IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-329

Filed: 2 October 2018

Haywood County, Nos. 16 JA 6-7

IN THE MATTER OF: E.G.B., B.R.B.

Appeal by respondent-father from order entered 27 September 2017 by Judge Kristina Earwood in Haywood County District Court. Heard in the Court of Appeals 13 September 2018.

Assistant Agency Attorney Jordan R. Israel for petitioner-appellee Haywood County Department of Health and Human Services Agency.

David A. Perez for respondent-appellant father.

Matthew C. Phillips for guardian ad litem.

ARROWOOD, Judge.

Respondent-father appeals from the trial court's permanency planning order which, *inter alia*, ceased respondent-father's visitation with his two children, Elizabeth[1] and Bethany. Based on the reasons stated herein, we affirm.

I. Background

[1] Pseudonyms have been used to protect the identity of the juveniles and for ease of reading.

Respondent-father and respondent-mother began a sexual relationship when respondent-mother was 14 years old and respondent-father was 17 years old. Respondent-mother gave birth to Elizabeth when she was 15 years old and to Bethany when she was 16 years old. Respondent-father is a member of the Eastern Band of Cherokee Indians ("EBCI").

On 2 February 2016, Haywood County Health and Human Services Agency ("HHSA") obtained nonsecure custody of Elizabeth and Bethany (collectively "the children") and filed juvenile petitions alleging that they were abused, neglected, and dependent juveniles. The petitions alleged: drug use by both respondent parents; domestic violence between respondent parents; improper supervision of Elizabeth; physical injuries sustained by Elizabeth due to poor parenting skills; criminal charges against respondent-father in Buncombe County for driving while impaired and a related charge of misdemeanor child abuse for having Elizabeth in the vehicle; and criminal charges against respondent-father in Forsyth County for breaking and entering after he allegedly entered a hotel room where a 13-year-old female was present and instructed her to take off her clothes.

By an order entered 31 March 2016, the trial court adjudicated the children as neglected and dependent juveniles. The trial court entered a separate disposition order on the same day, continuing custody of the children with HHSA. The permanent plan was reunification, with a concurrent plan of legal guardianship with

a relative or court-approved caretaker. Respondent-father was ordered to: (1) complete all objectives of his case plan; (2) undergo a mental health/substance abuse assessment and follow and complete all the recommendations of the assessment; (3) submit to random drug screens as requested by HHSA; (4) undergo a Capacity to Parent Assessment with IQ testing and a psychological component and complete all recommendations; (5) complete parenting classes and demonstrate parenting skills learned; (6) obtain and maintain safe and independent housing, cooperate with announced and unannounced home visits by HHSA, and inform HHSA of all changes in address and/or phone numbers; (7) obtain and maintain stable employment and provide verification of employment to HHSA; (8) communicate with HHSA a minimum of every ten days; (9) sign all requested releases of information regarding all treatment providers for HHSA and the guardian ad litem program; (10) undergo a domestic violence intervention program assessment and follow and complete all recommendations of the assessment; and (11) refrain from incurring further criminal charges and resolve all pending charges. Respondent-father was granted supervised visitation with Elizabeth and Bethany for a minimum of one hour per month.

On 15 June 2016, the trial court held a 90-day review hearing. By order entered 1 July 2016, the trial court found that respondent-father had a scheduled two-hour visit with the children on 26 April 2016. Respondent-father brought his mother and grandmother and falsely informed the Community Social Services

Assistant that HHSA's director had authorized them to attend visitation. Despite a social worker's request that respondent-father refrain from giving Elizabeth chocolate, he gave her fifteen pieces of chocolate during his visit. Respondent-father provided several bags of toys and clothes for the children. When a social worker inventoried the bags, a cell phone was found. The trial court further found that respondent-father had a scheduled visit with the children on 24 May 2016. Although a social worker had previously requested that respondent-father only bring diapers and wipes to the visits, he brought five bags of items, including a wooden ball for Elizabeth that was not age appropriate. Respondent-father also requested the Community Social Services Assistant to prepare a bottle for Bethany and assist him in changing Elizabeth's diaper. The trial court found that HHSA had difficulty in getting respondent-father to leave when visits were over. HHSA had a deputy on duty escort respondent-father out, and at the end of the 24 May 2016 visit, it took three staff members to escort respondent-father from the premises.

