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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-981

Filed: 21 March 2017

Ashe County, Nos. 14 JA 27-28

IN THE MATTER OF: T.E., K.E., Jr.

Appeal by respondents from order entered 2 June 2016 by Judge David V. Byrd in Ashe County District Court. Heard in the Court of Appeals 27 February 2017.

*Grier J. Hurley for petitioner-appellee Ashe County Department of Social Services.*

*Paul W. Freeman, Jr., for guardian ad litem.*

*Richard Croutharmel for respondent-appellant father.*

*Robert W. Ewing for respondent-appellant mother.*

McCULLOUGH, Judge.

Respondent-mother and respondent-father (“respondents”) appeal from an order adjudicating their sons “Teddy” and “Kevin”<sup>1</sup> to be neglected juveniles. Because no appeal lies from this order prior to the trial court’s entry of the resulting dispositional order, we dismiss respondents’ appeals as interlocutory.

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<sup>1</sup> We use these pseudonyms to protect the juveniles’ privacy and for ease of reading.

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On 29 July 2014, DSS obtained nonsecure custody of Teddy and Kevin and filed juvenile petitions seeking adjudications of abuse and neglect as to each child. The petitions alleged that respondent-mother had been charged with assault with a deadly weapon and misdemeanor child abuse after ramming her car, with Teddy and Kevin in the vehicle, into respondent-father's work truck. The petitions further described a history of substance abuse and domestic violence between respondents resulting in six prior child protective services reports, as well as a recent incident witnessed by the children which led to both respondents being charged with simple assault. After an adjudicatory hearing on 24 October 2014, the trial court entered a "Juvenile Adjudication Order" concluding that Teddy and Kevin were neglected juveniles. The court held a dispositional hearing on 12 November 2014 resulting in a "Juvenile Disposition Order" that maintained the children in DSS custody.

Respondents appealed from the "Juvenile Adjudication Order" and "Juvenile Disposition Order." *In re T.E., K.E., Jr.*, \_\_ N.C. App. \_\_, 779 S.E.2d 192, 2015 N.C. App. LEXIS 750, 2015 WL 5431880 (2015) (unpublished) ("*T.E. I*"). In an opinion filed 15 September 2015, this Court held that the trial court failed to make sufficient findings of fact to support its conclusion that Teddy and Kevin were neglected juveniles. *Id.*, 2015 N.C. App. LEXIS 750 at \*7-10, 2015 WL 5431880 at \*3-4. However, we further ruled that DSS had presented sufficient evidence to "support – but not require –" an adjudication of neglect. Accordingly, we remanded to the trial

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court for entry of additional findings “related to whether respondents’ incidents of domestic violence posed a substantial risk of harm to the juveniles.” *Id.*, 2015 N.C. App. LEXIS 750 at \*7, 10, 2015 WL 5431880 at \*3, 5. Because the court’s disposition was contingent upon a valid adjudication, we vacated both the adjudication order and the disposition order. *Id.*, 2015 N.C. App. LEXIS 750 at \*10, 2015 WL 5431880 at \*5; *see also* N.C. Gen. Stat. § 7B-807(a) (2015) (requiring the trial court to dismiss petition with prejudice and return children to parent’s custody if petitioner fails to prove abuse, neglect, or dependency). We specifically authorized the court to receive additional evidence on remand, in its discretion. *Id.*

At a proceeding on 9 December 2015, the trial court determined that additional evidence was not required to make the necessary findings of fact. The court reviewed the transcript of the 24 October 2014 hearing and entered a new “Juvenile Adjudication Order” on 2 June 2016. Based on additional findings that Teddy and Kevin “were adversely affected” and placed at “substantial risk of physical, mental, or emotional harm” by respondents’ conduct, the court again adjudicated the children neglected. The court ordered that Teddy and Kevin would remain in DSS custody “[p]ending the disposition hearing” and purported to set a dispositional hearing for 12 November 2014 – the same date provided in the original adjudication order. On 1 July 2016, respondents filed notices of appeal from the adjudication order entered 2 June 2016.

