

NO. COA14-1254

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

IN THE MATTER OF:
N.B., L.B.

Mecklenburg County
Nos. 13 JA 117-18

Appeal by respondent-mother ("Mother") from order entered 11 August 2014 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 16 March 2015.

Kathleen M. Arundell for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

Appellate Defender Staples Hughes, by Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

DILLON, Judge.

Mother appeals from the district court's "Permanency Planning Review and Guardianship Order" which (1) changed the permanent plan for her children N.B. ("Noah") and L.B. ("Lindsay")¹ from "guardianship, with a concurrent goal of reunification with a

¹ We use pseudonyms throughout this opinion to protect the juveniles' privacy.

parent" to one of guardianship; (2) awarded guardianship of the children to their paternal grandparents ("Mr. and Ms. Smith"); and (3) granted Mother one hour per month of supervised visitation. For the following reasons, we affirm the trial court's order.

I. Background

In March 2006, the Jefferson County, New York, Department of Social Services filed a petition alleging that Mother had neglected Noah and Lindsay. The Jefferson County Family Court (the "New York Court") subsequently entered an order concluding that Mother had neglected the children by her misuse of drugs while caring for the children and by her failure to address her long history of alcohol and substance abuse. The New York Court placed the children in the custody of respondent-father ("Father") and ordered Mother to, *inter alia*, get treatment.

In March 2010, Father moved with the children to North Carolina. In October 2010, the New York Court entered an order "relinquishing jurisdiction to the State of North Carolina."

In February 2013, the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") obtained non-secure custody of the children and filed a juvenile petition alleging that they were abused, neglected, and dependent, based in part on Mother's abuse of alcohol and "reports of domestic violence between

the mother and men that visit the home, in the presence of the children."

In June 2013, the children were diagnosed with posttraumatic stress disorder ("PTSD") from witnessing incidents of domestic violence involving their Mother.

In July 2013, the Mecklenburg County District Court adjudicated Noah and Lindsay neglected and dependent and ordered them to "remain in YFS custody with placement with [the paternal grandparents, Mr. and Ms. Smith]." The court found that Mother was drinking "excessively" and abusing drugs in front of her children and was involved in "frequent arguments" and "physical altercations" with her live-in boyfriend. The district court ordered Mother to have a psychological evaluation that included a substance abuse assessment as well as a domestic violence assessment.

In August 2013, the parents' visitation was involuntarily suspended.

In September 2013, the district court entered a review order establishing a permanent plan of reunification "with a concurrent goal of guardianship." It noted that Mother had yet to obtain her court-ordered evaluation and assessments. The court also found that Mother had not grasped the seriousness of her issues but had

"minimized her substance abuse issues and her domestic violence issues with [her boyfriend.]"

In January 2014, the district court entered another review order, finding that neither parent had made progress toward reunification. The court found that although both children continued to exhibit PTSD symptoms, their symptoms had diminished since their parents' visitation was suspended. The court ordered Mother to obtain a psychological evaluation and substance abuse and domestic violence assessments.

In February 2014, the district court changed Noah and Lindsay's permanent plan to "guardianship; with a concurrent goal of reunification." The court again noted the parents' failure to obtain their court-ordered evaluations and described Father as having "all but 'checked out.'" While "commend[ing] [M]other for the work she is doing[,]" the court identified the following issues as barriers to reunification: "domestic violence, substance abuse and mental health needs[,]" the children's mental health needs[, and] understanding the impact of the past on the children."

Subsequently, Mother obtained a psychological evaluation and substance abuse assessment from Nicole L. Cantley, Ph.D., resulting in Axis I diagnoses of attention deficit hyperactivity disorder; adjustment disorder with mixed anxiety and depressed

mood; alcohol abuse, early full remission; and opioid dependence, sustained partial remission. Dr. Cantley reported that Mother "admits to a history of prescription drug addiction (i.e. barbiturates, benzodiazepines, opiates)[,]" but that Mother "still denies that such use caused problems[,]" and that despite a history of child neglect resulting from her abuse of drugs and alcohol, Mother "continues to externalize blame" and to display a "lack of insight that [treatment] is even medically necessary[.]" Dr. Cantley stated that Mother's "willingness or ability to apply what she is learning may be short-lived outside the treatment program" unless Mother acknowledged a problem and accepted responsibility for her actions and specifically cautioned against Mother's continued use of the prescription narcotic tramadol, which was "ill-advised" given her "history of narcotic and opiate addiction[.]"

