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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-245

No. COA21-38

Filed 1 June 2021

McDowell County, Nos. 15 JA 41; 18 JA 12; 18 JA 51

IN RE: N.B., H.B., & L.B.

Appeal by Respondent-Mother from order entered 28 August 2020 by Judge Robert K. Martelle in McDowell County District Court. Heard in the Court of Appeals 28 April 2021.

Aaron G. Walker for McDowell County Department of Social Services.

Stephanie L. Gumm for Guardian ad Litem.

Leslie Rawls for Respondent-Mother.

WOOD, Judge.

¶ 1 Respondent-Mother appeals from a disposition order placing N.B., H.B., and L.B. (collectively, “the juveniles”) in foster care without first considering placement with relatives. After careful review, we hold the trial court failed to consider kinship placement with the juveniles’ paternal grandmother (“Grandmother”), a former guardian, and failed to make related findings of fact. We vacate the disposition order and remand for the trial court to conduct a hearing to consider placement of the

juveniles with a relative.

I. Background

¶ 2 The juveniles are the teenaged children of Respondent-Mother and her husband, Mr. B. (“Respondent-Father”) (collectively, “Respondent-Parents”). Respondent-Father did not appeal.

¶ 3 From 2016–2019, the juveniles lived with their Grandmother. In 2018, Grandmother was appointed the guardian of the minor children by the Juvenile Court as a dispositional alternative through each of the minor children’s respective cases brought by the Department of Juvenile Justice (“DJJ”). Her guardianship ceased once the children’s probations and DJJ’s jurisdiction ended.

¶ 4 Thereafter, the juveniles lived primarily with Respondent-Mother where they shared a bedroom. N.B. told DSS he sometimes stayed with Respondent-Father and Grandmother, but not often. N.B. also stated that he and H.B. “were allowed to just wander the county or the state, for that matter, without supervision.”

¶ 5 On July 23, 2020, the McDowell County Department of Social Services (“DSS”) went to Respondent-Mother’s residence. At the time, Respondent-Parents were both on felony probation. As a condition of Respondent-Parents’ probations, they were subject to periodic searches. DSS received a report in connection with a probation search of the home. Probation officers (“Officers”) seized numerous weapons from the home, including semi-automatic rifles and handguns. Officers told the social worker

they found two semi-automatic rifles in the car, one in the house, and four buried in a bunker in the shed.

¶ 6 Respondent-Mother told DSS that they had an AK-47 in the home because they had been robbed. She showed DSS a hole in the wall where, during the robbery, a bullet had gone into the couch, through the wall, and into the bedroom where L.B. was sitting. L.B. and H.B. were home during the robbery. H.B. wrestled the gun away from the intruder.

¶ 7 Officers also found heroin and drug paraphernalia, including needles in the juveniles' bedroom. They found used needles and residue in the bathroom everyone shared. A social worker testified the home was cluttered and "filthy." Respondent-Parents were criminally charged as a result of the items seized during the search.

¶ 8 On July 23, 2020, DSS filed petitions alleging the juveniles were neglected juveniles. The trial court appointed Guardian *ad Litem*s and attorney advocates for each juvenile and granted nonsecure custody to DSS that same day. Each of the juveniles and Respondent-Mother were drug tested the day after the juveniles came into DSS custody. L.B. tested negative; however, N.B. and H.B. both tested positive for cannabinoids and THC. Respondent-Mother tested positive for amphetamines and methamphetamines.

¶ 9 On July 30, 2020, the trial court conducted a pre-adjudication hearing. Although Grandmother was initially included as a respondent, the trial court

released Grandmother as a party after determining that she had been appointed as a guardian through DJJ and that her guardianship concluded once DJJ's jurisdiction ended. The trial court specifically ordered DSS to investigate the juveniles' potential placement with Grandmother.