Following a review hearing held on 15 November 2016, the trial court entered an order on 15 December 2016 finding that respondent-father had requested that the children be medicated on Tylenol for his visits. He reported that "they cried during a visit and therefore must be in pain[.]" In addition, respondent-father reported to HHSA that Elizabeth was pale and requested that she undergo a gastrological test. He also requested an eye specialist to assess Bethany, although a prior exam

indicated that she did not need to return until age two. The trial court granted HHSA the discretion, in consultation with the guardian *ad litem* program and the EBCI, to move respondent-father's visitation to monitored visits for two two-hour visits per month.

Following a permanency planning review hearing held on 16 February 2017, the trial court entered an order on 6 March 2017 wherein the parties stipulated to the terms of visitation. Respondent-father's visits would occur on the first and third weeks of each month at the Visitation Center in Catawba County, North Carolina. Although his initial visit would last for two hours, the subsequent visits would last for four hours, supervised by HHSA. If visits went well through March and April 2017, and respondent-father engaged in consistent psychotherapy with a licensed psychotherapist, provided his Capacity to Parent Assessment to that psychotherapist, signed releases of information, provided records, and otherwise complied with HHSA, the guardian *ad litem* program and the tribe, his visitation starting in May 2017 would move to supervised visitation into the community.

The next permanency planning review hearing was held on 8 and 29 August 2017, and the trial court entered an order on 27 September 2017. The parties stipulated that respondent-mother would have full physical placement of the children, and that the issue of legal custody of the children and respondent-father's visitation would be preserved for the hearing. The trial court concluded that

continued visits with respondent-father were not in the children's best interests and would be contrary to their health, safety, and well-being. The trial court ordered that once respondent-father obtained a new Sex Offender Specific Evaluation and successfully completed the recommended treatment, he could motion the trial court to consider reinstating supervised visitation at a visitation center, at his cost. Respondent-father filed timely notice of appeal.

II. Discussion

On appeal, respondent-father argues that several findings of fact in the 27 September 2017 permanency planning order are not supported by competent evidence. Respondent-father also contends that the trial court abused its discretion by ceasing his visitation with the children. We disagree.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re J.C.S.*, 164 N.C. App. 96, 106-107, 595 S.E.2d 155, 161 (2004) (internal citations omitted). Unchallenged findings of fact are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

In the 27 September 2017 permanency planning order, the trial court made the following pertinent findings of fact:

22. The five appointments with Michelle Cagle, LCSW at Analenisgi – over the course of five months – are not in compliance with the court-ordered case plan that the Respondent Father engage in consistent psychotherapy. The treatment the Respondent Father has obtained is not addressing the concerns raised in the Capacity to Parent Evaluation and does not satisfy the Court.

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32. . . . [HHSA], GAL Program, and [EBCI] have enormous concern about the children's safety, health, and well-being during the Respondent Father's visits with them. The Respondent Father has insisted on constantly feeding the children non-nutritious snack choices throughout the duration of the four-hour visits. He would bring lunch for the children in addition to the snacks, and constantly overfeed the toddlers. On the July 13th, 2017 visit, the Respondent Father brought large tubs of mashed potatoes and handed a tub to each child. The children would eat until they were full and the Respondent Father would insist they eat more. The girls had unfettered access to a bucket of cookies, which they proceeded to drop on the floor and step on, and then eat. The Respondent Father allowed the children to then eat off the floor. [A social worker] additionally witnessed [Bethany] eating out of a trash can, while the Respondent Father made no effort to stop her. . . . On July 13th, 2017, the Respondent Father had visitation from 11:00 am to 3:30 pm and was told to bring lunch. He brought vanilla wafers, chicken, two tubs of mashed potatoes, green beans, bananas, Fanta, Hawaiian Punch, applesauce, yogurt pouches, and gummies. The Respondent Father was feeding [Elizabeth] instead of [Bethany] during this visit.

33. [Elizabeth] has vomited during and after visits with the Respondent Father on several occasions from

eating too much and has vomited during transport from the visitation center back to the placement. The Respondent Father has been advised numerous times not to provide sugary snacks and drinks, but persists in doing so and in providing the foods to the children.

