IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-965

Filed: 18 August 2020

Johnston County, No. 18 JA 193

IN THE MATTER OF: A.M.

Appeal by respondents from order entered 7 June 2019 by Judge Paul A. Holcombe, III in Johnston County District Court. Heard in the Court of Appeals 9 June 2020.

Holland & O'Connor, PLLC, by Jennifer O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Peter Wood for respondent-appellant mother.

Richard Croutharmel for respondent-appellant RM.

Marie H. Mobley for guardian ad litem.

TYSON, Judge.

Respondent-mother and Respondent ("RM") appeal from the trial court's adjudication and disposition orders. We vacate the trial court's order and remand

with respect to Respondent-mother's visitation. RM lacks standing to appeal, and we dismiss his appeal and deny his petition for writ of certiorari.

I. Factual Background

In December 2017, Respondent-mother and RM began a romantic relationship. During this same time period, Respondent-mother was also romantically involved with Juan Sanchez. Respondent-mother became pregnant and gave birth to a daughter, A.M., in September 2018. RM was present for A.M.'s birth and was listed as her father on A.M.'s birth certificate.

Respondent-mother allowed RM to take A.M. from the hospital to his home. Johnson County Department of Social Services ("DSS") had been involved with Respondent-mother and her three older children in May 2018. DSS had received reports concerning neglect and abuse of these children. DSS investigated and the social worker observed Respondent-mother repeatedly threatening the children as well as the social worker. DSS offered services for the children and Respondent-mother. Respondent-mother refused.

Respondent-mother yelled at the children and blamed them for DSS' involvement during a 16 July 2018 home visit. Respondent-mother refused to comply with the services offered by DSS and continued to yell at the children. Two of Respondent-mother's children crawled off of their chairs and began to fold into fetal positions on the floor.

That same day, DSS obtained an order for nonsecure custody to remove Respondent-mother's three children. Respondent-mother was pregnant with A.M. at that time. While the social worker explained the children would be placed in foster care, Respondent-mother continued to berate the children. Law enforcement officers assisted in removing the children from Respondent-mother's home. After a 24 October 2018 hearing, these three children were adjudicated to be neglected and dependent. These children remain in foster care and DSS was relieved of further efforts towards reunification with Respondent-mother. That order is not before us.

DSS received information that A.M. had been born and was living in the home of RM. RM also had a previous history with DSS and untreated mental health issues which led DSS to file a juvenile petition alleging infant A.M. was neglected on 30 October 2018.

After filing their petition, DSS received allegations RM was using marijuana while providing care for A.M. and his fourteen-year-old daughter in the home. Allegations of RM's use of domestic violence against Respondent-mother also surfaced. RM admitted to DSS workers that he had held A.M. with one hand and had pushed and shoved Respondent-mother with his other hand.

RM was arrested for assault on 19 December 2018. DSS filed an amended petition on 19 December 2018 and alleged A.M. was both neglected and dependent. DSS also obtained an order for nonsecure custody of A.M. and removed her from RM.

A nonsecure custody hearing was held on 27 December 2018 and the trial court dissolved the nonsecure custody order. Respondent-mother claimed to be out of state and the need for a nonsecure custody was no longer necessary. Respondent-mother had, by this point in time, asserted RM was not the biological father of A.M. A.M. was returned to RM's care. RM was ordered to allow DSS access to his home, to participate in a psychological evaluation and follow any recommended treatment, to submit to drug screens, to enter a new safety plan for A.M., and to participate in paternity testing.

Prior to the December 2018 amended petition, Respondent-mother had been frequently visiting A.M. under RM's supervision. In March and April 2019, Respondent-mother visited A.M. Both DSS and the guardian *ad litem* reported these visits between mother and daughter were appropriate. Respondent-mother brought gifts and clothing for A.M. during one of the visits.

The results of the 23 January 2019 paternity test concluded RM "is excluded from paternity" and "is not the biological father of [A.M.]." The district court concluded the presumption of paternity from the birth certificate was rebutted by the DNA test results for A.M. and RM and entered an order of non-paternity on 19 February 2019.