¶ 10 On August 20, 2020, the trial court conducted the juveniles' adjudication and disposition hearing (the "August Hearing"). The trial court considered DSS's Court Report ("DSS Report"), which did not indicate an investigation of Grandmother as a possible kinship placement or offer any explanation as to DSS's failure to comply with the trial court's order to do so. Nevertheless, on August 28, 2020, the trial court adjudicated the juveniles neglected and continued nonsecure custody with DSS, with DSS having placement discretion. The juveniles were placed in foster care with nonrelatives. The order was silent regarding Grandmother as a potential kinship placement option. On September 2, 2020, Respondent-Mother filed her notice of appeal.

II. Standard of Review

¶ 11 We review a dispositional order for abuse of discretion. *In re K.S.D-F.*, 375 N.C. 626, 627, 849 S.E.2d 831, 838 (2020). A trial court abuses its discretion when its ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.U.D.*, 373 N.C. 3, 6, 832 S.E.2d 698, 700 (2019). This Court "review[s] statutory compliance *de novo*." *In re N.K.*, ___

N.C. App. ___, ___, 851 S.E.2d 389, 395 (2020).

III. Analysis

A. Custody

¶ 12 Respondent-Mother contends the trial court erred in continuing custody with DSS through foster care placement with nonrelatives at disposition. Respondent-Mother argues the trial court was required to make specific findings precluding kinship placement with Grandmother before it could consider nonrelative foster care placement for the juveniles. We agree.

¶ 13 When examining “out-of-home” placement for a juvenile, N.C. Gen. Stat. § 7B-903(a1) provides that the trial court “*shall first consider* whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home.” N.C. Gen. Stat. § 7B-903(a1) (2020) (emphasis added). Furthermore, N.C. Gen. Stat. § 7B-903(a1) requires that “[i]f the court finds [] the relative is willing and able to provide proper care and supervision in a safe home, then *the court shall order* placement of the juvenile with the relative *unless* the court finds that the placement is contrary to the best interests of the juvenile.” N.C. Gen. Stat. § 7B-903(a1) (emphasis added).

¶ 14 Respondent-Mother notes Grandmother was appointed the guardian of the juveniles through DJJ court, but that her guardianship concluded when DJJ jurisdiction ended. DSS’s report states that N.B. desired to live with Grandmother

and that H.B. wished to see and spend more time with Grandmother; yet there is no indication that placement with Grandmother was explored. DSS recommended custody of the children be placed with DSS, and the trial court ordered the juveniles continue in DSS's custody through foster care placement with nonrelatives.

B. *In re D.S.*

¶ 15 “This Court has held that before placing a juvenile in an out-of-home placement at a permanency planning hearing, the trial court was required to first consider placing [the juveniles] with [their relatives] unless it found that such a placement was not in [the juveniles’] best interests.” *In re D.S.*, 260 N.C. App. 194, 197, 817 S.E.2d 901, 904 (2018) (internal quotation marks and citation omitted). Additionally, this Court has held that “[f]ailure to make specific findings of fact explaining the placement with the relative is not in the juvenile[s’] best interest will result in remand.” *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted).

¶ 16 In the case of *In re D.S.*, the trial court concluded that placement with the juvenile’s paternal grandmother was not in her best interest, though it entered no findings indicating it considered the paternal grandmother as a placement option. *In re D.S.*, 260 N.C. App. at 200, 817 S.E.2d at 906. This Court held the trial court did not make “findings of fact or conclusions of law resolving this issue, which it [was] statutorily required to do.” *Id.* The trial court’s order failed to include findings to

support a determination of whether or not DSS properly considered the grandmother's home for kinship placement or rejected it as a result of its investigation. *Id.*

¶ 17 Here, the trial court was aware Grandmother had been named the juveniles' guardian previously, as demonstrated in the record and the trial court's August Order. The record also reveals that the trial court was aware that DSS was to investigate Grandmother as a possible placement for the juveniles because in its July Order, the trial court ordered: "Placement with [Grandmother] of the children and former guardian of the children [H.B.] and [N.B.] shall be investigated by the Department as a possible placement for the minor children."