In April 2014, a YFS social worker submitted a report informing the district court that she had discussed Dr. Cantley's evaluation with Mother, and that Mother understood "that she was not to take [t]ramadol any longer as this was a controlled and addictive substance."

In June 2014, the court entered an order, finding that Mother was "making progress" but ordered her to comply with her case plan

and with Dr. Cantley's recommendations.

In July 2014, the district court held a review hearing, speaking with Noah and Lindsay in chambers and hearing testimony from the social worker, Mr. and Ms. Smith, and Mother, and receiving into evidence a "Court Summary" and "Reasonable Efforts Report" prepared by YFS. The court also received a urinalysis showing Mother's positive test for tramadol on 23 April 2014.

In August 2014, the court entered an order changing Noah and Lindsay's permanent plan to guardianship and appointed Mr. and Ms. Smith as their guardians, based on the evidence and the recommendations of YFS and the guardian *ad litem*. Mother gave timely notice of appeal from this order.

II. Subject Matter Jurisdiction

Mother first challenges the district court's subject matter jurisdiction, claiming that the children were under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), and that North Carolina courts lacked "jurisdiction to adjudicate the children neglected and dependent when they were the subject of a custody order in New York."

"The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal[,]” *In re T.B.*, 177 N.C. App. 790, 791, 629 S.E.2d 895,

896-97 (2006), and is a question of law subject to *de novo* review. *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010).

The parties agree that the New York Court entered the "initial child-custody determination" for purposes of the UCCJEA. N.C. Gen. Stat. § 50A-201(a) (2013); *see also* N.C. Gen. Stat. § 50A-102(8) (2013) ("'Initial determination' means the first child-custody determination concerning a particular child."). "Accordingly, any change to that [New York] order qualifies as a modification under the UCCJEA." *In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004); *see also* N.C. Gen. Stat. § 50A-102(11) (2013).

The jurisdictional requirements for a modification under the UCCJEA are as follows:

[A] court of this State may not modify a child-custody determination made by a court of another state unless *a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a) (1) or G.S. 50A-201(a) (2) and:*

- (1) *The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or*
- (2) *A court of this State or a court of the other state determines that the*

child, the child's parents, and any person acting as a parent do not presently reside in the other state.

N.C. Gen. Stat. § 50A-203 (2013) (emphasis added). Under the UCCJEA, North Carolina courts have jurisdiction to make an initial determination under the UCCJEA if North Carolina is the "home state of the child on the date of the commencement of the proceeding[.]" N.C. Gen. Stat. § 50A-201(a)(1). A child's "home state" is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (2013).

In this case, the record shows that North Carolina has been the children's home state since March 2010, when they moved here with Father, as reflected in various court filings. Therefore, the first jurisdictional requirement for a modification under the UCCJEA is satisfied. *In re J.C.*, __ N.C. App. __, __, 760 S.E.2d 778, 780 (2014).

The remaining jurisdictional requirement for a modification under the UCCJEA is satisfied by the New York Court's order "relinquishing jurisdiction to the State of North Carolina." See N.C. Gen. Stat. 50A-203(1). Indeed, the "Initial (7-Day) Order" entered in March 2013 by the district court in Mecklenburg County

contains a finding that the New York Court “exercised jurisdiction during a custody hearing in August 2010; the NY court found no one resided in NY and relinquished jurisdiction to NC[.]”

We are unpersuaded by Mother’s suggestion that the New York Court’s order is insufficient to relinquish jurisdiction because that court’s order lacks findings of fact to indicate the specific statutory basis under New York law for relinquishment. See N.Y. Dom. Rel. Law §§ 76-a, 76-f (2014). However, under the UCCJEA, “the original decree State is the sole determinant of whether jurisdiction continues.” *In re N.R.M.*, 165 N.C. App. at 300, 598 S.E.2d at 151 (quoting N.C. Gen. Stat. § 50A-202 official cmt.). Nothing in the UCCJEA requires North Carolina’s district courts to undertake collateral review of a facially valid order from a sister state before exercising jurisdiction pursuant to N.C. Gen. Stat. § 50A-203(1). The New York Court’s order is sufficient. See *Williams v. Walker*, 185 N.C. App. 393, 403, 648 S.E.2d 536, 543 (2007). Accordingly, this argument is overruled.

