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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-585

Filed: 15 November 2016

Wake County, Nos. 15 JA 262, 263

IN THE MATTER OF:

J.B. and J.B.

Appeal by respondent from order entered 10 May 2016 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 18 October 2016.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant father.

Matthew D. Wunsche, for appellee guardian ad litem.

Roger A. Askew, for petitioner-appellee Wake County Human Services.

CALABRIA, Judge.

When DSS files a petition alleging neglect, the trial court gains exclusive jurisdiction over the matter, and the action is not abated by a prior child custody proceeding. Where there was evidence of substantial risk of neglect which supported the trial court's findings of fact, and those findings in turn supported the trial court's conclusions of law, the trial court did not err in adjudicating the minor children neglected. Where respondent's cross-examination was rambling and testamentary, the trial court did not abuse its discretion in curtailing cross-examination. Where

respondent presented evidence and was afforded the opportunity to speak, the trial court did not err in declining to grant him an additional closing argument. Where there was ample evidence to support its decision, the trial court did not err in suspending visitation. Where the minor children were placed in the custody of their mother, the trial court was relieved of the duty to conduct periodic reviews.

I. Factual and Procedural Background

Respondent-father and mother were married in 2003, separated in 2010, and divorced in 2012. Two minor children were born to the marriage, both of whom have been diagnosed as autistic. Following the parties' separation, respondent initiated a civil action against mother for child custody and visitation. In January 2011, respondent filed a motion for temporary custody of the minor children. In 2012, mother obtained a domestic violence protective order ("DVPO") against respondent, which was extended through the end of 2014, based on harassment. In April 2013, the trial court entered a custody order, granting legal and physical custody of the minor children to mother. Respondent was granted specified visitation, starting with supervised visitation, with the possibility of future unsupervised weekend visits. Respondent was also required to complete SafeChild classes.

The parties filed multiple subsequent motions in this matter. Among these, on 1 May 2015, respondent filed a motion for an order to show cause and motion for contempt, alleging that mother had violated the custody order by failing to bring the

children to visit him. On 18 June 2015, mother filed a motion for an order to show cause and motion for contempt, alleging that, after a visit, respondent did not return the minor children, but instead “decided to give himself extra time with said kids[.]”

On 20 July 2015, Wake County Human Services (“DSS”) was informed of respondent’s refusal to return the children, and an Amber alert was issued; the children were soon returned, and DSS attempted to conduct a safety assessment regarding the children while in respondent’s care. DSS found that respondent “refused to cooperate with [DSS;]” that he “was allegedly homeless and often slept in a tent behind a Laundromat[;]” and that the minor children were “both autistic and largely non-verbal[.]” but that respondent “refused to acknowledge that the children had any special needs that required attention.” DSS and mother expressed “significant concerns that the father does not properly provide for the children’s basic needs while they are in his care.” On 4 September 2015, DSS filed petitions alleging respondent’s interference with its investigations, and seeking an *ex parte* order requiring respondent to cease interference. The trial court issued orders requiring respondent to disclose the whereabouts of the minor children, to allow DSS to assess their living conditions, and to cease interference with the investigation.

On 18 September 2015, DSS filed a motion to intervene in the child custody proceeding. On 27 October 2015, DSS moved for an emergency custody order, alleging that, (1) following a visitation on 25 October 2015, respondent informed

mother that “the largely non-verbal female child told him that someone had touched her inappropriately[]” while in mother’s home, at which point respondent left with the female child; (2) respondent refused to respond to mother’s subsequent telephone calls, his location and that of the female child were unknown, and the weather was “cold and rainy[;]” (3) respondent “has plainly stated in open court that [DSS] will not be involved with his children[,]” and that “he would not wait for orders of the Court and would ‘take care of it’ himself[;]” and (4) respondent’s “erratic and unstable behaviors demonstrate that there is a possibility that he may flee the jurisdiction with the child.” DSS therefore sought emergency custody and immediate suspension of respondent’s visitation. The child was returned on 29 October 2015.

On 30 October 2015, DSS filed the petition at issue, alleging that the minor children were neglected. At the hearing on the petition, respondent appeared *pro se*, and mother, who did not appear, was represented by counsel. At the time of the hearing, respondent had been in custody in Bertie County for a child support matter.

