NO. COA12-594
NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

IN THE MATTER OF:

Orange County
No. 11 JA 1

L.L.

Appeal by respondent-mother from order entered 28 February 2012 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 9 October 2012.

No brief for petitioner-appellee Orange County Department of Social Services.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for respondent-appellee father.

Mary McCullers Reece, for respondent-appellant mother.

Michael N. Tousey, for guardian ad litem.

CALABRIA, Judge.

Respondent-mother appeals from a permanency planning review order. Respondent-father ("Sam")[1] also filed a brief, but is not

[1] We use pseudonyms to protect the identity of the children and for ease of reading.

appealing the permanency planning review order, rather he requests that we uphold the order. We reverse and remand.

I. Background

On 6 January 2011, the Orange County Department of Social Services ("DSS") filed a petition alleging that L.L. ("Larry") was a neglected and dependent juvenile. According to the petition, Larry was neglected in that he did not receive proper care, supervision or discipline from his parent and that he lived in an environment injurious to his welfare. The petition also alleged that Larry was dependent because respondent-mother was unable to provide for his care or supervision. Namely, DSS alleged that when one of respondent-mother's other children arrived at school, the child was dirty and hungry. In addition, respondent-mother appeared to have mental health problems, she threatened to flee the jurisdiction with the children, and refused to disclose the name of the church she claimed was providing housing for them. DSS provided facts to support the allegations. The trial court found if Larry remained in her custody he was at risk of harm and ordered Larry to be placed in non-secure custody with DSS. At the time, Larry was 8 months old.

On 14 June 2011, the trial court entered an adjudication and dispositional order continuing Larry's custody and placement authority with DSS. On 17 June 2011, when Larry was 13 months old, DSS placed him in a trial home placement with Sam. On 26 July 2011 and on 7 December 2011, when the trial court reviewed the custody order, custody and placement authority were to continue with DSS, and Larry's placement was to continue with Sam.

A permanency planning hearing was held on 16 February 2012. According to the Permanency Planning Order, filed on 28 February 2012, the trial court awarded legal and physical custody of Larry to Sam. Respondent-mother was granted bi-weekly visitation at a visitation center. Legal custody of Larry remained with Sam. Respondent-mother appeals.

II. Permanency Planning Order

Respondent-mother argues that the trial court erred by concluding that placement with Sam was in the child's best interest because this conclusion was not supported by a required finding of fact pursuant to N.C. Gen. Stat. § 7B-907(b)(1). We agree.

Pursuant to N.C. Gen. Stat. § 7B-907(b), courts reviewing a permanency planning order are required to consider certain

relevant information. N.C. Gen. Stat. § 7B-907(b) (2011). Particularly, if the juvenile is not "returned home," the court shall consider specific factors and "make written findings regarding those that are relevant." *Id.* One of the factors that requires a finding is the answer to: "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." N.C. Gen. Stat. § 7B-907(b)(1) (2011).

Even where the "evidence and reports [of a case] might have supported the determination of the trial court, . . . our statute requires the court to consider the § 7B–907(b) factors and make relevant findings." *In re Ledbetter*, 158 N.C. App. 281, 286, 580 S.E.2d 392, 395 (2003). The court's findings of fact also "must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (internal citation and quotation marks omitted). The lack of sufficient specificity in a permanency planning order as to the factors listed in N.C.G.S. § 7B-907(b) will result in reversal and remand for the making of appropriate findings. *Ledbetter*, 158 N.C. App. at 286, 580 S.E.2d at 395.

In the instant case, rather than allowing Larry to return home, the court granted custody of the juvenile to Sam. Pursuant to N.C. Gen. Stat. § 7B-907(b), placement with a non-custodial parent is not considered a return home. *See In Re J.M.D.*, __ N.C. App. __, __, 708 S.E.2d 167, 172 (2011) ("The word 'home' in [N.C. Gen. Stat. § 7B-907(b)(1)] is clearly referring to the *home from which the juvenile was removed*."). Since the trial court granted Sam custody of Larry, a required finding was whether it was "possible for the juvenile to be returned home immediately or within the next six months," and why it was not in the "juvenile's best interests to return home." N.C. Gen. Stat. § 7B-907(b)(1). Although the trial court made findings regarding other factors listed in N.C. Gen. Stat. § 7B-907(b), the trial court's order lacks a necessary finding regarding whether it was *possible* for Larry to return home immediately or within six months. Accordingly, we must reverse the trial court's order and remand the case for the entry of an order which is consistent with the requirements of N.C. Gen. Stat. § 7B-907(b).