The adjudication hearings were held 6 February and 20 February 2019. The trial court adjudicated A.M. to be neglected and dependent on 1 April 2019. The

initial disposition hearing was held over two days, on 23 April 2019 and 24 April 2019. At this hearing, which began at 9:45 a.m., Respondent-mother refused to appear until 3:00 p.m. in the afternoon.

Respondent-mother provided untruthful testimony to the court concerning her housing and living situation. Mr. Sanchez, A.M.'s father, testified via telephone and Respondent-mother sent threatening text messages to him while he was testifying.

The court entered its disposition order on 7 June 2019. The court found placement for A.M with RM was not appropriate, he did not have legal rights affected by the action, and RM's presence as a party was no longer necessary. The court found A.M. should remain in DSS custody and that DSS should continue reunification efforts with Respondent-mother and A.M.'s biological father, Mr. Sanchez.

Based upon her texting Mr. Sanchez and her in-court behavior, the court placed Respondent-mother into custody for contempt and ordered her not to be scheduled to be released until the next court date. The court suspended visitations between A.M. and the mother. Both RM and Respondent-mother filed timely notices of appeal.

II. RM's Appeal

In his notice of appeal, RM states he is appealing the trial court's adjudication and disposition orders. RM argues the trial court erred in finding he was a caretaker

rather than a custodian and asserts the court erred in concluding A.M. was dependent.

A. Grounds for Appellate Review

"Standing is jurisdictional in nature and [c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re M.S.*, 247 N.C. App. 89, 92, 785 S.E.2d 590, 592 (2016) (citations and internal quotation marks omitted).

N.C. Gen. Stat. § 7B-1002 limits a statutory right to appeal a disposition order to the following parties:

> Appeal from an order permitted under G.S. 7B-1001 may be taken by:
> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
> (3) A county department of social services.
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.

N.C. Gen. Stat. § 7B-1002 (2019).

N.C. Gen. Stat. Ann. § 7B-101(3) defines "caretaker" as

> Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a residential setting. A person responsible for a juvenile's health and welfare means a stepparent; foster

> parent; an adult member of the juvenile's household; an adult entrusted with the juvenile's care; a potential adoptive parent during a visit or trial placement with a juvenile in the custody of a department.

N.C. Gen. Stat. § 7B-101(3) (2019).

N.C. Gen. Stat. § 7B-101(8) (2019) defines "custodian" as a "person or agency that has been awarded legal custody of a juvenile by a court." At the filing of the juvenile petition, RM was presumed to be a parent. His name was listed as A.M.'s father on the birth certificate. He took A.M. to his home as an infant from the hospital. Earlier, the trial court had dismissed a nonsecure custody order and allowed A.M. to be returned to RM's care. A parent is not a custodian.

A parent's natural and primary rights over the care, custody, and control of his child do not hinge upon court-ordered legal custody of a juvenile by a court. *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L. Ed. 2d 49, 56-57 (2000) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citation omitted)); *see also In re A.P.*, 165 N.C. App. 841, 846, 600 S.E.2d 9, 13 (2004) (explaining differences between custodians, persons *in loco parentis* to the children, and caretakers).

In the case of *In re M.S.*, this Court found "the record contains nothing to suggest that a [stepfather was] awarded legal custody of [the juvenile] by a court and,

as a result, he cannot assert a basis to appeal as her 'custodian' pursuant to N.C. Gen. Stat. § 7B-101(8)." *In re M.S.*, 247 N.C. App. at 93, 785 S.E.2d at 593.

Legal custody was never granted to RM. Uncontroverted evidence was presented that RM is not the biological or adoptive father of A.M.

At the adjudication hearing, the trial court heard testimony RM was not the father, that he was upset by this information, and assaulted Respondent-mother while holding A.M., which resulted in DSS removing the child from his care for a period of time. At the conclusion of the first day of the adjudication hearing, after hearing testimony from DSS social workers and RM, the court ordered A.M. to be placed in foster care with Respondent-mother's other children immediately.

By the time of the disposition hearing, the district court's order of RM's nonpaternity of A.M. had been entered. A.M. was no longer in RM's care. The court found RM had previously been a caretaker as defined in N.C. Gen. Stat. § 7B-101(3).