34. The Respondent Father has not demonstrated an ability to change diapers. The minor children were observed to wear soiled diapers for extended periods of time during visits. During visits, the Respondent Father will eventually remove a soiled diaper from one of the children, then leave it on the floor. On each visit, he must be reminded to change the children and take them to the bathroom. . . . The Respondent Father does not respond at all to [Elizabeth's] requests to use the bathroom, forcing the child to soil herself. The Respondent Father has also been instructed by numerous social workers multiple times about wiping the girls incorrectly, and the need to wipe them in a front-to-back direction to avoid infections. Despite this, the Respondent Father continues to wipe them from back-to-front. . . .

35. There are significant concerns for the children's physical safety during visits and the Respondent Father's inability to appropriate[ly] supervise them. On February 16th, 2017, the Respondent Father brought a pair of craft scissors and let the children play with them. Visitation staff were compelled to intervene when [Elizabeth] took the scissors, ran with them, and proceeded to throw them across the room. . . . On May 16th, 2017, June 6th, 2017, and June 20th, 2017, the children climbed on chairs and were allowed by the Respondent Father to continue standing on the chairs for some time. The Respondent Father has also allowed the children to climb up on and stand on tables. The Respondent Father does not intervene and Community Social Services Technicians (CSST) have had to intervene. On March 21[st], 2017, the Respondent Father attempted

to take [Elizabeth] to the bathroom and she ran away down the hall. The Respondent Father did not attempt to redirect her to the bathroom or to chase her, and social workers had to catch her. On June 6th, 2017, both [Elizabeth] and [Bethany] ran away from the Respondent Father to the door that exits to the parking lot of [HHSA] and had to be stopped by a social worker. . . .

36. The Respondent Father favors the older child, [Elizabeth], over [Bethany], and often ignores [Bethany] to focus his attention on [Elizabeth]. . . . During visits, [Bethany] often plays and sits alone and will lie herself down to sleep when she becomes tired. When the children fight over toys or food, the Respondent Father intervenes to remove the object from [Bethany] and give it to [Elizabeth]. On May 2nd, 2017, [Elizabeth] was ill and unable to attend the visit. The Respondent Father advised the social worker with the [EBCI] that i[t] was a waste of everyone's time to bring only [Bethany]. On June 20th, 2017, [Bethany] climbed into a chair in an attempt to reach some items. The Respondent Father was unaware of [Bethany's] actions and continued to focus only on [Elizabeth]. Social workers had to intervene. On other occasions, [Bethany] has attempted to crawl into the Respondent Father's lap, but he is unresponsive and his attention continues to be focused upon [Elizabeth]. On March 7th, 2017, [Bethany] was eating and began choking on her food. The Respondent Father did not respond and had to be alerted to this by the social worker. He then denied that she was choking and attributed her difficulty in breathing to congestion. . . .

37. . . . After visits with the Respondent Father, the juveniles are dirty and require cleaning. However, the Respondent Father does not attend to their cleanliness at the conclusion of the visits, despite his claimed concern for their hyg[ie]ne. . . .

38. The Respondent Father had a monitored community visit with the juveniles on July 18th, 2017. . . . The Respondent Father brought inappropriate food, as discussed above, and permitted [the children] to run around the picnic pavilion area with a mouth full of food. . . . The Respondent Father carried [Bethany] throughout most of the visit, instead of letting her play in the park, while [Elizabeth] was able to play. . . . The Respondent Father then gave the girls three individual containers of ice cream. . . .

39. While transporting the juveniles back from the visit on July 18th, 2017, [Elizabeth] needed to pull over twice to vomit. Later that evening when she returned to her placement, she became ill, complained about stomach pains, and vomited. [Elizabeth] is lactose intolerant and was diagnosed as such at birth. The Respondent Father was aware that [Elizabeth] was lactose intolerant. . . .

. . . .

74. Jenny Bean is a Child Welfare Social Worker with the [EBCI]. . . . She is properly deemed as an expert in Indian Culture as it applies to Indian child-rearing, and the Court receives her as such.

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79. It was Ms. Bean's expert opinion that the children do not appear to have a bond with the Respondent Father.