III. Evidentiary Support for Findings

Mother challenges several of the district court’s findings of fact as unsupported by the evidence.

“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. 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, 595 S.E.2d 155, 161 (2004).

As in all dispositional proceedings, "[t]he court may consider any evidence, including hearsay evidence . . . or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c) (2013). It is the province of the fact-finder to "weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted).

A. Mother's Drug Abuse

Mother first objects to any suggestion in findings 11, 12, 13 and 28 that it was probable or likely that she would again abuse prescription pain medications. However, in her report, which the court incorporated by reference into its order, Dr. Cantley opined that "[a]llthough *relapse is common and symptomatic of drug and alcohol dependency, she is at greater risk* given that she quit for

secondary gains (to comply with [YFS] recommendations and for reunification." (Emphasis added.) Further she opined that there were "barriers to [Mother's] progress in drug and alcohol treatment" which included "[Mother's] lack of insight that it is even medically necessary, and her admittance that she is simply following the orders of YFS" and that "[Mother's] willingness or ability to apply what she is learning may be short-lived outside of the treatment program." Dr. Cantley's report pointed to Mother's proclivity "to externalize blame" as a barrier to progress.

Mother continued to exhibit these traits at the July 2014 review hearing. She testified that Noah and Lindsay "didn't come into [YFS] custody because of something I did[,] " faulted YFS and the social worker for refusing to work with her, and accused Ms. Smith of "trying to sabotage" her relationship with the children. Mother claimed she had successfully completed substance abuse treatment and had done "[e]verything that [she] could do" to satisfy YFS. Disputing the YFS social worker's testimony, Mother insisted she had "passed every drug screen." As previously noted, however, a urinalysis confirmed Mother's continued use of tramadol, contrary to Dr. Cantley's recommendation and her own representations to YFS. We must conclude that there was competent

evidence to support the trial court's finding of a likelihood of future substance abuse by Mother.

Mother next takes issue with the reference in the order to her "admitted failure to[]reveal her addiction history to the prescribing doctors/professionals" in finding 12. However, her own testimony supports this finding. Specifically, she acknowledged taking hydrocodone for "more than a year" during these proceedings by obtaining prescriptions from her "family doctor" and then "a different doctor." When asked whether she had made these prescribing doctors "aware of [her] substance abuse history[,] " Mother testified, "No. I didn't abuse my medication." Dr. Cantley reported that Mother was prescribed both hydrocodone and tramadol for pain, raising the possibility of another prescribing physician. This argument is overruled.

B. Grandparents' Ability To Provide Care

Mother challenges the trial court's finding that Noah and Lindsay "have blossomed under [Mr. and Ms. Smith's] care." However, there is competent evidence to support this finding. Specifically, Ms. Smith testified that the children were "doing pretty good" and are "progressing well under the circumstances." She described Lindsay as "a normal teenager who seems happy and well adjusted" and who is "utilizing her skills for stress

management" learned in therapy. She testified that Noah "is playing in a basketball league" and also "opening up to his therapist." Ms. Smith informed the court that she and her husband had obtained "two lottery positions in a charter school" for the children. This exception is overruled.

Mother further objects to the finding that the Noah and Lindsay "feel safe and comfortable in the grandparents' home." She hinges this claim on the fact that the YFS court summary describes Noah as saying he felt "safe and comfortable" in his grandparents' home but describes Lindsay as merely saying "that she felt 'fine' and 'safe[.]'" We point out that the district court also spoke in chambers with Noah and Lindsay about "how things were going at their grandparents' house[,]" at which time they voiced their "agreement with the guardianship recommendation[.]" Regardless of whether Lindsay actually used the term "comfortable" with the social worker or the court, we find Mother's argument to be unconvincing. Any imprecision by the court in paraphrasing Lindsay's feelings is harmless.

