court then ordered:

3. That the Respondent Parents shall have visitation as arranged [among] the parties, to be supervised as set out in the findings of fact, hereinabove.

Under the statutory mandate of N.C. Gen. Stat. § 7B-905, if the trial court had placed Hannah in the custody of DSS rather than the Bakers, then DSS would "arrange, facilitate, and supervise a visitation plan" that was "expressly approved by the court." DSS would then have the discretion to make a good faith determination whether the visitation plan was in the best interests of Hannah or consistent with Hannah's health and safety. If the plan was not in the best interests of Hannah or consistent with her health and

safety, the DSS director may temporarily suspend all or part of the visitation plan.

However, in the instant case, the trial court placed Hannah in the custody of the Bakers. Therefore, the trial court's single finding that delegated the arrangement of the visitation to the parties, DSS, and the Guardian Ad Litem was an improper delegation of a judicial function to Hannah's custodians because it does not adequately define the parameters of respondent-mother's visitation rights. The trial court gave the parties the discretion to arrange all the details of respondent-mother's visitation plan rather than a minimum outline of a visitation plan such as the time, place, and conditions of the visitation. Although the court included in the finding that if the schedule could not be arranged that the case was to be calendared for the court, this was not an appropriate visitation plan.

Therefore, the trial court's single finding regarding visitation does not support its conclusion of law, and neither the finding nor the conclusion support the decretal portion of its order regarding visitation. Accordingly, we vacate the portions of the order related to respondent-mother's visitation and remand the matter for the trial court to make additional findings for an appropriate visitation plan that provides a minimum outline of visitation such as the time, place, and conditions of visitation. *See, e.g., W.V., ___ N.C. App. at ___, 693 S.E.2d at 387* (remanding order to trial court to clarify the respondent's visitation rights because order only stated that the respondent "shall have weekly

visitations supervised by petitioner"); *In re T.B.*, ___ N.C. App. ___, ___, 692 S.E.2d 182, 190 (2010) (remanding order to trial court to clarify the respondent's visitation rights because order "left the scope and extent of [the respondent's] visitation to 'the discretion of the treatment team'").

V. CONCLUSION

Proposed issues on appeal not addressed in respondent-mother's brief are abandoned. N.C.R. App. P. 28(b)(6) (2009). Since the order does not adequately address respondent-mother's visitation rights, we vacate the portion of the order regarding visitation and remand for further consideration of that issue. We affirm the order in all other respects.

Affirmed in part; vacated and remanded in part.

Judges HUNTER, ROBERT C., and ELMORE concur.

Report per Rule 30(e).