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94. Continued visits with the Respondent Father, whether supervised or unsupervised, are not in the minor children's best interests and would be contrary to their health, safety, and well-being:

a) The Respondent Father has not demonstrated an ability to establish independence from the Paternal Grandmother . . . and the Paternal Great-Grandmother . . ., who are court-ordered not to be part of this case.
b) The Respondent Father has not demonstrated consistent parenting skills.
c) The Respondent Father has displayed disregard for the no-contact order with the Respondent Mother.
d) Issues delineated in the Capacity to Parent Evaluation of Dr. Pete Sansbury are still present and have been wholly unaddressed.
e) The Respondent Father has not consistently engaged in psychotherapy that has been court-ordered. The therapy undertaken by the Respondent Father with Michelle Cagle has been inadequate in both duration and substance. There exists untreated mental health issues relating to the Respondent Father's sexual proclivities. Specifically, the Respondent Father's demonstrated sexual preference for very young girls must be addressed and any recommended treatment must be completed successfully to ensure the well-being of the minor children.

95. In addition to fears for the children's physical safety and well[-]being in the care of the Respondent Father, the Court is deeply concerned that the children will be at risk for abuse and exploitation in his care. The Respondent Father got the Respondent Mother pregnant at 14 years old, and again at 15 years old. He broke into a 13-year old girl's hotel room, pointed a gun at her, and demanded she take her clothes off. The Respondent Father's internet search history revealed a search for "incest," along with several other grossly sexually deviant topics. The Respondent Father has messaged other friends of the Respondent Mother asking for nude pictures and for sexual acts,

> along with members of the Respondent Mother's family. The Respondent Father has posted nude pictures of the Respondent Mother on the internet, despite her then-minor status. The Respondent Mother testified that the Respondent Father raped her when she was a minor, and committed many acts of domestic violence against her. The Respondent Father has not reported any issues with sexual deviance or domestic violence to his mental health team at Analenisgi and has thus received no treatment for those issues. The Respondent Father got a Sexual Offender Specific Evaluation related to his Forsyth County charges, but had his mother fill it out for him, and the Court does not consider any recommendations from that Evaluation to be valid. The Respondent Father shows a particular obsession with [Elizabeth]. He insists on dressing her in particular outfits he brings for her to visitations, and upon putting her hair into updos. When he changes the girls' diapers, he insists upon massaging "butt paste" onto the entirety of their genitals, both vagina and buttocks. He claims to social workers that he does so because the children have diaper rash, but the children do not have diaper rash.

First, respondent-father challenges finding of fact 22. In the 6 March 2017 permanency planning order, the trial court ordered respondent-father to "[e]ngage in consistent psychotherapy with a licensed psychotherapist[.]" However, at the permanency planning review hearing held in August 2017, Michelle Cagle ("Ms. Cagle"), a licensed clinical social worker, testified that out of eight scheduled therapy sessions since March 2017, respondent-father had canceled three sessions. Ms. Cagle also testified that there was a "lack of progress" in treatment, stating that "we weren't really getting to the root causes of the anxiety and the treatment of the anxiety." It

was not until the last couple sessions that Ms. Cagle and respondent-father were able to "practice some -- some methods that are going to help him manage his anxiety[.]" Based on the foregoing, there is sufficient competent evidence in the record to support finding of fact 22.

Second, respondent-father contests finding of fact 79. Jenny Bean ("Ms. Bean"), an Indian child welfare social worker for EBCI, initially testified that the children did not appear to be bonded with respondent-father. Later on, Ms. Bean testified as follows:

> Q. Ms. Bean, I am going to push a little, but each lawyer has asked you about the bond between [respondent-father] and these kids. The answer, you don't feel they have a bond with [respondent-father]; is that your testimony?
>
> A. I don't feel like – I mean, I think they have – I don't think they have, probably, the bond that they have with their mom.
>
> Q. But they do have a bond, though?
>
> A. Yes.

Although Ms. Bean offered conflicting testimony, "the court is empowered to assign weight to the evidence presented at the [hearing] as it deems appropriate." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996). "[T]he trial judge acts as both judge and jury, thus resolving any conflicts in the evidence. If there is competent evidence to support the trial court's findings of fact and conclusions of law,

the same are binding on appeal even in the presence of evidence to the contrary." *Id.* at 439, 473 S.E.2d at 397-98 (internal citations omitted). Thus, because there was competent testimony to support the finding that respondent-father did not have a bond with the children, the trial court did not err in entering finding of fact 79.