C. YFS' Reasonable Efforts

Mother also challenges the court's finding that "YFS has made reasonable efforts to . . . eliminate the children's need for . . . [an] out of home placement." See N.C. Gen. Stat. § 7B-

906.1(e)(5) (2013). However, this finding is supported by the evidence. Specifically, the YFS social worker testified regarding her interactions with Mother and received into evidence a "Reasonable Efforts Report." The report details the social worker's contact with Mother since the previous review hearing in April 2014 showing that the social worker was extensively involved in the scheduling and supervision of visits between Mother and the children in April and May 2014, that she contacted Mother to inform her of medical issues with the children, and that she coordinated Mother's therapeutic visitation with the children's therapist. The court incorporated the "Reasonable Efforts Report" by reference into its order. Accordingly, Mother's argument is overruled.

IV. Sufficiency of Findings Under N.C. Gen. Stat. § 7B-906.1

Mother claims that the district court's order lacks certain findings of fact required by the permanency planning statute, N.C. Gen. Stat. § 7B-906.1 (2013).

A. Guardians' Financial Resources

Mother first contends the court awarded guardianship to Mr. and Ms. Smith without properly verifying that they "will have adequate resources to care appropriately for the juvenile[s]" as required by N.C. Gen. Stat. § 7B-906.1(j) (2013). *See also* N.C.

Gen. Stat. § 7B-600(c) (2013). The order includes the following pertinent findings:

42. This Court questioned [Mr. and Ms. Smith] pursuant to NCGS §7B-600.

43. [Mr. and Ms. Smith] understand the legal and financial obligations of guardians.

44. [Mr. and Ms. Smith] are fit and proper people to have the care, custody, and control of [Noah] and [Lindsay] through a guardianship arrangement.

45. [Mr. and Ms. Smith] are ready, willing, and able to . . . fulfill the duties and responsibilities of legal guardians.

Mother argues that these findings and the evidence they are based on are not sufficient to meet the requirements of N.C. Gen. Stat. 7B-906.1(j). We disagree.

This Court has previously held "that the Juvenile Code does not 'require that the court make any specific findings in order to make the verification' prescribed by N.C. Gen. Stat. § 7B-906.1(j). *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007).² It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the

² *In re J.E.* was decided under a previous version of the statute, N.C. Gen. Stat. § 7B-907(f), but the applicable language in that version is almost identical to the applicable language in N.C. Gen. Stat. § 7B-906.1(j). See 2013 N.C. Sess. Laws 129, sects. 25, 26; 2003 N.C. Sess. Laws 140, sect. 9(d).

guardianship. *Id.* Here, the court made explicit findings of Mr. and Ms. Smith's understanding of and ability to fulfill their financial responsibilities as guardians. Both Mr. and Ms. Smith affirmed to the court their willingness to "be responsible for the children's physical, emotional and educational and mental well-being up until the time they turn 18." The YFS court summary also states that Mr. and Ms. Smith "are willing and able to provide a long term home for the children through guardianship." Having "spoken in depth" with Mr. and Ms. Smith "about meeting the requirements and responsibilities" of guardianship, the social worker affirmed her belief that they had "the means to support the children[.]" Such evidence more than suffices to support a verification under N.C. Gen. Stat. § 7B-906.1(j). *See In re J.E.*, 182 N.C. App. at 616-17, 643 S.E.2d at 73. Mother's argument is overruled.

B. Ceasing Reunification Efforts

Mother also claims that the district court improperly ceased reunification efforts without making the necessary findings under N.C. Gen. Stat. § 7B-906.1(d)(3) (2013), requiring the court to consider "[w]hether efforts to reunite the juvenile[s] with either parent would be futile or inconsistent with the juvenile[s'] safety and need for a safe, permanent home within a reasonable period of

time." *Id.*

We agree with Mother that the order effectively ceases reunification efforts by (1) eliminating reunification as a goal of Noah and Lindsay's permanent plan, (2) establishing a permanent plan of guardianship with Mr. and Ms. Smith, and (3) transferring custody of the children from YFS to their legal guardians.³ *Cf. In re A.E.C.*, 2015 N.C. App. LEXIS 14, *11 (N.C. Ct. App. Jan. 20, 2015) (noting "the order need not explicitly cease reunification efforts"); *In re A.P.W.*, __ N.C. App. __, __, 741 S.E.2d 388, 391 (2013) (finding an implicit ceasing of reunification efforts where the court changed the permanent plan to adoption and ordered DSS to seek termination of parental rights). However, we also believe and, therefore, hold that the findings exhibit that the trial court considered the factor.

