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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-321

Filed: 20 November 2018

Edgecombe County, No. 16 JA 91

IN THE MATTER OF: D.E.

Appeal by respondent-mother from orders entered 5 December 2017 by Judge Pell C. Cooper in Edgecombe County District Court. Heard in the Court of Appeals 4 October 2018.

Best, Lawrence Law, P.A., by Natarlin R. Best, Trevorina L. Jackson, and Henry Clay Turner IV, for petitioner-appellee Edgecombe County Department of Social Services.

Sean P. Vitrano for respondent-appellant mother.

The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.

DIETZ, Judge.

Respondent appeals from an order granting full legal and physical custody of her daughter Deanna¹ to Deanna's biological father, closing the juvenile case, and transferring the matter to a Chapter 50 custody action. Because we agree that the

¹ We use a pseudonym to protect the identity of the juvenile.

trial court failed to make sufficient findings as required by Sections 7B-905.1 and 7B-911 of the General Statutes, we vacate the trial court's orders and remand for additional fact-finding.

Facts and Procedural History

On 15 September 2016, the Edgecombe County Department of Social Services was called to the home of Respondent and her husband for a domestic violence issue. During the incident, Respondent was intoxicated and holding Deanna, who was three weeks old at the time, as a human shield to prevent police from arresting her. DSS observed drug paraphernalia, cigar wrappers, wine bottles, and a scale in the home. In addition, the home did not have running water. Law enforcement arrested and jailed Respondent and her husband, who is not Deanna's biological father. Respondent was charged with possession of marijuana, possession of marijuana paraphernalia, and simple assault. Respondent's husband was charged with possession of marijuana, possession of marijuana paraphernalia, and assault on a female.

DSS then filed a juvenile petition alleging that Deanna was neglected and dependent and obtained nonsecure custody the same day. After a hearing, the trial court entered an order adjudicating Deanna a neglected juvenile. The trial court ordered Respondent to complete mental health and substance abuse assessments,

secure and maintain appropriate housing, and complete domestic violence counseling.

Later, after a permanency planning review hearing, the trial court entered an order ceasing reunification efforts with Respondent, awarding legal and physical custody of Deanna to her biological father, and ordering the juvenile case to be closed and transferred to a Chapter 50 civil child custody proceeding. The same day, the trial court also entered an “Order of Transfer” directing that the juvenile case be closed and that a civil case be opened with Deanna’s biological father as the plaintiff and Respondent as the defendant. Respondent appealed.

Analysis

I. Petition for a Writ of Certiorari

As an initial matter, Respondent has filed a petition for a writ of certiorari as an alternative basis for review of her case because her notice of appeal failed to identify the orders from which she was appealing and the court to which appeal was made. *See* N.C. R. App. P. 3(d). Because Respondent timely appealed; because the notice of appeal, although defective, provided reasonable notice of the orders Respondent sought to appeal and the court to which she intended to appeal; and because Respondent identified an issue of probable merit in her petition, we exercise our discretion to issue a writ of certiorari and review both orders. *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017).

II. Visitation

Respondent first argues that the trial court erred by failing to specify the minimum frequency and length of Respondent's visits with her daughter. We agree. The applicable statute, N.C. Gen. Stat. § 7B-905.1, provides that the visitation order "shall specify the minimum frequency and length of the visits":

(a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.

...

(c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation *shall specify the minimum frequency and length of the visits* and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1 (emphasis added).

Here, the trial court provided that "[v]isitation between the mother [and the child] shall be supervised at the discretion of the father." The court provided no further conditions or parameters for visitation. This language in the order is insufficient to satisfy the statutory criteria of section 7B-905.1. Moreover, the "judicial function of awarding visitation may not be delegated by the court to the

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custodian of the child.” *In re J.D.R.*, 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015). Thus, the conditions and parameters of visitation cannot be left entirely to the discretion of the custodial parent. The trial court must define the conditions and parameters of the visitation sufficiently to meet the requirements of the statute.

DSS contends that the trial court’s order does not even implicate section 7B-905.1 because it does not award visitation at all. DSS asserts that the language indicating that visitation “shall be supervised at the discretion of the father” was simply providing the father with the *option* to allow visitation and, if the father chose to do so, requiring that any visitation be supervised.