Third, although respondent-father disputes several portions of finding of fact 94, each challenged portion is supported by competent evidence. He contends that he demonstrated an ability to establish independence from his mother and grandmother. However, unchallenged findings indicate that respondent-father's housing was owned by his mother and that he was not paying rent. Furthermore, other than his mother and grandmother, respondent-father had no other support network. Respondent-father also argues that his parenting skills at the visits with his children showed improvement. Yet unchallenged findings of fact indicate that despite being advised numerous times not to provide sugary snacks and drinks to the children, he continued to do so. Respondent-father had to be reminded on each visit to change the children's diapers and take them to the bathroom. Furthermore, respondent-father was told on several occasions by social workers to wipe the girls from front-to-back, but he continued to wipe them from back-to-front.

Respondent-father insists that he did not violate a no-contact order with respondent-mother. However, respondent-mother's testimony directly disputes this challenge. She testified that she believed respondent-father had contacted her

through messages on Facebook. Respondent-mother believed the Facebook profile belonged to respondent-father, because there were pictures of him on the profile and a "status made that was very obvious it was talking about [respondent-father.]" Next, although respondent-father maintains that he addressed "most of the matters" identified in the Capacity to Parent Evaluation, unchallenged finding of fact 22 establishes that the treatment respondent-father "has obtained is not addressing the concerns raised in the Capacity to Parent Evaluation and does not satisfy the Court." Lastly, respondent-father argues that he was consistently engaging in psychotherapy, that Ms. Cagle was providing appropriate therapy, and that he did not have a demonstrated sexual preference for young girls. As previously discussed, there was competent evidence that respondent-father was not engaging in consistent psychotherapy, having missed three out of eight appointments with Ms. Cagle. In addition, there was sufficient evidence in the record for the trial court to infer that he had a sexual preference for young girls. He began a relationship with respondent-mother when she was 14 years old, his internet searches included a search for "incest," and it was alleged that he entered the hotel room of a 13-year-old and ordered her to get undressed. *See In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985) ("The trial judge determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be

drawn from the evidence, he alone determines which inferences to draw and which to reject.").

Fourth, respondent-father contends that finding of fact 95 is "partially erroneous" but fails to challenge any specific portion of the finding or the evidence supporting the finding. Rather, it seems that respondent-father merely disagrees with the trial court's interpretation of the evidence. Under the abuse of discretion standard, it is not appropriate for this Court to re-weigh the evidence. *See Carpenter v. Carpenter*, 225 N.C. App. 269, 272, 737 S.E.2d 783, 786 (2013).

In the second issue on appeal, respondent-father argues that the trial court abused its discretion by ceasing his visitation with the children. His argument has no merit.

N.C. Gen. Stat. § 7B-905.1(a) provides that "[a]n order 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." N.C. Gen. Stat. § 7B-905.1(a) (2017). Thus, the court may prohibit visitation by a parent when it is in the juvenile's best interests and consistent with the juvenile's health and safety. *See In re J.S.*, 182 N.C. App. 79, 86-87, 641 S.E.2d 395, 399 (2007). This Court reviews an order denying visitation to a respondent-parent for an abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

Here, the trial court made numerous detailed findings of fact as to why it was in the children's best interests and consistent with their health and safety that respondent-father's visitation be prohibited. Unchallenged findings of fact establish that during supervised visits with the children, respondent-father constantly fed the children non-nutritious food; overfed the children to the point they would become ill and vomit; allowed the children to eat off of the floor and out of the trashcan; did not comply with recommendations that he not provide sugary snacks and drinks to the children; failed to demonstrate an ability to change diapers; failed to respond to Elizabeth's requests to use the bathroom; allowed the children to play with potentially dangerous items; failed to adequately supervise the children; failed to attend to the children's cleanliness; favored Elizabeth over Bethany and often ignored Bethany; brought inappropriate toys for the children; and gave Elizabeth ice cream despite knowing that she was lactose intolerant. In addition, the evidence and findings indicate that the children would be at risk for abuse and exploitation in his care, and that respondent-father failed to establish independence from his mother and grandmother, to comply with the no-contact order with respondent-mother, to address the issues delineated in the Capacity to Parent Evaluation, and to consistently engage in court-ordered psychotherapy. Based on the foregoing, the trial court's decision to cease respondent-father's visitation with his children was not manifestly unsupported by reason. Accordingly, we hold that the trial court did not

abuse its discretion in finding it to be in the best interests of the children to cease respondent-father's visitation and affirm the order of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge HUNTER, JR. concur.

Report per Rule 30(e).