The record on appeal is replete with evidence tending to show Respondent-mother voluntarily allowed RM to take care of A.M. so Respondent-mother could avoid DSS interference with her access to A.M. The uncontested evidence shows RM neglected A.M. while she was in his care. By the conclusion of the adjudication hearing and at all times thereafter, A.M. was placed in the custody of DSS not RM.

The trial court's conclusion is supported by findings based upon evidence presented at the hearings and included in the record on appeal. As a caretaker, RM

has no statutory right to appeal. *In re M.S.*, 247 N.C. App. at 93, 785 S.E.2d at 593. His appeal is dismissed.

B. Petition for Writ of Certiorari

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21.

Here, RM petitions this Court to issue its writ of certiorari to review his assertions. RM recognizes the trial court's finding that he was a caretaker denies him the right to appeal. RM contends this Court has authority to allow his appeal to proceed by issuing its writ of certiorari.

"A petition for the writ must show merit or that error was probably committed below. Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citations omitted).

Here again, RM argues again that the trial court erred in characterizing him as a caretaker instead of custodian. As explained above, RM has not shown any error on the part of the trial court in its determination that RM was only a caretaker. RM cannot show there was probable reversible error in the trial court's judgment. *See id.*

Further, RM argues the trial court erred by adjudicating A.M. as dependent. Also, for the reasons stated above, he has no standing to assert this argument. RM has not demonstrated any possible meritorious issue to justify the issuance of the writ. *See id.* at 189, 111 S.E.2d at 9. In the exercise of our discretion, RM's petition is without merit and is denied.

III. Respondent-mother's Appeal

Respondent-mother's sole argument on appeal is that the trial court abused its discretion by denying her visitation without making the mandatory statutory findings and where denial of visitation was not in the best interest of A.M.

A. Standard of Review

The trial court's dispositional order must meet the minimum statutory requirements to deny visitation. *In re N.B.*, 240 N.C. App. 353, 365, 771 S.E.2d 562, 570 (2015). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (internal quotation marks and citation omitted).

B. Analysis

N.C. Gen. Stat. § 7B-905.1(a) at the applicable time provided:

> 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.

N.C. Gen. Stat. § 7B-905.1(a)(2017)(emphasis supplied).

Our Court has held, "In the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) (citation and internal quotation marks omitted), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 23-24, *as recognized in In re N.B.*, 240 N.C. App. at 364, 771 S.E.2d at 570.

Where "the trial court's order contains no such findings of fact," the statute mandates the portion of the order denying visitation must be vacated and remanded for further proceedings before the trial court, consistent with the statutes and precedents. *Id.* at 523, 621 S.E.2d at 652.

Here, the trial court made the following finding of fact:

> 37. As the mother is being incarcerated today for contempt of court and is not scheduled to be released prior to the next court date, visitations between the juvenile and the mother are suspended. It would not be in the child's best interests and welfare to continue visits between now and the review hearing on May 22, 2019. As a party, [Respondent-mother] may file a motion to review the suspension of her visitation between now and the next court date, see N.C.G.S. § 7B-905.l(d), if she appeals her contempt convictions and makes bond pending the appeal.

The "order" section of the court's preprinted disposition form order states: "The

Court expressly approves the visitation plans (Attachment 4). Notice: All parties have a right to file a motion for review of the visitation plans which are being entered pursuant to N.C.G.S. § 7B-905.1. See N.C.G.S. § 7B-905.1(d)." Attachment 4 is a form entitled, "North Carolina Family Time and Contact Plan." The form lists NO VISITS/NO CONTACT for Respondent-mother.

The trial court made no findings of fact to explain or support why it was not in A.M.'s best interests to have visitation with her mother when her temporary incarceration for contempt ended. All testimony showed the visits between Respondent-mother and her child were appropriate. No finding supports a conclusion that A.M.'s health or safety is at risk when she was visiting with her mother.

The trial court's order suspending all visitation upon Respondent-mother's release from contempt is vacated. This matter is remanded for further hearing on Respondent-mother's statutory right to visit with her child. *See* N.C. Gen. Stat. § 7B-905.1(a) (the court "*shall provide* for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety") (emphasis supplied).

IV. Conclusion

RM was not a custodian of A.M. during the course of this action. As a caretaker, he does not have standing to appeal and his appeal is dismissed. His petition for writ of certiorari is denied.