¶ 18 However, the record is devoid of any evidence that DSS tried to contact Grandmother or to follow the trial court's prior order to investigate her as a placement option. Under the section entitled "Current Situation of Child," DSS reported no relatives had "been identified as potential placement providers since the last hearing," and a kinship care assessment was not in progress. The few times Grandmother is mentioned in the DSS Report is to note Respondent-Father was living with Grandmother and that when N.B. came to the DSS office on July 24, 2020, "[t]he respondent father and Maternal¹ Grandma arrived at the office to speak to

¹ It appears DSS inadvertently refers to Grandmother as "Maternal Grandma" when she is, in fact, the parent of Respondent-Father.

[N.B.]” There is not a DSS home study or other report about Grandmother’s residence in the record.

¶ 19 Similarly, the Guardian *ad Litem* report (“GAL Report”) is devoid of the Guardian *ad Litem*’s efforts to determine the appropriateness of kinship-placement with Grandmother. Grandmother is mentioned only twice in the GAL Report; once, to state that N.B. “wants the judge to know that he wishes to live with his [Grandmother],” and next to convey to the court that H.B. “expressed that he wishes to be able to see his [paternal grandparents] more often and for longer periods of time.”

¶ 20 In support of its disposition decision to order custody with DSS through foster care placement with nonrelatives, the trial court made the following findings of fact in its August Order:

2. *That it is in the best interest of the [juveniles] that they be in the custody of [] [DSS] and for [] [DSS] to have placement discretion. The juveniles should remain in the care and custody of [] [DSS] with placement in their discretion and with authority to authorize necessary medical, dental, psychiatric, psychological, education or assessment services for the [juveniles]. (emphasis added).*

...

4. That DSS has made reasonable efforts to eliminate the need for juveniles’ removal from the home of the respondents and it is contrary to the welfare of the juveniles to return to the home of the respondents at this time. *The [juveniles] are placed in foster care placements*

and are doing well. The parents have not identified any appropriate kinship placements. (emphasis added).

5. That it is in the best interests of the [juveniles] that this case not be a reunification at this point.

6. *The juveniles' current placement is appropriate and is participating in the foster care goals for the juveniles as are outlined herein. . . . It is not possible for the juveniles to be placed with a parent within the next six months; however, termination of parental rights, adoption, custody, and guardianship should not be pursued at this time. (emphasis added).*

¶ 21

Based upon these findings of fact, the trial court concluded:

3. *That it is in the best interest of the [juveniles] that they be in the custody of [] [DSS] and for [] [DSS] to have placement discretion. The juveniles should remain in the care and custody of [] [DSS] with placement in their discretion and with authority to authorize necessary medical, dental, psychiatric, psychological, education or assessment services for the children. (emphasis added).*

. . .

6. [T]his case should not be a reunification case at this time.

¶ 22

The trial court's August Order memorializing the August Hearing is silent as to whether it considered and rejected Grandmother as a willing and able relative placement for the juveniles. Additionally, no testimony or records produced at the August Hearing show the results of any DSS home study of Grandmother's home.

¶ 23

The trial court made a single finding of fact regarding the possibility of kinship placement. Finding of fact 4 states, "The parents have not identified any appropriate

kinship placements.” However, this finding is contradicted by finding of fact 9, in which the trial court acknowledged Grandmother as the juveniles’ paternal grandmother and previously appointed guardian. Finding of fact 9 also notes that she was present at the August Hearing, though no longer a party. The trial court made no finding that it was not in the juveniles’ best interests to be in the care and custody of Grandmother. Here, as in the case of *D.S.*, the trial court “never made any findings of fact or conclusions of law resolving this issue, which it is statutorily required to do before placing [the juveniles] with a non-relative.” *In re D.S.*, 260 N.C. App. at 200, 817 S.E.2d at 906. Therefore, whether Respondent-Mother or Respondent-Father explicitly identified Grandmother as a potential kinship placement does not relieve the trial court of its duty to consider kinship placement with Grandmother before placing the juveniles with nonrelatives. We hold the trial court erred in failing to consider Grandmother as a kinship placement.

