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NO. COA11-1146
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

IN THE MATTER OF:

Craven County
No. 10JA14

Z.D.N.T.

Appeal by Respondent from order entered 21 June 2011 by Judge L. Walter Mills in Craven County District Court. Heard in the Court of Appeals 3 January 2012.

Craven County Department of Social Services, by Laura M. Watts-Whitley, for Petitioner-Appellee.

Harrington, Gilliland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for Respondent-Appellant.

Pamela Newell, for Guardian ad Litem.

BEASLEY, Judge.

On 5 February 2010, the infant juvenile, Z.D.N.T.¹, was placed in the nonsecure custody of the Craven County Department of Social Services ("Petitioner"). Z.D.N.T. was subsequently adjudicated as dependent on 4 August 2010 and with custody

¹ To protect the privacy of the victim, her initials are used in this opinion.

remaining with Petitioner. Following a permanency planning review hearing on 27 May 2011, the court filed an order on 21 June 2011 awarding custody of Z.D.N.T. to her paternal grandparents. The court also ordered that any motion to enforce or modify the custody order must be filed as a civil action pursuant to Chapter 50 of the North Carolina General Statutes.

On 5 July 2011 Respondent-mother filed notice of appeal, signed solely by her giving notice of appeal "to the Superior Court pursuant to N.C.G.S. 15A-1431. . . ." Respondent's appellate counsel, conceding the notice of appeal is defective because it is not signed by counsel as required by N.C.R. App. P. 3.1(a) and N.C. Gen. Stat. § 7B-1001(c) and does not give notice of appeal to this Court, has filed a petition for writ of certiorari asking this Court to overlook the deficient notice of appeal and to consider Respondent's appeal on the merits. In our discretion we allow the petition.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent

evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Respondent contends the court erred in awarding custody of the child to a non-parent without a showing that Respondent was unfit as a parent. As a general principle, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). In recognition of this principle, our Supreme Court has decreed that when making a custody decision between a parent and a non-parent, a "best interest of the child" test may be applied only when the movant shows, by clear or convincing evidence, that the parent is unfit or has forfeited her constitutionally protected status by conduct inconsistent with the best interest or welfare of the child. *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, ____ N.C. App. ____, ____, 712 S.E.2d 355, 357 (2011). Thus, if the court finds that a parent is unfit or has

acted inconsistently with her constitutionally protected status, the court may apply a best interest determination in awarding custody to a nonparent in a juvenile court proceeding. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009), *appeal dismissed, disc. review denied*, 365 N.C. 212, 709 S.E.2d 919 (2011).

The court's unchallenged findings of fact indicate that Z.D.N.T. is Respondent's fifth child. All of her other children have been removed from Respondent's custody and her parental rights to them have either been voluntarily or involuntarily terminated. Two of the children were taken into Petitioner's custody in October 2007 after Respondent made homicidal statements regarding them. Respondent's fourth child was taken into custody in February 2008 because of Respondent's untreated mental illness, lack of a safe home for herself and the child, and Respondent's refusal to feed the child. Respondent was diagnosed by multiple mental health professionals as having a mental illness to include personality disorder for which Respondent has never successfully completed treatment and which directly and negatively impacts Respondent's ability to provide a safe, nurturing environment for Z.D.N.T. At the time Respondent was pregnant with Z.D.N.T., she continued to

experience unstable living arrangements and relationships, and failed to participate in recommended therapy to assist her in stabilizing her mental health.

The court's findings of fact also indicate that Respondent does not accept any responsibility for the removal of Z.D.N.T. or any of her four other children from her care and custody. Respondent refuses to acknowledge that she has mental health issues, and until Respondent accepts the mental health diagnoses or addresses her mental health issues, further efforts to attempt to reunify Respondent with Z.D.N.T. will be futile and inconsistent with Z.D.N.T.'s safety and need for a safe, permanent home within a reasonable period of time. The court also specifically found that Respondent's mental health problems, which she has failed to mitigate or solve, render her unfit to have Z.D.N.T. in her care and custody.

We hold the foregoing findings of fact support the court's conclusion of law that returning Z.D.N.T. to Respondent's custody, care and control is contrary to Z.D.N.T.'s best interest because Respondent's mental health has not improved such that Respondent is a fit and proper custodian of Z.D.N.T. We conclude the court acted properly and we therefore overrule this argument.

Respondent next contends the court erred in relieving all attorneys and parties from further responsibility and ordering no further review hearings in this case. Respondent argues the court failed to make findings of fact required by N.C. Gen. Stat. § 7B-906(b) in order to waive mandatory review hearings. Respondent's argument is misplaced.

"In certain cases which have originated as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes, a time may come when involvement by the Department of Social Services is no longer needed and the case becomes a custody dispute between private parties which is properly handled pursuant to the provisions of Chapter 50." *Sherrick v. Sherrick*, ___ N.C. App. ___, ___, 704 S.E.2d 314, 317 (2011). Authority for making the transfer and terminating its jurisdiction is granted to the juvenile court by N.C. Gen. Stat. § 7B-911, which establishes procedures to be followed in transferring jurisdiction. *Id.* Specifically, the transfer may be made on the court's own motion or by motion of a party after the court has made appropriate findings of fact at a dispositional or subsequent hearing awarding custody of the juvenile to a parent or other suitable person. N.C. Gen. Stat. § 7B-911(a) (2009). When entering a custody order pursuant to

N.C. Gen. Stat. § 7B-911, the juvenile court must either "cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody." N.C. Gen. Stat. § 7B-911(b) (2009). The court must also follow other procedures set out in N.C. Gen. Stat. § 7B-911(b). Finally, to terminate the court's jurisdiction in the juvenile proceeding the court must: (1) make findings in the civil custody order that support an award of custody in an action pursuant to Chapter 50 and (2) make findings that (a) there is no need for continued State intervention on behalf of the juvenile through a juvenile court proceeding, and (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, if this person is not a parent or a person with whom the child was living when the juvenile petition was filed. N.C. Gen. Stat. § 7B-911(c) (2009). The trial court may enter one order which can be placed in both the juvenile and civil files. *In re A.S. & S.S.*, 182 N.C. App. 139, 142, 641 S.E.2d. 400, 403 (2007).

In this case, Respondent concurred with the transfer of the case from juvenile court to civil court. A party may not complain of action to which the party assented. *Pitt Cty. v. Deja Vue, Inc.*, 185 N.C. App. 545, 557, 650 S.E.2d 12, 20-21 (2007). Even if she could complain, Respondent has not shown that the court failed to comply with the foregoing statutory procedures to transfer a case from the juvenile court to the civil court.

We are satisfied that the juvenile court properly transferred the case and terminated its jurisdiction. We overrule this contention.

We affirm the order.

Affirmed.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).