On 26 February 2016, in the middle of DSS’ presentation of evidence, respondent filed a motion for summary judgment, which was denied. The motion was not renewed.

During the trial, respondent represented himself and asked a number of questions which constituted testimony. During his cross-examination of a social worker, respondent asked questions such as, “Are you aware that I’m a college

graduate in sociology with a concentration in criminal justice?” When the witness responded in the negative, respondent went on to describe his GPA. The trial court intervened, and discontinued that particular line of cross-examination, noting that:

[T]he Court has a feeling that [respondent] intends on simply just asking any question he can ask without any type of direction. And I have a concern that, if I allow this to continue, we could essentially be here for days upon days without getting anywhere in this cross-examination. That’s a concern.

Subsequently, in a separate line of questioning, respondent repeatedly asked the social worker if she knew who had called police officers to assist in various issues with the children. Again, the trial court intervened, noting that, “at some point, the Court has to make a determination as to when does the Court cease this line of questioning, particularly if we’re just spinning and spinning and not getting anywhere.” Respondent was offered the chance to respond, after which the trial court stated:

Well, the Court, I believe, when it becomes repetitious to the point where we are not moving forward in any testimony, then I think the Court, based on that, can make a determination if it’s simply used to essentially waste time. When it’s repeating things over and over again and answers that the witness has previously answered, and I cannot force her to give answers to questions that she does not know the answer to. So therefore, I am going to limit the cross-examination.

This cross-examination is ceased with the understanding that [respondent], upon his presentation of evidence, if he so chooses to call witnesses, he is welcome to recall. But at

this point, I'm going to cease the cross-examination.

DSS engaged in redirect of the witness, after which respondent proceeded to ask questions on recross beyond the scope of redirect. Once again, the trial court discontinued respondent's line of questioning, noting that it was "becoming repetitious."

During cross-examination of another DSS employee, respondent asked repeatedly whether DSS had observed any abuse by respondent of the minor children. DSS objected, noting that abuse was not alleged in the juvenile petition, and the trial court once more intervened, noting that (1) respondent would have his own opportunity to present evidence; (2) neglect, not abuse, was alleged in the petition; and (3) the current line of questioning had once more grown repetitious. Later on, respondent asked the witness what kind of clothing he wore in her office; again, the trial court intervened, holding that this was irrelevant. Still later, respondent asked the witness about various matters of knowledge. The witness testified that she had no knowledge of these matters, and when respondent attempted to ask her about these matters further, the trial court intervened, ultimately stating that this cross-examination was "not productive."

On 10 May 2016, the trial court entered its order on adjudication and disposition. The trial court entered findings of fact, and concluded as a matter of law that the minor children were neglected as defined by N.C. Gen. Stat. § 7B-101(15),

that it was in the children's best interests to have legal custody returned to their mother, and that it was in their best interests to suspend visitation with respondent. The trial court ordered respondent to complete a psychological evaluation and obtain safe and stable housing, permitted respondent to move for review at any time, waived further hearings, relieved the guardian *ad litem* and attorneys of record, and retained jurisdiction.

From the oral rendering of the trial court's disposition, respondent appeals. Because respondent appealed from the oral rendering of disposition prior to the filing of the trial court's written opinion, we grant certiorari.

II. Prior Pending Matter

In his first argument, respondent contends that the trial court lacked jurisdiction over this matter. We disagree.

A. Standard of Review

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Respondent contends that the petition of neglect in the instant case, and the prior child custody proceeding against mother and respondent in which DSS intervened, involved “a substantial identity as to parties, subject matter, issues involved, and relief demanded[,]” and that therefore the district court action under the petition abated, and the trial court lacked jurisdiction. Respondent notes that, where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it. *Johns v. Welker*, 228 N.C. App. 177, 180, 744 S.E.2d 486, 489 (2013).

Johns dealt with issues in which there are courts of concurrent jurisdiction. Specifically, that case involved a pending civil custody action and a pending adoption action. In addressing these matters, this Court held that the district court had jurisdiction over both custody and contested adoptions, and that there was no statute specifying a procedure for concurrent proceedings in those matters. *Id.* at 181, 744 S.E.2d at 490. As such, we held that jurisdiction went to the court which first acquired it.