The guardian *ad litem* ("GAL") and Sam argue in their briefs that findings of fact 6(e)-(h) and 9 are sufficient to imply consideration of N.C. Gen. Stat. § 7B-907(b)(1). However,

findings 6(e)-(h) were used to support the trial court's finding that "[i]t is possible for the juvenile to be returned [sic] home of the non removal parent in the immediate future or within the next six (6) months." Finding of fact 9 states:

> Further efforts to reunify or place the juvenile with Respondent mother would be futile or inconsistent with the best interest of the juvenile in that the juvenile is thriving in the care of [Sam] and it is in the juvenile's best interest that custody be awarded to [Sam]. It is in the juvenile's best interest that Respondent mother have visits with the juvenile.

This finding is incomplete because it only considers the second part of N.C. Gen. Stat. § 7B-907(b)(1), why "it is not in the juvenile's best interests to return home." Thus, these findings fail to demonstrate that the trial court considered "[w]hether it is possible for the juvenile to be returned home" to the *removal* parent, as N.C. Gen. Stat. § 7B-907(b)(1) requires.

The GAL alternatively argues that this first criterion is not relevant because the permanency plan at issue in the instant case was scheduled for additional consideration. "While it is true that the court is not expressly required to make every finding listed, it must still make those findings that are relevant to the permanency plans being developed for the children." *In re J.S.*, 165 N.C. App. at 512, 598 S.E.2d at 660-

61. In the instant case, the permanent plan was placement with Sam. Because Larry was removed from the home and placed with Sam, whether or not it was possible for Larry to be returned home was a relevant factor.

Respondent-mother argues in her brief that this case needs to be "reversed and remanded so that the trial court may hear new evidence, make the required findings as to whether or not [Larry] can return [home], and enter a permanent plan that is in [Larry's] best interest." To avoid a second appeal, we note that it is "entirely within the trial court's discretion as to whether to permit presentation of additional evidence on remand." *J.M.D.*, __ N.C. App. at __, 708 S.E.2d at 173.

III. Visitation Plan

Respondent-mother also argues that the trial court violated N.C. Gen. Stat. § 7B-905(c) by failing to adopt an appropriate visitation plan including terms designating the time and duration of the visits. Our reversal of the trial court's permanency planning review order obviates our need to address issues pertaining to visitation. However, in an effort to prevent potential repetition of error on remand, we choose to briefly address respondent-mother's remaining argument on appeal.

"Any dispositional order under which a juvenile is removed from the custody of a parent . . . 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) (2011). "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." *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005). The failure to specify the circumstances under which a parent may visit a child "could result in a complete denial of the right." *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

It is improper for the trial court to delegate the judicial function of establishing visitation rights to a custodian. *Id.* An order that includes granting a custodian discretion over visitation is improper, even if the order indicates that visitation should not be "unreasonably prevented." *In re L.B.*, 181 N.C. App. 174, 192, 639 S.E.2d 23, 32 (2007). This Court determined that an order leaving visitation "up to the guardian," or in the discretion of a "treatment team," was improper. *In re R.A.H.*, 182 N.C. App. 52, 61, 641 S.E.2d 404,

409-10 (2007); *In re D.M.*, __ N.C. App. __, __, 712 S.E.2d 355, 358 (2011).

An order that fails to provide a minimum outline for visitation is improper because it may effectively allow the guardian to deny visitation. *In re E.C.*, 174 N.C. App. at 523, 621 S.E.2d at 652. The ultimate inquiry is whether the order lacks specificity such that it "*could result* in a complete denial of the right [to visitation] and *in any event* would be delegating a judicial function to the custodian." *Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849 (emphasis added). An order that provided for weekly, supervised visitation was found to be unsatisfactory because it failed to establish the minimum outline for visitation. *In re W.V.*, 204 N.C. App. 290, 295, 693 S.E.2d 383, 387 (2010).

In the instant case, the trial court granted respondent-mother "minimum bi-weekly supervised visits with the juvenile at a visitation center such as Time Together in Raleigh." This order does not specify a day of the week, a time of day, the duration of the visits, or the exact location. It merely provides the minimum frequency and that the visits should take place at a visitation center. The facts of the instant case indicate that visitation could effectively be denied by the

custodian by choosing a location for visits that is inconvenient for respondent-mother, by choosing scheduling visits at times or on days which are inconvenient for respondent-mother, or by allowing visits for only a short duration. As a result, the visitation plan is insufficient. On remand, the trial court should include a complete minimum outline as required by ***In re E.C*** in the visitation plan.

IV. Conclusion

Accordingly, because we conclude that the trial court failed to make a required finding of fact regarding whether it was possible for Larry to be returned home immediately or within the next six months, we reverse and remand for a new permanency planning hearing.

Reversed and remanded.

Judges BEASLEY and THIGPEN concur.

Report per Rule 30(e).