IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1122

Filed: 5 May 2015

Onslow County, Nos. 11 JA 158, 13 JA 41

IN THE MATTER OF:

L.S. and T.J.S.

Appeal by respondents from orders entered 31 July 2014 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 6 April 2015.

Lorna Welch for petitioner-appellee Dare County Department of Social Services.

Peter Wood for respondent-appellant mother.

Blackburn & Tanner, by James E. Tanner, III, for respondent-appellant father.

Doughton Rich Blancato, PLLC, by William A. Blancato, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondents, the parents of the juveniles Laura and Tobias,[1] appeal from orders ceasing reunification efforts and appointing guardians for the juveniles. After careful review, we affirm in part, and vacate and remand in part.

[1] We use pseudonyms to protect the minors' privacy.

I. Factual & Procedural History

On 27 July 2011, the Onslow County Department of Social Services ("DSS") filed a petition alleging that Laura and her older brothers, John and Joe, were neglected juveniles.[2] DSS claimed that respondents' home and the juveniles were found in an unsanitary condition; the juveniles had diaper rash; respondent-mother was diagnosed with bipolar disorder and was not taking her medication; respondent-mother was observed screaming and yelling at John and Joe and "violently yanking them by their arms"; respondent-mother had left John and Joe in a bathtub for several hours unsupervised; neither respondent displayed affection to John or Joe; and respondents were uncooperative with DSS. Respondents voluntarily placed John and Joe with family friends, but Laura remained in respondents' care. On 4 November 2011, the trial court adjudicated the three juveniles as neglected.

On 4 February 2013, DSS filed a second petition, this time alleging that Laura and her one-day-old brother, Tobias, were neglected and dependent juveniles. DSS stated that respondent-mother had admitted she would be unable to adequately care for Laura and Tobias, and that she was not taking her prescribed medication. Additionally, DSS claimed that both respondents had failed to comply with their In-Home Services Agreement regarding their care for Laura. DSS obtained non-secure

[2] Respondent-father is not the biological father of John and Joe, and the juveniles are not parties to this appeal.

custody of Laura and Tobias. On 24 July 2013, *nunc pro tunc* 19 April 2013, the trial court adjudicated Laura and Tobias dependent juveniles.

In an order entered on 31 July 2014 following a permanency planning hearing, the trial court ceased reunification efforts and changed the permanent plan for the juveniles to guardianship with a concurrent plan of adoption. On the same day, the trial court entered an order placing Laura and Tobias in separate guardianship arrangements. Respondents appeal.

II. Analysis

A. Respondent-Mother

Respondent-mother argues the trial court abused its discretion by failing to appoint a guardian ad litem for her. We are not persuaded.

"On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent who is incompetent in accordance with G.S. 1A–1, Rule 17." N.C. Gen. Stat. § 7B–1101.1(c) (2013). An incompetent adult:

> [L]acks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

N.C. Gen. Stat. § 35A–1101(7) (2013). "A trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention, which raise a substantial question as to whether the

litigant is *non compos mentis*." *In re J.A.A. & S.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005) (citation omitted). "Whether to conduct such an inquiry is in the sound discretion of the trial judge." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511, *aff'd per curiam*, 364 N.C. 596, 704 S.E.2d 510 (2010) (citation omitted).

Respondent-mother contends that "red flags," such as her history of psychological issues, as well as her denial of such issues and refusal to take medication, warranted an inquiry into her competency. We are not persuaded.

The record demonstrates that respondent-mother attended almost every hearing in the case, providing the trial court ample opportunity to observe and evaluate her capacity to act in her own interests. Furthermore, despite being represented by counsel throughout the proceedings, her attorney never requested appointment of a guardian ad litem, and neither did any other party. Additionally, respondent-mother testified on her own behalf at the 10 March 2014 permanency planning hearing. It was apparent from her testimony that she understood her own diagnoses and the recommendations for treating her psychological issues. Respondent-mother was also able to discuss her visitation with her children, her efforts at obtaining employment, her finances, as well as her objections to Laura's placement. We further note that the trial court initially allowed respondent-mother to have custody of Laura, and later granted her unsupervised visitation, decisions which indicate that the trial court had no concern with her competency. In summary,

the record does not suggest that respondent-mother's mental health problems were sufficiently disabling such that they raised a substantial question as to whether she was *non compos mentis*. Accordingly, we conclude the trial court did not abuse its discretion by failing to inquire into whether respondent-mother needed a guardian ad litem.

