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NO. COA05-567

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF:

K.J.H.,
Minor Child

Wayne County
No. 03 J 51

Appeal by respondent-appellant from order entered 3 January 2005 by Judge Rose Vaughn Williams in District Court, Wayne County. Heard in the Court of Appeals 14 November 2005.

No brief filed for petitioner-appellee Wayne County Department of Social Services.

Annick Lenoir-Peek for respondent-appellant father.

Winifred H. Dillon for respondent-appellee mother.

McGEE, Judge.

The Wayne County Department of Social Services (DSS) filed a petition dated 6 March 2003 alleging K.J.H. to be an abused, neglected, and dependent juvenile. At an adjudication hearing on 26 June 2003, K.J.H. was adjudicated abused, neglected, and dependent. The trial court placed K.J.H. in the custody of his paternal grandfather and ordered supervised visitation with respondent-father and respondent-mother (collectively the parents). The trial court conducted three review hearings between September

2003 and March 2004. Pursuant to the review hearings, the trial court awarded custody of K.J.H. to respondent-father and granted more liberal supervised visitation with respondent-mother. Pursuant to a permanency planning hearing held 15 July 2004, the trial court entered a permanency planning order on 16 August 2004 (the permanency planning order) which continued custody with respondent-father and continued supervised visitation with respondent-mother. Respondent-father appealed to this Court. We affirmed the order of the trial court. See *In re K.J.H.*, ___ N.C. App. ___, ___ S.E.2d ___ (2005) (COA05-132) (unpublished).

While that appeal was pending with our Court, the trial court conducted a review hearing on 4 November 2004. Pursuant to the review hearing, the trial court entered an order on 3 January 2005 (the review order) continuing custody with respondent-father and continuing supervised visitation with respondent-mother. The terms of respondent-mother's supervised visitation were identical to the terms of the permanency planning order, with one exception: the trial court changed the supervising party from maternal grandparents to "maternal grandparents [] or their appropriate adult designee." The trial court concluded as a matter of law that there was "no need for further reviews by the Court in [the] matter." The trial court ordered that the attorneys and the guardian ad litem (GAL) be relieved from representation, and ordered the matter "removed from the active calendar of the Wayne County Juvenile Court." Respondent-father appeals.

Before addressing the merits of respondent-father's arguments, we first address respondent-mother's motion to dismiss the appeal. In her motion to dismiss, respondent-mother contends that the review order from which respondent-father appeals is not an appealable order within the definition of N.C. Gen. Stat. § 7B-1001, and therefore his appeal is interlocutory.

N.C. Gen. Stat. § 7B-1001 (2003) establishes the right to appeal from a final order in a juvenile case, and defines a final order as the following:

- (1) Any order finding absence of jurisdiction;
- (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
- (3) Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent; or
- (4) Any order modifying custodial rights.

N.C.G.S. § 7B-1001. Respondent-mother contends that the review order does not meet any of the statutory definitions of a final order. We disagree. We find that the review order is a final order under subparagraph (2) because it is an order "which in effect determines the action and prevents a judgment from which appeal might be taken[.]" N.C.G.S. § 7B-1001(2).

The review order released the attorneys and the GAL and ordered that the matter be "removed from the active calendar of the Wayne County Juvenile Court." In so ordering, the trial court effectively closed the case and terminated its jurisdiction over

the matter. See *In Re P.L.P.*, ___ N.C. App. ___, ___, 618 S.E.2d 241, 243 (2005) (holding that jurisdiction ceased where a trial court ordered that the GAL and the attorneys were "'released from further responsibility in [the] matter and [the] juvenile file [was] hereby closed.'"); see also N.C. Gen. Stat. § 7B-201 (2003) ("When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court[.]"). Since jurisdiction was terminated, the review order effectively determined the action and prevented a judgment from which appeal might be taken. Therefore, it was an appealable final order under N.C. Gen. Stat. § 7B-1001(2). Cf. *In re B.N.H.*, 170 N.C. App. ___, 611 S.E.2d 888, *disc. review denied*, 359 N.C. 632, 615 S.E.2d 865 (2005) (holding that a permanency planning order was not a final order under N.C. Gen. Stat. § 7B-1001(3) where the order was an initial order and merely repeated the previous directives of the trial court); *In re B.P.*, ___ N.C. App. ___, 612 S.E.2d 328 (2005) (dismissing as interlocutory an appeal from a temporary order that set a date for a future review of the permanency plan for two of the appellant's children); *In re Laney*, 156 N.C. App. 639, 577 S.E.2d 377 (2003) (dismissing as interlocutory an appeal from a temporary order which continued the matter for final disposition at a later date). We therefore deny the motion to dismiss and address the merits of respondent-father's appeal.