The trial court violated the statute and abused its discretion by failing to provide a visitation plan for Respondent-mother without making the statutorily required findings and supported conclusions that it was not in A.M.'s best interests to visit with her mother upon Respondent-mother's release from her incarceration for contempt of court. *It is so ordered.*

DISMISSED IN PART; VACATED IN PART; AND REMANDED.

Judge COLLINS concurs.

Judge STROUD concurs in part regarding RM and dissents in part from remanding Respondent-mother's visitation.

Report per Rule 30(e).

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion regarding RM's appeal but dissent as to Respondent-mother's appeal. The majority concludes that "the trial court made no findings of fact explaining why it was not in A.M.'s best interests to have visitation with her mother when her temporary incarceration for contempt ended." I dissent because while the trial court's order did not address visitation with Respondent-mother after her temporary incarceration for contempt ended, it did specifically set a hearing to address visitation prior to her release from jail. Because the trial court made the necessary findings of fact, I would affirm the order.

I first note that it is unclear which standard of review the majority used to review the trial court's order regarding Respondent-mother's visitation. In the portion of the opinion entitled "Standard of Review," the majority notes a standard of review as *de novo*, citing to *In re J.S.L.,* 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). But, in the "Conclusion" section, the majority states that the trial court "abused its discretion by failing to provide a visitation plan[.]"

Indeed, the proper standard of review for this issue is abuse of discretion:

> An 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) (2015). The order must establish an adequate

> visitation plan for the parent in the absence of findings that the parent has forfeited their right to visitation or that it is in the child's best interest to deny visitation. We review an order denying visitation to a respondent-parent only for abuse of discretion.

Matter of T.W., 250 N.C. App. 68, 77–78, 796 S.E.2d 792, 798 (2016) (citation, quotation marks, ellipses, and brackets omitted).

Here, the trial court did not abuse its discretion nor did it commit any legal error as to the temporary denial of visitation for Respondent-mother. The hearing on this matter was held on 23 and 24 April 2019, and the signed and written order was filed on 7 June 2019. The order does not deny Respondent-mother visitation indefinitely; the terms of the order are clearly directed only to the time period of Respondent-mother's incarceration, and the trial court specifically set a future hearing for 22 May 2019.

During the hearing, Respondent-mother was twice held in direct criminal contempt of court for attempting to intimidate and interfere with the testimony of a witness and then for cursing and yelling in the courtroom, necessitating her removal from the courtroom. Respondent was sentenced to 30 days imprisonment for the first criminal contempt and 15 days for the second, to run consecutively to the first. Therefore, as of 24 April 2019, Respondent-mother was imprisoned, and she would remain in the custody of the Johnston County Sheriff for 45 days, until 8 June 2019.

The order on appeal scheduled a review hearing for 22 May 2019 – *prior to* Respondent-mother's release. As noted by the majority, the trial court found:

> 37. *As the mother is being incarcerated today for contempt of court and is not scheduled to be released prior to the next court date, visitations between the juvenile and the mother are suspended*. It would not be in the child's best interest and welfare to continue visits between now and the reviewing hearing on May 22, 2019. As a party, [Respondent-mother] may file a motion to review the suspension of her visitation between now and the next court date, see N.C.G.S. § 7B-905.1(d), if she appeals her contempt convictions.

(Emphasis added.). Thus, the order set a date of 22 May 2019 for a review hearing, a date well before Mother would be released from her imprisonment, *and* gave Respondent-mother the option of requesting review even sooner; the period of time Respondent-mother would have no visitation was based upon the time she would be imprisoned.

The majority opinion notes a paragraph of the trial court's decree regarding visitation, but omits the next relevant paragraph:

> 4. The Court expressly approves the visitation plans (Attachment 4). Notice: All parties have a right to file a motion for review of the visitation plans which are being entered pursuant to N.C.G.S. § 7B-905.1. See N.C.G.S. § 7B-905.1(d).
>
> 5. This matter shall be set for a review hearing pursuant to N.C.G.S. § 7B-906.1, which shall be designated as a permanency planning hearing, on May 22, 2019.