In the instant case, however, there is a statute on point. Specifically, our General Statutes provide that the district court “has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2015). This statute also provides:

When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused,

neglected, or dependent:

(1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to subsection (d) of this section or the court in the juvenile proceeding enters an order dissolving the stay.

(2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

N.C. Gen. Stat. § 7B-200(c). As such, there is explicit statutory authority that overrides the doctrine of abatement cited by respondent. When DSS filed the petition alleging neglect, the district court gained “exclusive, original jurisdiction” over that matter, and the prior custody matter was stayed pending the resolution of the petition. The trial court had explicit statutory jurisdiction over this matter, and did not err in proceeding.

This argument is without merit.

III. Adjudication of Neglect

In his second argument, respondent contends that the trial court erred in its adjudication of neglect. We disagree.

A. Standard of Review

“The role of this Court in reviewing a trial court’s adjudication of neglect and abuse is to determine ‘(1) whether the findings of fact are supported by “clear and

convincing evidence,” and (2) whether the legal conclusions are supported by the findings of fact[.]’ ” *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff’d as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). “If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.” *Id.*

B. Analysis

Respondent contends that there was no evidence of neglect in the proceeding below. Respondent notes that, to support a determination of neglect, the evidence must show “some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline.” *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citations and quotations omitted). Respondent contends that, in the instant case, the evidence that he was uncooperative with DSS, that he returned his children late, and that he violated the custody order, was not evidence that showed impairment or risk of impairment to the juveniles. He further contends that the events giving rise to the petition at issue, his departure with his daughter for several days, did not show any impact on the other juvenile.

Even assuming, *arguendo*, that the evidence showed no physical, mental, or emotional impairment of the juveniles, it clearly established a substantial risk of such

impairment. The evidence at trial showed that respondent had returned the children to their mother in urine-soaked clothes. The evidence further showed that the children are autistic, and that respondent denies that they have autism; that the older of the two children is largely non-verbal and has special medical needs including a special diet; that there was violence in the home, and that mother secured a DVPO against respondent; that respondent did not provide an address to DSS, and may have been living in a tent; and that respondent's daughter, after being recovered, had not been in school for several days, which meant that those of her special needs which were provided for in school were not met.

We hold, on review, that this clear and convincing evidence supports the trial court's findings that respondent could not provide a safe and stable environment for the children, and could not provide proper care and supervision. These findings, in turn, support the trial court's conclusion that the minor children were neglected. The trial court did not err in adjudicating the minor children neglected.

This argument is without merit.

IV. Cross-Examination and Closing

In his third argument, respondent contends that the trial court erred in limiting respondent's cross-examination and closing argument. We disagree.

A. Standard of Review

“[T]he trial court has broad discretion in controlling the scope of cross-examination, and such a ruling may likewise not be disturbed absent abuse of discretion and a showing the ruling was so arbitrary it could not have been the product of a reasoned decision.” *Fallis v. Watauga Med. Ctr., Inc.*, 132 N.C. App. 43, 62, 510 S.E.2d 199, 211, *disc. review denied*, 350 N.C. 308, 534 S.E.2d 589 (1999).

[I]t is left to the trial judge's sound discretion to determine whether counsel has abused [that] latitude accorded him in the argument of hotly contested cases. [The appellate courts] will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict.

Id. at 53, 510 S.E.2d at 206 (quoting *State v. Hockett*, 309 N.C. 794, 799, 309 S.E.2d 249, 252 (1983)).

B. Analysis

Respondent contends that the trial court committed prejudicial error by discontinuing his cross-examination of witnesses, and by declining to permit him to offer closing arguments.

With respect to respondent's cross-examination, we note first that the trial court discontinued respondent's questioning on multiple occasions, citing the fact that it was repetitious. In examining the transcript on review, we note that the trial court afforded respondent ample opportunity to perform proper cross-examination. Respondent was advised of his right to counsel, which he refused. He was informed that his questions were off-topic or testamentary, but briefly permitted to continue.

Even when defendant was dissuaded from a line of questioning, he was permitted to proceed with the witness. It was only after multiple pages of transcript, and numerous seemingly-random and extraneous questions, that the trial court instructed respondent to discontinue his cross-examination. On review, we hold that this was not an abuse of the trial court's discretion.