B. Respondent-Father

1. Cessation of Reunification

Respondent-father first argues that the trial court erred by ceasing reunification efforts. Although his appeal from the order ceasing reunification efforts is premature and technically untimely, in our discretion we will treat his appeal as a petition for a writ of certiorari and review his argument, as discussed hereinafter.

N.C. Gen. Stat. § 7B–1001(a)(1)-(6) lists the six types of juvenile orders which are appealable. Pursuant to N.C. Gen. Stat. § 7B–1001(a)(5), a parent who has properly preserved the right to appeal an order which ceases reunification "shall have the right to appeal the order if no termination of parental rights petition or motion is filed within 180 days of the order." N.C. Gen. Stat. § 7B–1001(a)(5)(b) (2013). Consequently,

> for a respondent-parent who has preserved their right to appeal the order ceasing reunification efforts, the statute renders the order unappealable for a period of 180 days, if no termination of parental rights [] petition or motion is filed. After 180 days have passed without the filing of a TPR petition or motion, the respondent-parent may

proceed with their appeal.

In re A.R., __ N.C. App. __, __, 767 S.E.2d 427, 428 (2014) (internal citation omitted).

In the instant case, the trial court's order ceasing reunification efforts was entered on 31 July 2014. Respondent-father timely filed his notice of intent to appeal that order. However, pursuant to N.C. Gen. Stat. § 7B–1001(a)(5)(b), respondent-father could not proceed with an appeal from the order ceasing reunification efforts until after a motion or petition to terminate his parental rights was filed, or until 180 days had passed since entry of the trial court's order. Once one of those conditions precedent had been satisfied, then respondent-father could proceed with his appeal. *See In re A.R.*, __ N.C. App. at __, 767 S.E.2d at 429 ("[W]e conclude that the 180-day period in N.C. Gen. Stat. § 7B–1001(a)(5)(b) operates solely to delay the date from which notice of appeal may be taken."). Respondent-father filed notice of appeal from the order ceasing reunification efforts on 12 August 2012, and filed the record on appeal in this case on 16 October 2014. Both filings were made prior to the expiration of the 180-day period. Because neither condition precedent here had yet been satisfied, respondent-father's appeal from the order ceasing reunification efforts was premature and improper.

However, in our discretion we elect to hear respondent-father's appeal pursuant to the extraordinary writ of certiorari. *See* N.C. R. App. P. 21(a)(1) (2014) ("The writ of certiorari may be issued in appropriate circumstances by either

appellate court to permit review of the judgements and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

Respondent-father argues the trial court erred by failing to make sufficient findings of fact before ceasing reunification efforts. We disagree.

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re I.R.C.*, 214 N.C. App. 358, 361, 714 S.E.2d 495, 497 (2011) (quoting *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citation omitted)). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and quotation marks omitted). "When a trial court ceases reunification efforts with a parent, it is required to make findings of fact pursuant to N.C. Gen. Stat. § 7B–507(b)." *In re C.M.*, 183 N.C. App. at 213-14, 644 S.E.2d at 594 (citations omitted).

N.C. Gen. Stat. § 7B-507(b) provides in pertinent part:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement

> of the juvenile shall not be required or shall cease *if the court makes written findings of fact that*:
>
> > (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B–507(b) (2013) (emphasis added). "When a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citation omitted). In the instant case, the trial court had an obligation to determine that efforts to reunite Laura and Tobias with respondent-father would be futile or inconsistent with the juveniles' health, safety, and need for a safe, permanent home within a reasonable period of time before it could direct reunification efforts to cease.

In its 31 July 2014 order as to the mandatory review and permanency planning hearing on 14 March 2014, the trial court made the following pertinent findings of fact concerning respondent-father:

> 3. On June 14, 2013, the Director of the Onslow County Department of Social Services, pursuant to NCGS 7B-905(c), suspended the respondent parents' unsupervised visitation of the juveniles, due to concerns that the respondent parents were drugging the juveniles while the juveniles were in their care. The Court found at a hearing held on July 29 – July 31, 2014 that the parents had given the juveniles medication to make them sleep while the juveniles were in their care, and that suspension of visitation by the Director of the Department of Social Services was reasonable pursuant to 7B-905(c), and in the best interests of the juveniles.