Even if this were an appropriate reading of the trial court’s order (and we are not persuaded that it is), we would still be required to vacate and remand the order. This reading, in effect, is a denial of visitation rights for Respondent, because the decision of whether Respondent would be permitted to visit her child is left entirely to the biological father’s discretion. This sort of total denial of visitation requires “findings that the parent has forfeited their right to visitation or that it is in the child’s best interest to deny visitation.” *In re T.W.*, __ N.C. App. __, __, 796 S.E.2d 792, 798 (2016); *see also In re K.C.*, 199 N.C. App. 557, 562, 681 S.E.2d 559, 563 (2009) (The trial court must “either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.”). The trial court’s order does not contain sufficient findings to justify denying a

visitation plan altogether. On remand, the trial court should either establish a visitation plan specifying the minimum frequency and length of visits or make findings that visitation would be inappropriate or not in the child's best interests.

III. Closure of Juvenile Case and Transfer to Chapter 50 Action

Respondent next argues that the trial court erred by ordering that the juvenile case be closed and the matter transferred to a Chapter 50 civil custody case without making the statutorily required findings. Again, we agree.

The transfer of a Chapter 7B juvenile case to a Chapter 50 civil custody case is governed by N.C. Gen. Stat. § 7B-911, which requires the following:

(c) When entering an order under this section, the court shall satisfy the following:

(1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes[.]

(2) Make the following findings:

a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911(c).

Respondent first contends that the trial court failed to make findings required under Chapter 50 to support its conclusion that custody with Deanna's biological father was in Deanna's best interest. We agree.

N.C. Gen. Stat. § 50-13.2(a) provides that:

An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.

N.C. Gen. Stat. § 50-13.2(a). "The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178 (citations omitted).

Here, the trial court's order of transfer does not contain any of the fact findings required by section 50-13.2(a). The trial court made findings relevant to that

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consideration in its permanency planning review order, but those findings were limited:

5. [Respondent] is diagnosed with post-traumatic stress disorder and anxiety disorder. She is currently pregnant with her fifth child. She is currently residing with her mother and receives [Supplemental Security Income] benefits. [Respondent] has not complied with her case plan and has not visited with her daughter. . . .

6. The father . . . currently resides with his parents and is employed fulltime at Poppies factory in Battleboro, NC. He completed substance abuse and domestic violence assessments and there were no recommendations for substance abuse. He has complied with all case plan recommendations, except attending domestic violence classes due to a conflict with his work schedule. He actively participates in weekly overnight, supervised visits with his daughter.

Even assuming that the findings in the court's permanency planning review order could be considered part of the court's transfer order, the findings are still insufficient to allow this Court meaningful review of the trial court's best interest determination. While the findings detail Respondent's mental health issues, current pregnancy, living situation with her mother, and receipt of Supplemental Security Income, the order does not find that these factors relate to Deanna's best interest and welfare.

Moreover, although the trial court found that Respondent did not comply with her case plan, the court also found that Deanna's biological father had not complied with all of his case plan either. Importantly, N.C. Gen. Stat. § 50-13.2(a) specifically tasks the court with considering any acts of domestic violence between the parties. In

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this case there was evidence that the biological father “has assault charges on his criminal record involving” Respondent, and the trial court found that the biological father had not attended domestic violence classes as of the 14 November 2017 permanency planning review hearing.

To be sure, the trial court may have weighed these factors and, in its discretion, determined that custody with the father was nevertheless in Deanna’s best interest. The record certainly would support that determination. But the trial court did not expressly engage in this sort of best interests analysis or make any express best interest findings in its order, and thus this Court cannot engage in a meaningful review of whether the trial court acted within its sound discretion.

Respondent also contends that the trial court failed to find that there was not a need for continued State intervention, and that the order contained no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary. DSS argues that support for the trial court’s ultimate finding that State intervention is no longer necessary can be found in the DSS court report. But the trial court never stated that it accepted the findings in that report as fact, or otherwise adopted those findings in support of its determination. Thus, although we agree that the record could support the trial court’s decision, the order itself does not contain sufficient findings to support the outcome.

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Finally, Respondent contends that the trial court failed to make the finding required by N.C. Gen. Stat. § 7B-911(c)(2)(b) that “[a]t least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile.” But the statute provides that “this finding is not required if the court is awarding custody to a parent.” N.C. Gen. Stat. § 7B-911(c)(2)(b). The court awarded custody to Deanna’s biological father and thus this finding was not required by the statute.

Conclusion

We vacate the trial court’s permanency planning review order and order of transfer and remand the matter to the trial court. On remand, the trial court, in its discretion, may decide this case on the existing record or may conduct any further proceedings that it deems appropriate.

VACATED AND REMANDED.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).