IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-283

Filed: 7 August 2018

Forsyth County, No. 15 JT 288

IN THE MATTER OF: L.A.G.

Appeal by respondent-mother from orders entered 13 December 2016 by Judge Denise S. Hartsfield and 1 November 2017 by Judge Lisa V. Menefee in Forsyth County District Court. Heard in the Court of Appeals 26 July 2018.

Assistant County Attorney Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Mark L. Hayes for respondent-appellant mother.

Christopher J. Waivers for guardian ad litem.

ZACHARY, Judge.

Respondent appeals from orders eliminating reunification with the minor child L.A.G. ("Lara")[1] as a permanent plan and terminating respondent's parental rights to Lara. After careful consideration, we vacate the orders and remand for further proceedings consistent with this opinion.

[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading.

Background

Lara was born in September 2015 to respondent and the father, who is not a party to this appeal. On 31 December 2015, the Forsyth County Department of Social Services ("DSS") filed a petition alleging that Lara was an abused and neglected juvenile. The petition alleged that, on 1 December 2015, respondent noticed that Lara had bruises on her left arm and would cry when her arm was raised, and that respondent took Lara to the pediatrician the next day. Dr. Anna Miller-Fitzwater diagnosed Lara with fractures in her right clavicle and right distal tibia, and with bruising in a non-ambulatory infant. Dr. Miller-Fitzwater learned from the parents that Lara had bruises on her legs in the past that respondent believed resulted from impact with the ring she wore while changing Lara's diapers. More recently, Laura had been bleeding from the attachment on the underside of her tongue, and the father thought she cut it when she put her hands in her mouth. The parents were unsure how the most recent bruising had occurred. Dr. Miller-Fitzwater concluded that, "without an adequate history to explain the multiple injuries[,] I am concerned that this presentation could be consistent with inflicted trauma." In a subsequent skeletal survey on 17 December 2015, Dr. Miller-Fitzwater noted healing fractures on the left radius and ulna, skeletal irregularities to the right radius and ulna, and "slight

angular deformity of the right anterior eighth rib and to a lesser extent the sixth and seventh ribs." DSS also noted in the petition that the parents admitted to acts of domestic violence having occurred between them while respondent was pregnant.

Following a 3 June 2016 adjudicatory and dispositional hearing, the trial court entered a 30 June 2016 order adjudicating the juvenile to be abused and neglected and ordering respondent to complete a parenting capacity assessment and psychological evaluation and comply with all recommendations, to complete parenting and domestic violence classes, and to demonstrate the ability to keep Lara safe. The trial court held a permanency planning hearing on 31 October 2016, after which the court entered an order on 13 December 2016 establishing a primary permanent plan of adoption with a secondary plan of custody or guardianship. Respondent timely filed a notice to preserve the right to appeal from the trial court's permanency planning order.

On 31 January 2017, DSS filed a petition to terminate parental rights, alleging neglect and willful failure to make reasonable progress in correcting the conditions leading to the removal of the juvenile from the home as grounds to terminate respondent's rights. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(2) (2017). Following a hearing on the petition, the trial court entered an order on 1 November 2017 terminating respondent's parental rights after adjudicating the existence of both

grounds alleged in DSS's petition. Respondent timely filed notice of appeal from the trial court's termination order.

Discussion

Before this Court, respondent first contends that the trial court erred in eliminating reunification as a permanent plan for the juvenile without making the requisite findings under N.C. Gen. Stat. § 7B-906.2. We agree.

The trial court's 13 December 2016 permanency planning order established a primary permanent plan of adoption with a secondary plan of custody or guardianship. "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2017). Here, the trial court did not make findings under N.C. Gen. Stat. § 7B-901(c), and thus the court could only eliminate reunification as a permanent plan after making a written finding that efforts at reunification "clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id*. *See In re T.W.*, ___ N.C. App. ___, ___, 796 S.E.2d 792, 795 (2016) ("[I]f reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C.

Gen. Stat. § 7B-906.2(b)."). Eliminating reunification as a permanent plan pursuant to N.C. Gen. Stat. § 7B-906.2(b) requires that the trial court

> make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2017).

In the present case, the trial court made the following findings relevant to a determination of whether reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety:

> 13. [Respondent] was court ordered to attend parenting classes. She has completed parenting classes through the COOL Program.
>
> 14. [Respondent] was court ordered to complete a psychological evaluation/parenting capacity assessment. [DSS] has made a referral to Dr. Chris Sheaffer for that assessment. The assessment has not been completed.
>
> 15. [Respondent] was court ordered to complete domestic violence classes through the COOL Program. [Respondent] has not completed the domestic violence classes.

16. [Respondent] was court ordered to submit to random drug screens. [Respondent] submitted to a drug screen on October 18, 2016. The results were negative for all substances.