4. The Court finds that the respondent parents still deny administering medication or any wrongdoing, on their own part or on the part of their spouse, during their unsupervised visitations with the juveniles. Thus, any additional unsupervised visitation with the respondent parents is still not in the juveniles' best interests at this time. However, the Court finds that it would be in the juvenile [Laura's] best interest to have additional supervised visitation individually with the respondent father in a therapeutic setting, outside of the presence of the respondent mother. The Court further finds that telephone visitation between the respondent father and the juvenile [Laura] should cease at this time, as such visitation is not in the juvenile's best interest, as the respondent mother could be heard on at least one occasion in the background, crying, during these telephone conversations. The Court finds that visitation between the respondent father and the juvenile [Laura] may, however, take place outside of the respondent mother's presence, and that the possibility of increased visitation on a one-on-one basis with [Laura] should be explored by the respondent father with a request to the juvenile's therapist; and that, if the respondent father complies with the therapist's recommendations, such visitation may take place at the discretion of the juvenile's therapist . . . in a therapeutic setting.

. . . .

7. The respondent father[] . . . has not yet followed through with certain recommendations from the Department of Social Services nor with previous Court orders. Specifically, the Court finds that the respondent father has not completed marital counseling nor did he complete the final two classes of a parenting classes program. The respondent father has not demonstrated that he is able to adequately care for the juveniles while exercising unsupervised visitation. The respondent father has not demonstrated that he is able to adequately care for the

juveniles, as he has blamed others for his children being removed from his care, minimized the truth of the removal of the juveniles[] from his home to his family, and is more intent on remaining with his wife and going along with her decisions than taking the initiative to attempt to reunite with his children on his own, and that he is not likely to address and remedy his barriers to reuniting with his children within the next six months.

8. The juveniles[’] return to the home of the respondent mother and father in this case home would be contrary to the juveniles’ best interests. The juveniles need more adequate care or supervision than would be given in the home from which they were removed, and so the juveniles are still in need of placement at this time. The juveniles should remain in their current respective placements, as they are well bonded with their respective caregivers and receiving adequate care with those individuals.

9. DSS has made the following efforts to eliminate the need for placement: exploring potential kinship and foster care options in this case that would allow for shared parenting of the juveniles with the respondent parents, referring the respondent parents for services such as parenting class, community social assistance services, mental health services, marital counseling, and therapy to help them to learn appropriate parenting skills to provide a safe and stable home to which the juveniles would be able to return.

10. The efforts to reunite the juvenile[s] with either parent should cease as such efforts to reunify would be futile and inconsistent with the child[ren]’s health, safety, and need for a safe permanent home within a reasonable period of time.

11. The Court finds that reunification with the respondent parents is unlikely to take place within the next six months because the respondent parents have not yet remedied the circumstances that led to the juveniles’ removal from their home and are unlikely to do so in the near future.

> Therefore, the Court must consider an alternative permanent plan of care for the juveniles, and the Court determines at this time that the permanent plan of care for the juvenile[s] should be changed to guardianship with a court approved caretaker, with a concurrent plan of adoption.
>
> 11. [sic] The respondent mother and father are unfit, and have acted inconsistently with their constitutionally protected parental statuses.
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> 12. Because it is unlikely that the juveniles may be returned to their parents within six months, the plan of reunification is no longer the plan most likely to achieve permanence for the juveniles within the most reasonable amount of time, and that the joint permanent plan of guardianship with a court approved caretaker, with a concurrent plan of adoption, would be the plan most likely to achieve permanence for the juveniles within the most reasonable amount of time.

In its 31 July 2014 order as to the mandatory review and permanency planning hearing on 10 June 2014, the trial court made the following pertinent findings of fact concerning respondent-father:

> 4. . . . The Court further finds that the respondent father did not take advantage of an opportunity given to him by the Court at the previous hearing, allowing him to visit with the juveniles in a therapeutic setting.
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> 5. The Court finds that the respondent parents have represented to agencies of the Department of Social Services, to other parties in this case, and to the Court that they are living separate and apart when, in fact, they are continuing to reside together. The Court finds the respondent father not to be credible in his testimony.
>
> . . . .