In addressing the equivalent statutory requirement for ceasing reunification efforts under N.C. Gen. Stat. § 7B-507(b)(1), our Supreme Court has explained that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re A.E.C.*, 2015 N.C. App. LEXIS 14 at *11 (*quoting In re L.M.T.*, 367 N.C. 165, 167-68, 752

³ Because the order removed Noah and Lindsay from "the custody or placement responsibility" of YFS, the provisions of N.C. Gen. Stat. § 7B-507(b) (2013) do not apply.

S.E.2d 453, 455 (2013)). In other words, the findings must “make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” *Id.*

Here, the trial court’s findings refer to Mother’s persistent “failure to comply with recommendations concerning her use of prescription pain pills[;]” her dishonesty about her continued contact with her live-in boyfriend and failure to appreciate the risk domestic violence “poses to herself and her children[;]” and her refusal to accept responsibility for her actions or acknowledge a problem with substance abuse, despite “a history of court involvement [that] includes at least 6 child custody cases which date back to the 1990s and span multiple counties and states.” The order also includes several findings directly pertaining to the prospects for reunification:

27. [Mother] is either unwilling or unable to apply the information, skills, and strategies she has learned through various services to her daily life and interactions with her children. . . .

. . . .

49. [Mother] is not a fit and proper person to have the care, custody, and control of the children.

. . . .

51. The children cannot be reunified with [Mother] within six months or in the foreseeable future.

52. It is contrary to the children's best interest and contrary to their need for a safe and permanent home to be reunified with either parent.

At minimum, these findings "embrace[] the substance" of the statutory provisions in N.C. Gen. Stat. § 7B-906.1(d)(3). *In re L.M.T.*, 367 N.C. at 169, 752 S.E.2d at 456. Accordingly, Mother's argument is overruled.

V. Visitation Order

In her final argument, Mother challenges the visitation schedule ordered by the district court as "too vague and ill-defined." The court scheduled a review hearing and awarded Mother visitation pending the hearing as follows:

- [Mother's] visitation shall be supervised by the family therapist, Dr. Tracy Masiello, in a therapeutic setting.
- [Mother] is entitled to at least one visitation session per month for a minimum of one hour.
- Sessions may be longer and/or more frequent if the therapist recommends.
- [Mother] is responsible for contacting the family therapist at least once per month to participate in scheduling visitation appointments.
- [Mother] shall respond to messages from the therapist within 48 hours (2 days).

The order also declares the court's intention to "enter a detailed visitation plan for each parent" following the 10 September 2014 review hearing.

Mother argues that the visitation order fails to designate the time and place of the visits and thus does not provide the "minimum outline of visitation" required by *In re E.C.*, 174 N.C. App. 517, 523, 621 S.E.2d 647, 652 (2005) and its progeny. Our decision in *In re E.C.* relied on a version of N.C. Gen. Stat. § 7B-905(c) that required an "appropriate visitation plan . . . expressly approved by the court." In *In re E.C.*, we determined that this statutory language meant "[a]n appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised." 174 N.C. App. at 523, 621 S.E.2d at 652.

However, since our decision in *In re E.C.*, G.S. 7B-905(c) was amended (in 2013) to remove the language requiring that the plan be "expressly approved by the court[,] and a new statute governing visitation in dispositional orders was enacted, G.S. 7B-905.1(b), (c), which only requires the order to account for "the minimum frequency and length of visits and whether the visits shall be supervised." See 2013 N.C. Sess. Laws 129, Sects. 23, 24 (June 19, 2013). These changes became effective 1 October 2013 *before*

the trial court's August 2014 order and are applicable to the present case. By enacting G.S. 7B-905.1 and by not including the language that was in former G.S. 7B-905(c), we believe that the General Assembly intended to eliminate any requirement that the trial court include in its order the particular time or place for such visitations but only require the trial court to provide a framework for such visitations. Therefore, *In re E.C.* has been abrogated by the statutory amendment to the extent that it holds that a trial court *must* provide for the time, place, and conditions of visitation in an order allowing visitation.

Here, the trial court accounted for the minimum frequency and length of the visitation (one hour, once per month) and provided for the visitations to be supervised by the family therapist (Dr. Masiello). The trial court left it to Mother to coordinate with Dr. Masiello regarding these visits. We hold that the trial court's order meets these minimum requirements for visitation, and this argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirmed the trial court's "Permanency Planning Review and Guardianship Order[.]"

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.