Respondent-father presents no argument for his assignment of error ten, and it is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). Moreover, assignments of error two, three, four, and

five pertain to the permanency planning order that this Court affirmed in the 1 November 2005 unpublished opinion. See *In re K.J.H.* Therefore, we review the four assignments of error that pertain to the review order and that are argued by respondent-father on appeal: whether the trial court erred in (I) entering the review order more than thirty days after the hearing; (II) making findings of fact not supported by competent evidence; (III) finding and concluding it was in K.J.H.'s best interest to grant respondent-mother visitation; and (IV) awarding respondent-mother visitation supervised only by the maternal grandparents.

I.

Respondent-father first argues that the trial court committed "prejudicial and reversible error" by entering the review order on 3 January 2005, more than thirty days after the 4 November 2004 hearing.

Any order from a permanency planning review hearing shall be entered no later than thirty days following the completion of the hearing. N.C. Gen. Stat. § 7B-907 (2003).¹ In the present case,

¹ The briefs of both respondents refer to N.C. Gen. Stat. § 7B-906, which governs the procedure for review hearings that follow a trial court's order removing custody from a parent. N.C.G.S. § 7B-906 (2003). However, we find that the hearing at issue in this case is more properly governed by N.C. Gen. Stat. § 7B-907 since it is a review of the trial court's prior permanency planning order. See N.C. Gen. Stat. § 7B-907 (2003) ("Subsequent permanency planning hearings shall be held at least every six months . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile."). Both § 7B-906 and § 7B-907 require that orders be "reduced to writing, signed, and entered no later than 30 days following the completion of" the custody review or permanency review hearing. See N.C.G.S. § 7B-906; N.C.G.S. § 7B-907.

the order was entered two months after the hearing. Clearly, the trial court erred by violating N.C.G.S. § 7B-907. However, a trial court's violation of statutory time limits in a juvenile case is not reversible error *per se*. Rather, a party must show prejudice arising from the delay in order to warrant reversal. *In re C.J.B.*, ___ N.C. App. ___, 614 S.E.2d 368 (2005).

A review of our recent cases on point exemplifies that the need to show prejudice in order to warrant reversal is highest the fewer number of days the delay exists. And the longer the delay in entry of the order beyond the thirty-day deadline, the more likely prejudice will be readily apparent.

Id. at ___, 614 S.E.2d at 370 (internal citations omitted) (reversing an order that was entered five months after a hearing terminating parental rights where the appellant alleged prejudice, including delay in the appellate process, a "sense of closure" for the juveniles, and the loss of records and transcripts); *see also In re T.L.T.*, ___ N.C. App. ___, 612 S.E.2d 436 (2005) (holding that a seven-month delay was reversible error where the delay prejudiced the respondent, the juvenile, the foster parents, and the potential adoptive parents); *In re L.E.B.*, 169 N.C. App. 375, 610 S.E.2d 424, *disc. review denied*, 359 N.C. 632, 616 S.E.2d 538 (2005) (holding that a six-month delay was reversible error). In the present case, respondent-father's only allegations of prejudice are that the trial court's error caused him to delay his appeal to this Court by one month, and thereby allowed respondent-mother to visit with K.J.H. while an appeal could have been pending. In light of this Court's prior determinations on this issue, we are

not persuaded that sufficient prejudice befell either respondent-father or K.J.H. to warrant a finding of reversible error. The two-month delay between the hearing and entry of the order does not amount to reversible error by the trial court. This assignment of error is overruled.

II.

Respondent-father next argues that the trial court erred by making findings of fact not supported by competent evidence. Respondent-father assigns error to the following findings of fact:

8. That in March, 2003, [K.J.H.] was harmed while in the care of both parents.
9. That [K.J.H.] was premature and had to stay in the hospital for three weeks after birth.
10. That [K.J.H.] was colicky and difficult to comfort when he was released to the parents from the hospital.
11. That the mother returned to work approximately seven weeks after the birth of [K.J.H.] when the father was still unemployed and the father took care of [K.J.H.] while the mother worked and that the time period of the injuries to [K.J.H.] appear to correlate with this time period.
12. That [K.J.H.] was also left with various family members during the time his injuries could have occurred.
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16. That the criminal charge [against respondent-mother] has not been tried and it is not expected to be tried in the near future.
17. That since the July Court date, the overnight visits conducted by the mother have been favorable and have gone well.