7. The Court finds that the respondent mother and respondent father have not yet followed through with recommendations from the Department of Social Services nor with previous Court orders. The Court finds that the respondent parents have failed to demonstrate an ability to properly care for the juveniles while exercising visitation. . . . The Court finds that the respondent father has not demonstrated that he is able to adequately care for the juveniles, has blamed others for his children being removed from his care, minimized the truth of the removal of the juveniles[] from his home to his family, and is more intent on remaining with his wife and going along with her decisions than taking the initiative to attempt to reunite with his children on his own, and that he is not likely to address and remedy his barriers to reuniting with his children within the next six months.

8. The Court finds that the respondent parents have not taken advantage of opportunities to share the parenting of these juveniles, and have not taken the initiative to speak to the juveniles' placement providers regarding the welfare of the juveniles. . . .

9. The juveniles' return to the home of the respondent mother and father in this case . . . would be contrary to the juveniles' best interests, as the parents have not demonstrated to the Court their willingness to cooperate with the Department and this Court to remedy the circumstances that led to the juveniles' removal from their home by refusing to comply with Court Orders, by not acknowledging nor changing their parenting techniques to ensure a safe home for the juveniles, and by being untruthful with the Court about a change in circumstances: to wit, their fabricated separation. The juveniles need more adequate care or supervision than would be given in the home from which they were removed, and so the juveniles are still in need of placement at this time. . . .

These findings of fact are supported by competent evidence in the record. We conclude these findings support the trial court's ultimate conclusion that reunification efforts with respondent-father would be futile, as well as inconsistent with the juveniles' health, safety, and need for a safe, permanent home. Because the trial court related its findings to a conclusion of law that specifically set forth the basis for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b), we conclude that the trial court did not abuse its discretion in ordering that reunification efforts with respondent-father should cease. Therefore, we affirm this portion of the trial court's order and dismiss respondent-father's challenge.

2. Guardianship Appointment

Respondent-father next argues that the trial court erred in granting guardianship of the juveniles to non-relatives without adequately pursuing placement with a relative. We agree.

The trial court's authority to appoint a guardian in a custody review or permanency planning review hearing is found in N.C. Gen. Stat. § 7B–906.1(i), which provides that the court may "appoint a guardian of the person for the juvenile pursuant to G.S. 7B–600, or order 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

interests of the juvenile." N.C. Gen. Stat. § 7B–906.1(i) (2013). Pursuant to N.C. Gen. Stat. § 7B–903 (a)(2)(c), when placing a juvenile outside of the home,

> [i]n placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence.

N.C. Gen. Stat. § 7B–903(a)(2)(c) (2013). "This Court has recognized that our statutes give a preference, where appropriate, to relative placements over non-relative, out-of-home placements." *In re T.H.*, __ N.C. App. __, __, 753 S.E.2d 207, 216 (2014) (citing *In re L.L.*, 172 N.C. App. 689, 701, 616 S.E.2d 392, 399 (2005)). Furthermore, this Court has held that to satisfy the requirements of N.C. Gen. Stat. § 7B–903, the trial court must: (1) draw factual conclusions and not simply recite evidence regarding potential relatives, and (2) make specific findings of fact explaining why placement with a relative would not be in the child's best interest if placement is not with the relative. *In re L.L.*, 172 N.C. App. at 704, 616 S.E.2d at 401.

Here, Laura was placed with relatives, namely her maternal great-aunt and great-uncle. Thus, the trial court was not required to make any finding regarding placement with a relative in order to satisfy N.C. Gen. Stat. § 7B–903. Tobias,

however, was placed in guardianship with a non-relative. The record reveals that the issue of placing Tobias with relatives was discussed during the permanency planning hearings; however, the record also discloses that the trial court failed to make any findings regarding whether Tobias should be placed with relatives. Consequently, because the trial court failed to make the required findings, we vacate the trial court's order as it pertains to Tobias and remand this matter to the trial court to make further findings concerning Tobias' placement with relatives.

III. Conclusion

In summary, we vacate that portion of the trial court's order which awards guardianship of Tobias. We remand this matter to the District Court to enter findings of fact as required by N.C. Gen. Stat. § 7B-903. With respect to all other matters considered by this Court on appeal, the trial court's order is affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and DILLON concur.

Report per Rule 30(e).