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Respondents both claim that the trial court violated the mandate of this Court in *T.E. I* by failing to enter a new disposition order after adjudicating Teddy and Kevin neglected on 2 June 2016. Respondents also challenge certain findings of fact supporting the adjudication of neglect.

The guardian ad litem (“GAL”) responds, *inter alia*, that respondents’ appeal from the adjudication order is not authorized by N.C. Gen. Stat. § 7B-1001(a) (2015) and should be dismissed pending the trial court’s entry of its disposition order. We agree.

As a general matter, there is no right of immediate appeal from an interlocutory order, “which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). In the context of juvenile abuse, neglect, and dependency cases, N.C. Gen. Stat. § 7B-1001(a) provides that “appeal of a *final order* of the court in a juvenile matter shall be made directly to the Court of Appeals.” (Emphasis added). “An adjudication order – even where it includes a temporary disposition – is not a final order as contemplated by our juvenile code.” *In re P.S.*, \_\_ N.C. App. \_\_, \_\_, 775 S.E.2d 370, 372, *cert. denied*, 368 N.C. 431, 778 S.E.2d 277 (2015). Subsection 7B-1001(a) provides a right of appeal from “[a]ny initial order of disposition and the adjudication order upon which it is based.” N.C. Gen. Stat. § 7B-1001(a)(3) (2015). Subdivision (a)(3) “specifies that an adjudication

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order may only be appealed along with a corresponding disposition order, which is lacking in this case.” *In re P.S.*, \_\_ N.C. App. at \_\_, 775 S.E.2d at 371.

Respondent-mother suggests that the trial court’s new “adjudication order relates . . . back to the entry of the final disposition order on December 4, 2014.” However, because our mandate in *T.E. I* vacated both the original adjudication order and the original disposition order entered on 4 December 2014, we find her position untenable.<sup>2</sup>

Respondents also assert a right to appeal the 2 June 2016 adjudication order pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2015), which authorizes an appeal from “[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile.” *Id.* at \_\_, 775 S.E.2d at 372. Respondent-father notes that the order purported to place Teddy and Kevin in DSS custody pending a dispositional hearing scheduled for a date well in the past, 12 November 2014, suggesting that “the trial court did not intend on changing its disposition order despite the fact that the Court of Appeals vacated the disposition order when it remanded the case.”

In *In re P.S.*, this Court explicitly held that a temporary custody arrangement included in an adjudication order does not render the order appealable under N.C.

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<sup>2</sup> Equally untenable is DSS’s position that the trial court was not required to enter a new disposition order, yet “[w]ithout a disposition order the parents have no right to appeal” the adjudication order.

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Gen. Stat. § 7B-1001(a)(4). *In re P.S.*, \_\_ N.C. App. at \_\_, 775 S.E.2d at 372. As we explained,

the trial court granted only temporary custody to DSS, pending the initial disposition hearing . . . . We find that temporary custody is not akin to the type of custody change contemplated by the General Assembly in enacting N.C. Gen. Stat. § 7B-1001(a)(4). The temporary custody awarded here by the trial court is analogous to nonsecure custody, which the General Assembly specifically exempted from appeal under subsection (a)(4). We find further support for this position in our treatment of temporary custody orders arising under Chapter 50 of the General Statutes. We have repeatedly held that such orders are interlocutory and not immediately appealable. Based on the foregoing, we find no support for the position that subsection (a)(4) creates a separate route of appeal from the interlocutory order in this case.

*Id.* (internal citations omitted).

It appears from the record on appeal that the trial court construed the mandate in *T.E. I* so as not to require the entry of a new disposition order after entering its new adjudication order on 2 June 2016. However, because this Court vacated the prior disposition order, the new adjudication of neglect required the entry of a new disposition. *See* N.C. Gen. Stat. §§ 7B-901 through -905 (2015). Section 7B-901 requires a dispositional hearing to be held within thirty days of the adjudicatory hearing; and section 7B-905 requires entry of a dispositional order within thirty days of completion of the dispositional hearing. N.C. Gen. Stat. §§ 7B-901, -905(a).