. . . .

22. That according to psychological testing, neither parent has a significant problem at this time.
23. That neither parent appears to be violent nor has a criminal record of violence.
24. That the State has recently offered [respondent-mother] a misdemeanor plea for assault, which the mother refused to accept.

. . . .

26. That it takes [three and one-half] hours for the mother to get from her home to Wayne County where [K.J.H.] is residing. Despite this distance, the mother has traveled so that visits could take place. She has also traveled this distance to comply with the treatment ordered by the Court.
27. That a Court has never ruled that the mother has done anything wrong to cause injuries to [K.J.H.]
28. That the mother admitted to law enforcement officers that she had caused injury to [K.J.H.] after she was told that [K.J.H.] would stay in foster care until someone reported to [DSS] how the injury occurred.
29. That the mother has recanted this admission on the basis that it was only made to keep [K.J.H.] from going into foster care.
30. That [K.J.H.] is safe with the mother at visitation.

. . . .

32. That it is in the best interest of [K.J.H.] to have visitation with the mother.
33. That the mother's visits can be supervised by [the maternal grandparents]

as previously ordered.

. . . .

36. That [the mother] is a fit and proper person to have visitation with [K.J.H.] under the terms set out herein.

Respondent-father presents no argument for findings 9, 10, 27, and 29, and so abandons this assignment of error as to those findings. N.C.R. App. P. 28(b)(6). Finding 32 appears in the order both as a finding of fact and as a conclusion of law to which respondent-father assigns error. Finding 32 should properly be labeled a conclusion of law, and we will treat it as such. *Carpenter v. Brooks*, 139 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91-92 (2000). Accordingly, we will address finding 32 in the next section of this opinion in which we review the trial court's conclusions of law. For the same reason, we will also address finding 36 as a conclusion of law in the next section. *Id.*

We now address those findings of fact which respondent-father argues were not supported by competent evidence. A trial court's findings of fact are conclusive on appeal when they are supported by some competent evidence. *In re C.E.L.*, ___ N.C. App. ___, ___, 615 S.E.2d 427, 430 (2005). If supported by some competent evidence, the findings are conclusive even if some evidence supports findings to the contrary. *Id.*

Finding 8 is supported by competent evidence from the medical report dated 6 March 2003 (the medical report), the DSS report dated 3 April 2003 (the DSS report), and the GAL report dated 31

March 2003, each of which disclosed that K.J.H. suffered injuries while in the legal custody of both parents who shared primary child care responsibilities.

Respondent-father assigns error to that part of finding 11 that states that K.J.H.'s injuries correlated with the time period in which respondent-mother was at work and respondent-father provided primary care for K.J.H. Finding 11 is supported by respondent-mother's psychological evaluation and the medical report. The psychological evaluation reports that respondent-father provided primary care for K.J.H. while respondent-father was unemployed. According to the medical report, the examining physician was not able to determine the exact time frame in which K.J.H.'s injuries occurred, but noted that because there were so many broken bones of "different ages, . . . that [K.J.H.] was *physically abused*" by a caretaker. This evidence supports the trial court's finding that "the time period of [K.J.H.'s] injuries *appear[ed]* to correlate" with the time in which respondent-father was unemployed. (emphasis added) Moreover, finding 11 is not necessary to the trial court's ultimate determinations that respondent-father should retain custody of K.J.H. and that it was in K.J.H.'s best interest to have supervised visitation with respondent-mother.

Finding 12 is supported by the medical report, the DSS report, and respondent-mother's psychological evaluation, each of which stated that family members helped care for K.J.H. Finding 16 is supported by statements made by respondent-mother's attorney at the

review hearing that respondent-mother's criminal attorney had reported that the State had made two plea offers, which respondent-mother had declined. This evidence also supports finding 24, that respondent-mother refused to accept a misdemeanor plea offered by the State. Moreover, respondent-father concedes in his brief that respondent-mother's criminal charges of harming K.J.H. had not been tried at the time of the review hearing.