Attachment 4 to the Order, the "NORTH CAROLINA FAIMILY TIME AND CONTACT PLAN[,]" ("Plan") does state "NO VISITS/NO CONTACT[,]" as noted by the majority, but the duration of this plan is also limited. The Plan provides that this visitation is effective from 23 April 2019 through the date of "Court modification[,]" a hearing which was scheduled for 22 May 2019, before Respondent-mother's release from jail.

Further, the provisions of the order are consistent with the trial court's rendition, which leaves no question regarding the trial court's intent to cease visitation only during Respondent-mother's incarceration as the trial court stated it "would have ordered" visitation for Respondent-Mother had it not been for her imprisonment, *and* it "would have not ceased" visitation but would address the issue again at the permanency planning hearing:

> [T]he Court did not cease reunification efforts. The court is going to allow, well -- the court is not going to order a visit -- the court would have ordered a visit between [Respondent-mother] and her child and would have not ceased visits, but for the fact that it is -- based upon the court's findings today, that she's going to be in custody between now and the permanent placement hearing. So, in light of the fact that she is going to be in custody between now and then, *the court will readdress visitation at the permanency planning hearing. That will be closer to a time in which she will be released.*

(Emphasis added.). Thus, the order did not end visitation between Respondent-mother and the juvenile indefinitely; it temporarily ceased visitation while

Respondent-mother was imprisoned and scheduled a hearing on the matter before her release. I cannot discern any abuse of discretion in ceasing visitation for a brief and definite prior of time while a parent is imprisoned, particularly where the trial court has also set a hearing prior to the release and specifically noted in the order that Respondent-mother could file a motion to review the suspension of visitation even before the next court date.

The majority cites only one case in support of its reversal of the trial court's order regarding visitation, "*In re E.C.*, 174 N.C. App. 517, 522–23, 621 S.E.2d 647, 652 (2005) (citation and internal quotation marks omitted) *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 23-24 (N.C. 2013), *as recognized in In re N.B.*, 240 N.C. App. at 364, 771 S.E.2d at 570." In *E.C.*,

> the trial court's dispositional order failed to include an appropriate visitation plan. Instead the trial court ordered that visitation between [the] respondent[-mother] and her child was to be allowed in the 'discretion of the guardian.' The awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child.

174 N.C. App. at 522, 621 S.E.2d 652. This order is not comparable to *E.C.*, where the trial court delegated its authority and failed to order specific terms of visitation, doing so for an indefinite time. *See id.*

Since most of the majority opinion addressed RM's petition and Respondent-mother did not challenge any of the trial court's extensive findings of fact, I would

also note that the trial court could have relied upon many of those findings to cease Respondent-mother's visitation, but the order did not specifically rely on those findings in its conclusion because the lack of visitation was for a limited time while Respondent-mother was imprisoned and set a specific date for a review hearing before her release. Thus, there has been no need to discuss the trial court's detailed and uncontested findings regarding Respondent-mother's repeated fraud both to the trial court and various agencies regarding her address and her claims she had moved to Illinois; refusal to enter into a Family Services Agreement with DSS; "erratic, inconsistent and unpredictable" behavior; anger management issues; failure to address domestic violence issues; and failure to verify her participation in parenting classes, mental health counseling, and her employment. The trial court's order also included "Attachment 2" which is an order from the permanency planning hearing for three older children of Respondent-mother; the order relieved the Johnston County Department of Social Services of further reunification efforts as to those children. In Attachment 2, the trial court made more findings of fact regarding the issues Respondent-mother struggles with and specifically found "by clear, cogent, and convincing evidence that the mother is an unfit parent and is also acting inconsistently with her constitutionally protected status as a parent." Although the trial court did use a form order as the basis for the order on appeal, the entire order has 19 pages and it includes extensive and detailed findings of fact relevant to

Respondent-mother's fitness as a parent, with approximately 5 single-spaced pages devoted to findings of fact regarding her and this child. Additionally, since the trial court's order on appeal addressed only a brief temporary cessation of visitation during Respondent-Mother's imprisonment, which ended long ago, I also believe this issue is likely moot.

I therefore dissent as to the majority's vacating the portion of the order regarding Respondent-mother's visitation. Otherwise, I concur.