With respect to respondent's closing arguments, we acknowledge that there is traditionally a strong right to offer a closing argument to the jury. "In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." *State v. Bell*, 179 N.C. App. 430, 430, 633 S.E.2d 712, 713 (2006) (citing N.C. Super. and Dist. Ct. R. 10). However, where a party presents evidence, and is afforded the opportunity to present closing arguments, that party's constitutional rights are not negatively impacted by the trial court's actions in bypassing closing arguments. *See In re G.C.*, 230 N.C. App. 511, 522, 750 S.E.2d 548, 555 (2013).

In the instant case, defendant gave extensive testimony of his own, both on direct and on his own behalf. After defendant presented his evidence, the trial court asked whether the parties needed to be heard. In response, respondent offered a few brief statements. The trial court then entered its order.

We hold the instant case to be analogous with that of *In re G.C.* In that case, this Court noted that, at the end of the dispositional hearing, the trial court asked

whether counsel wished to present further evidence. This provided counsel an “opportunity for a closing argument.” Since an opportunity to offer a closing argument was provided, we held that the trial court’s actions did not adversely impact constitutional or statutory rights. *Id.* at 522, 750 S.E.2d at 555.

In the instant case, the trial court provided respondent ample opportunity to offer a closing argument. As such, we hold that the trial court’s actions in limiting his closing did not adversely impact his rights.

This argument is without merit.

V. Supervised Visitation

In his fourth argument, respondent contends that the trial court erred in denying respondent visitation with the minor children. We disagree.

A. Standard of Review

“This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion.” *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

B. Analysis

Respondent contends that it was error for the trial court to suspend visitation altogether. He notes that both DSS and mother had requested that he have some form of supervised visitation, and that DSS had testified that they had no safety concerns for the children with respect to supervised visits.

However, as previously stated, there was ample evidence of respondent's erratic behavior, and the potential risk that he posed to the minor children. Further, "North Carolina caselaw is replete with situations where the trial court declines to follow a DSS recommendation." *In re K.S.*, 183 N.C. App. 315, 324, 646 S.E.2d 541, 546 (2007) (quoting *In re Rholetter*, 162 N.C. App. 653, 664, 592 S.E.2d 237, 244 (2004)). Additionally, the trial court's order did not rule out the possibility of visitation indefinitely; the order explicitly provided that respondent could file a motion for review at a later time. As such, we hold that the trial court did not abuse its discretion in suspending respondent's visitation with the minor children.

This argument is without merit.

VI. Waiver of Further Review

In his fifth argument, respondent contends that the trial court erred in waiving further review while retaining jurisdiction. We disagree.

A. Standard of Review

"Issues of statutory construction are questions of law, reviewed de novo on appeal." *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592.

B. Analysis

Respondent contends that, pursuant to our General Statutes, the trial court may waive future hearings, if it finds by clear, cogent, and convincing evidence that:

- (1) The juvenile has resided in the placement for a period of at least one year.

(2) The placement is stable and continuation of the placement is in the juvenile's best interests.

(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.

(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.

(5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n) (2015). Respondent contends, however, that the trial court failed to make all of the requisite findings.

Respondent's reliance on this statute is misplaced. A prior section of the same statute provides that, "[i]f at any time custody is placed with a parent or findings are made in accordance with subsection (n) of this section, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-906.1(k). Respondent does not challenge the finding that mother was given physical and legal custody of the minor children. Because the children were placed in the custody of their mother, the court was relieved of the duty to conduct periodic judicial reviews, pursuant to N.C. Gen. Stat. § 7B-906.1(k). The trial court therefore did not err in waiving further review.

This argument is without merit.

VII. Conclusion

Because the trial court gained exclusive jurisdiction over this matter upon the filing of a petition alleging neglect, it was not abated by the prior child custody action. The evidence of neglect supported the findings, which in turn supported the trial court's conclusion that the juveniles were neglected. The trial court did not abuse its discretion in curtailing respondent's rambling and testamentary cross-examination, and did not err in declining to grant him closing argument where he presented evidence and spoke extensively. The trial court was not bound by DSS' recommendation of supervised visitation, and there was ample evidence to support its decision to suspend visitation and allow respondent to file a motion for review at a later time. Because the minor children were placed in the custody of their mother, the trial court was relieved of the duty to conduct periodic reviews.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

Report per Rule 30(e).