17. [Respondent] is employed at Lins Kitchen and Encore Consignment Shop.

18. [Respondent] was court ordered to attend bi-weekly individual counseling. [Respondent] is attending counseling once a week . . . .

19. [Respondent] is currently residing with her grandmother, sister, brother in-law and nephew in Kernersville, NC.

20. [Respondent] filed a Civil 50-B Restraining Order against [the father] and it was granted for one year. [Respondent] reports she has had no contact with [the father] but she does keep in contact with his parents.

. . . .

28. [Respondent] and [the father] are currently separated and there is an active Civil 50-B case for one year.

. . . .

32. It is not possible for [Lara] to return home now or within the next six months and is not in the best interest of [the] juvenile as pursuant to 7B-906.1(B),[2] due to:

- Age of [Lara]

[2] The trial court appears to have cited the wrong statutory subsection. N.C. Gen. Stat. § 7B-906.1(b) (2017), the subsection cited by the trial court, deals with calendaring permanency planning hearings and providing notice of the hearing to the parties. Instead, N.C. Gen. Stat. § 7B-906.1(e) (2017) directs the trial court to determine whether "it is possible for the juvenile to be placed with a parent within the next six months[.]"

> - Uncertainty/questionability as to removal and how [Lara] was injured
> - The father's current living situation
> - [Respondent]'s latest revelations
> - [Respondent] and [the father] recently separated. The Court is unclear if separation of permanence.
> - There is possible domestic violence between the parents and now a Civil 50-B is on file for a period of one year
> - The serious nature of [Lara]'s removal
>
> . . . .
>
> 34. There is no way the Court can return [Lara] to [respondent], [the father] or the paternal grandparents . . . at this time and it is not in the best interest of [Lara] to return to any of these households.
>
> . . . .
>
> 43. Return of [Lara] to the home of her parents would be contrary to the welfare of the child.

Not included in the trial court's written findings is a finding that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," a necessary prerequisite to eliminating reunification as a permanent plan. N.C. Gen. Stat. § 7B-906.2(b)(2017). Though the trial court's written findings " 'need not quote [the statute's] exact language[,]' " *In re N.B.*, 240 N.C. App. 353, 363, 771 S.E.2d 562, 569 (2015) (quoting *In re A.E.C.*, 239 N.C. App. 36, 42, 768 S.E.2d 166, 170 (2015), *cert. allowed*, 369 N.C. 527, 796 S.E.2d 791 (2017)), the findings must at least address the statute's concerns, and the trial court's findings cannot be said to do that. While the court finds that a return to respondent's home

at that time or within six months would be contrary to Lara's welfare and best interests, the question of what is in Lara's "welfare or best interests" is distinct from the question of what is inconsistent with her "health or safety." Similarly, considering the effects of Lara's hypothetical return home is distinct from considering the effects of continuing reunification efforts.

The trial court also failed to make any of the findings required by N.C. Gen. Stat. § 7B-906.2(d) before eliminating family reunification as a permanent plan. The findings list some ways in which respondent was making progress on her case plan, and some ways in which she was not, but did not resolve the ultimate question of "[w]hether the parent is making adequate progress within a reasonable period of time under the plan." N.C. Gen. Stat. § 7B-906.2(d)(1) (2017). Next, while the findings suggest that respondent was "actively participating in or cooperating with the plan" and with DSS, N.C. Gen. Stat. § 7B-906.2(d)(2), the court did not explicitly find that to be the case. Similarly, the findings suggest that respondent "remain[ed] available to the court, [DSS], and the guardian ad litem for the juvenile[,]" N.C. Gen. Stat. § 7B-906.2(d)(3), but the court did not make such a finding. Finally, the court did not resolve the issue of whether respondent was "acting in a manner inconsistent with the health or safety of the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(4) (2017). Thus, the trial court made none of the requisite findings prior to eliminating reunification as a permanent plan, and to the extent the court's findings address the apparent

statutory concerns of N.C. Gen. Stat. § 7B-906.2(d), those findings were largely favorable to respondent and therefore did not "demonstrate lack of success." N.C. Gen. Stat. § 7B-906.2(d) (2017). While we express no opinion as to whether the evidence could support the findings necessary to eliminate reunification as a permanent plan, we conclude that the trial court's current findings do not adequately support elimination of family reunification as a permanent plan.

As a result, we must vacate the trial court's 13 December 2016 permanency planning order and remand for further fact-finding. We leave to the discretion of the trial court whether to hear additional evidence. Because we vacate the trial court's permanency planning order, the court's subsequent termination order is also vacated. *A.E.C.*, 239 N.C. App. at 45, 768 S.E.2d at 172.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).