C. *In re L.L.*

¶ 24 In the case of *In re L.L.*, this Court opined that a trial court “shall first consider” placing a juvenile with relatives prior to it ordering placement of the juvenile with a nonrelative at disposition under N.C. Gen. Stat. § 7B-906, consistent with the requirement set forth in N.C. Gen. Stat. § 7B-903 (“Section 7B-903”). *In re L.L.*, 172 N.C. App. 689, 701, 616 S.E.2d 392, 399 (2005), *abrogated on other grounds by In re T.H.T.*, 362 N.C. 446, 665 S.E.2d 54 (2008). We note N.C. Gen. Stat. § 7B-906.1

replaced Section 7B-906. 2013 N.C. Sess. Laws 129, §§ 25-26.

¶ 25 We further note that current Section 7B-906.1(i) includes an identical reference to the same obligatory language of [Section] 7B-903. *Id.* Thus, our precedent in *In re L.L.* remains binding on this issue. *Id.* Compare N.C. Gen. Stat. § 7B-906(d) (2003) with N.C. Gen Stat. § 7B-906.1(i) (2020). “Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile[s] best interest will result in remand.” *In re A.S.*, 203 N.C. App. at 141-42, 693 S.E.2d at 660 (citation omitted).

¶ 26 Our Juvenile Code illustrates “a preference, where appropriate, to relative placements over non-relative, out-of-home placements.” *In re T.H.*, 232 N.C. App. 16, 29, 753 S.E.2d 207, 216 (2014); *see also In re A.S.*, 203 N.C. App. at 141, 693 S.E.2d at 660 (recognizing our statutes “direct a juvenile court to consider placement with a relative as a first priority”).

¶ 27 As in the cases of *In re D.S.* and *In re L.L.*, the trial court made no finding rejecting Grandmother as both willing and able to provide proper care and supervision in a safe home for the juveniles, her grandsons. *See In re D.S.*, 260 N.C. App. at 197, 817 S.E.2d at 904; *In re L.L.*, 172 N.C. App. at 703, 616 S.E.2d at 400-01.

¶ 28 The trial court in the August Hearing ignored its instruction to DSS in its July Order regarding consideration of Grandmother as a possible kinship placement as

well as the statutory requirements that it “shall order placement” with Grandmother over the juveniles’ foster care placements, inconsistent with this Court’s precedent. *See* N.C. Gen. Stat. § 7B-903(a1) (“If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court *shall* order placement of the juvenile[s] with the relative unless the court finds that the placement is contrary to the best interests of the juvenile[s]” (emphasis added)).

¶ 29 Accordingly, we hold the trial court abused its discretion by continuing custody with DSS through foster care placement with nonrelatives in disposition. We vacate the August Order and remand this matter for a new permanency planning hearing where the trial court is to consider relative placements for the minor children and to make the statutorily required findings of fact and conclusions of law. *See* N.C. Gen. Stat. § 7B-903(a1).

IV. Conclusion

¶ 30 We emphasize that “[o]ur statutes and precedents clearly mandate relative placements of [] juvenile[s] to maintain familial bonds. The statutes and precedents require and presume the juvenile[s]’ best interest is served when placed with a family member.” *In re A.N.T.*, 272 N.C. App. 19, 29, 845 S.E.2d 176, 182 (2020).

¶ 31 The trial court is statutorily required to consider and place the juveniles with a relative, who is willing and able to provide a safe home for them, before consideration of the juveniles’ placement with nonrelatives. *See* N.C. Gen. Stat. § 7B-

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Opinion of the Court

903(a1). We hold the trial court erred when it disregarded the mandate of Section 7B-903(a1) and ordered continued custody with DSS through foster care placement with nonrelatives without first considering relative placements. N.C. Gen. Stat. § 7B-903(a1). We vacate the disposition order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judge DILLON concurs.

Judge ARROWOOD concurs in result only.

Report per Rule 30(e).