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Respondents contend that the trial court failed to comply with our mandate in *T.E. I.* As our Supreme Court has explained, however, “[m]andamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute.” *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 59 (2008). Respondent-father allows that “[i]t may be that the parents’ remedy was to file a [petition for] writ of mandamus[,]” but nonetheless suggests “it is unclear whether the trial court would have entered a disposition order had the respondents asked it to do so.” As a writ of mandamus is not a mere request from the parties but an order from a supervisory court compelling performance of the act in question, *see id.* at 453, 665 S.E.2d at 59, we find his argument unpersuasive.

“Subject matter jurisdiction may not be waived, and this Court has the power and the duty to determine issues of jurisdiction *ex mero motu*” even when not raised by a party. *In re C.N.C.B.*, 197 N.C. App. 553, 555, 678 S.E.2d 240, 241 (2009) (citation and internal quotation marks omitted). As urged by the GAL, we must dismiss respondents’ appeal for lack of jurisdiction.

Respondents also petition this Court to review the adjudication order by writ of certiorari pursuant to N.C. R. App. P. 21. Rule 21 authorizes appellate review in “appropriate circumstances” when, *inter alia*, “no right of appeal from an interlocutory order exists[.]” N.C. R. App. P. 21(a)(1). Because immediate review of the adjudication order would risk the very type of “fragmentary appeals” that are

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avoided by requiring appeal to be taken from the final order in N.C. Gen. Stat. § 7B-1001(a), we conclude that the instant case does not present appropriate circumstances warranting review by writ of certiorari. *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 146 (1982). Therefore, we deny respondents' petitions.

In seeking immediate review by writ of certiorari, respondent-mother calls attention to the permanency planning review order entered by the trial court following a hearing on 23 October 2015, in which the court returned legal and physical custody of Teddy and Kevin to respondents. We note that this order also provided that "[t]he remand hearing remains scheduled for November 20, 2015[.]" thereby contemplating further proceedings in accordance with our mandate in *T.E. I*. Moreover, to the extent custody has been restored to respondents, we see no harm in delaying their appeal from the new adjudication order until the entry of a disposition order in accordance with our mandate to the trial court. To the extent the new adjudication order places the children back in DSS custody pending entry of a new disposition, respondent-mother's appeal must be taken after entry of that final order. *See In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (following *In re Laney*, 156 N.C. App. 639, 643, 577 S.E.2d 377, 379, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 762 (2003)).

Respondent-father suggests that "[t]his Court has granted certiorari in similar cases[.]" citing to our opinion in *In re A.S.*, 190 N.C. App. 679, 661 S.E.2d 313 (2008),

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*aff'd per curiam*, 363 N.C. 254, 675 S.E.2d 361, *reh'g denied*, 363 N.C. 381, 678 S.E.2d 231 (2009). In *In re A.S.*, however, the respondent-mother “appeal[ed] from the district court’s adjudication *and dispositional order* adjudicating her minor child as neglected.” *Id.* at 681, 661 S.E.2d at 315 (emphasis added). We reviewed this appealable final order by writ of certiorari, because the notice of appeal filed by counsel lacked the respondent-mother’s signature, in violation of the forebear rule to current N.C. R. App. P. 3.1(a). *Id.* at 683, 661 S.E.2d at 316 (noting that “[t]he error depriving this Court of jurisdiction appears to be due to trial counsel’s mistake regarding the requirements of the Rules of Appellate Procedure”). The instant case is materially *dissimilar* from *In re A.S.*, in that the trial court has yet to enter its final order as contemplated by N.C. Gen. Stat. § 7B-1001(a)(3). Unlike the respondent-mother in that case, respondent-father retains his right to appeal the adjudication order once a disposition is entered.

DISMISSED.

Chief Judge McGEE and Judge STROUD concur.

Report per Rule 30(e).