Finding 17, that K.J.H.'s overnight visits with respondent-mother "have been favorable and have gone well," is supported by statements from respondent-mother's counsel, as well as by statements from DSS. Respondent-mother's counsel stated at the hearing that, according to respondent-mother, the visits were going well and that K.J.H. "seem[ed] to enjoy the visits." DSS reported at the hearing that the trial court had received a favorable home study of the maternal grandparents' home from the Stanly County Department of Social Services. DSS recommended that respondent-mother's visitation continue and that the case be closed. At a permanency review hearing, a trial court "may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile[.]" N.C. Gen. Stat. § 7B-907(b) (2003). Accordingly, statements by counsel and DSS were properly before the trial court and constituted competent evidence on which the trial court based finding 17. Respondent-father points out that no evidence was presented by DSS in the form of direct observations of the visits between K.J.H. and respondent-

mother. While we agree that an evaluation by DSS would have been beneficial to the trial court's determination, we find other competent evidence to support the trial court's finding.

Respondent-father's argument as to finding 22 is substantially similar to an argument raised in his prior appeal, that respondent-mother has "significant" psychological problems. In the prior opinion, we held that there was competent evidence in the record to support the trial court's finding that respondent-mother had "undergone a psychological evaluation and no serious problems [were] determined." See *In re K.J.H.*, ___ N.C. App. at ___, ___ S.E.2d at ___. The record before the trial court at the November review hearing contained no additional evidence of respondent-mother's mental health. Accordingly, respondent-father's argument as to this finding is overruled.

Finding 23, that neither of the parents was violent, is supported by competent evidence from respondent-mother's psychological evaluation, which stated that "there was no indication . . . of self-harmful, suicidal, or homicidal ideation, intent, or action. . . . No unexpected problems are reported with . . . impulse control." Moreover, respondent-mother recanted her admission of harming K.J.H., and there had been no determination of her guilt by a criminal court at the time of the review hearing.

Finding 26 is supported by respondent-mother's testimony at the hearing. Moreover, the substance of finding 26 appeared in the permanency planning order as a finding of fact from which respondent-father did not appeal. Accordingly, we need not address

this finding. Similarly, the substance of finding 28 appeared in the permanency planning order as a finding of fact from which respondent-father did not appeal. While we need not address finding 28, we note that it is supported by respondent-mother's psychological evaluation and the DSS report that noted that respondent-mother felt pressured into confessing that she had harmed K.J.H.

Finding 30, that K.J.H. was safe during supervised visits with respondent-mother, was supported by the following: evidence that the visitations were supervised by the maternal grandparents, who received a favorable home study from the Stanly County Department of Social Services; evidence that respondent-mother had no serious psychological problems; and evidence that respondent-mother's therapy sessions were terminated by respondent-mother's therapist. The favorable home study of the maternal grandparents also supports finding 33, that the maternal grandparents could supervise visitation. Moreover, the trial court heard a recommendation by DSS that the maternal grandparents were proper parties to supervise visitation in their home.

Our review of the record on appeal shows each of the trial court's findings is supported by competent evidence. Accordingly, we find no error in any of the trial court's findings of fact and overrule this assignment of error.

III.

Finally, respondent-father argues that the trial court committed reversible error in finding and concluding that, in light

of the criminal charges pending against respondent-mother, that supervised visitation with respondent-mother was in K.J.H.'s best interest. As noted above, respondent-father also assigns error to the trial court's conclusion that respondent-mother was a fit and proper person to have visitation with K.J.H.

A trial court's conclusions of law are upheld when they are supported by findings of fact. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). In the present case, the trial court's conclusion that respondent-mother was a fit and proper person to have visitation with K.J.H. was supported by the trial court's findings that respondent-mother had no criminal record, attended parenting classes, attended therapy, and had no significant psychological problems. These findings also support the trial court's conclusion that it was in K.J.H.'s best interest to grant respondent-mother visitation. In addition, the trial court found that visitation had been going well, that K.J.H. was safe during visitation, and that the maternal grandparents had received a favorable home study. Accordingly, this assignment of error is overruled.

IV.

Respondent-father's final assignment of error is that the trial court "erred and abused its discretion" in awarding respondent-mother visitation supervised by the maternal grandparents. For the reasons stated above, we uphold the trial court's conclusion of law that it was in the best interests of K.J.H. to have visitation with respondent-mother supervised by the

maternal grandparents. Respondent-father provides no additional legal argument specific to his claim of an abuse of discretion. Accordingly, this assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).