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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1200

Filed: 16 May 2017

Rowan County, No. 12 JA 55

IN THE MATTER OF: A.G.

Appeal by Respondent from order entered 24 June 2014 by Judge Kevin Eddinger in Rowan County District Court. Heard in the Court of Appeals 3 May 2017.

*Jane R. Thompson, for Rowan County Department of Social Services, Petitioner-Appellee.*

*Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for Guardian ad Litem.*

*Richard Croutharmel for Respondent-Appellant.*

HUNTER, JR., Robert N., Judge.

Respondent seeks review of the trial court's 24 June 2014 order relieving the Rowan County Department of Social Services ("DSS") of reunification efforts between her and her granddaughter, A.G. ("Agatha"). We grant Respondent's petition for writ of certiorari and affirm the trial court's order.

**I. Facts and Background**

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Respondent is Agatha's maternal grandmother. Agatha was born in 2008. She resided with Respondent until she moved to Rowan County with her father and younger sister "Helga" in September 2011. Helga died in November 2011 while in her father's care. Respondent filed a civil complaint in December 2011 against Agatha's mother and father, seeking custody of the child. The parties settled the case via a consent order, entered 21 March 2012. Under the terms of the order, Respondent and Agatha's parents shared joint legal custody of Agatha. Agatha's father retained primary physical custody, while Respondent had secondary physical custody through visitation every other weekend. Agatha's mother was allowed only supervised visitation with her daughter.

On 5 April 2012, DSS filed a juvenile petition alleging Agatha was a neglected juvenile. The court adjudicated Agatha as a neglected juvenile at a hearing on 25 October 2012. In its order, filed 30 November 2012, the court found, *inter alia*, Agatha told DSS Respondent left her in the care of a man ("Mr. W.") who had been substantiated for sexually abusing Agatha's mother and his daughter. The court also made findings of fact regarding the substance abuse issues of Agatha's parents, her father's pending criminal charges causing him to be unable to care for Agatha, and her mother's lack of a permanent residence and inability to care for Agatha. The court ordered the permanent plan be a "concurrent plan of reunification and custody or guardianship with a relative or court-approved caretaker." The court awarded

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custody to DSS and visitation to Respondent. The court also ordered Mr. W. to have no contact with Agatha while she was in Respondent's care and charged Respondent with the responsibility for ensuring Mr. W. not have any contact with Agatha.

The court held a permanency planning review hearing on 4 April 2013 and filed an order continuing the permanent plan as a concurrent plan of reunification and custody or guardianship with a relative or court-approved caretaker. The court found, *inter alia*, that on 8 January 2013, Respondent moved into the residence of Mr. W.'s disabled stepfather in Scotland County, North Carolina, as the stepfather's live-in, full-time caregiver. The court found Respondent denied having any contact with Mr. W. The court permitted Respondent to have visits with Agatha in Rowan County.

At the next permanency planning hearing on 29 August 2013, the court modified the permanent plan to a concurrent plan of reunification with either Agatha's father or Respondent and custody or guardianship with a relative or court-approved caretaker.

After hearings on 9 January 2014, 4 April 2014, and 1 May 2014, the court again modified the permanent plan in a written order filed 24 June 2014. The court made the following findings of fact. On 12 October 2013, the foster mother reported to the social worker when she took Agatha to Respondent's home for a visit, a blue vehicle was parked in the yard. Agatha identified the vehicle as belonging to Mr. W.

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The social worker drove to Respondent's home to investigate, and asked Respondent whether Mr. W. was at the residence. Respondent denied Mr. W. was there but would not allow the social worker to enter the home. Respondent relented after the social worker advised Respondent she would not be allowed to visit with Agatha if she continued to deny permission to enter the house. After observing the house, the social worker departed, leaving Agatha with Respondent. She later returned to the residence after consulting with the attorney for DSS. The social worker terminated the visit, and while taking Agatha back to the home of the foster parent, asked Agatha whether she had seen Mr. W. Agatha became quiet and began to cry. Agatha told the social worker Mr. W. was at Respondent's house and he must have gone outside when the social worker entered the house.

The foster mother reported to the social worker after Agatha was returned to her home, Agatha stated she had seen Mr. W. at Respondent's residence, she sat on his lap while they watched a scary movie, and Mr. W. hugged her. The social worker also had a conversation with Agatha's father on 14 October 2013 in which he stated he saw Mr. W. walking down Respondent's street. He gave Mr. W. a ride, and during the course of the ride, Mr. W. revealed he was visiting his girlfriend in Salisbury and she was attempting to obtain custody of her granddaughter. Mr. W. did not know he was Agatha's father. When Agatha's father identified himself, Mr. W. "was eager to get out of the vehicle."

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During an assessment on 11 December 2013, Agatha reported Respondent told Mr. W. to hide in the woods so he would not be seen by the social worker, and if the social worker saw Mr. W., Agatha would not be allowed to see Respondent again.

The court ultimately made the following finding:

34. [Respondent] was the primary caretaker for [Agatha] from birth to age three, according to [Respondent] and the parents. [Respondent] maintains that [she] moved to Rowan County so that she could be closer to [Agatha]. [Respondent] tearfully proclaims that there is nothing that she would not do for [Agatha]. . . . In making such statements, [Respondent] discounts the fact that the court ordered her to keep [Mr. W.] away from [Agatha]. By her actions [Respondent] demonstrates that her commitment to [Mr. W.] overrules her love for [Agatha]. [Respondent] has had two years to cease her relationship with [Mr. W.], but she has failed to do so. [Respondent] has instead been deceitful and untruthful with the court concerning [Mr. W.]. She even brought [Mr. W.] to court with her on January 9, 2014, after he knew from attending the adjudication hearing that he was to have no contact with [Agatha]. The RCDSS was supporting [Respondent's] efforts to have [Agatha] in her home, despite [Respondent's] past CPS involvement and other transgressions, until the day [social worker] Wright found out that [Mr. W.] was at her home during [Agatha's] visitation time.

On the basis of these findings, the court changed the permanent plan to a concurrent plan of reunification with Agatha's father and custody or guardianship with a relative or court-appointed caretaker. The court relieved DSS of further reunification efforts with Respondent.

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Respondent filed notice of appeal from the order on 8 July 2014. She later withdrew the appeal based upon her counsel's advice that the order was not appealable pursuant to N.C. Gen. Stat. § 7B-1001 until there was an order terminating parental rights. Respondent filed a notice to preserve right of appeal on 17 July 2014.

On 19 July 2016, the court filed an order terminating the parental rights of Agatha's parents. On 17 August 2016, Respondent subsequently filed a second notice of appeal from the 24 June 2014 order. On 21 December 2016, Respondent filed a petition for writ of certiorari seeking review of the 24 June 2014 order in the event this Court determined she did not give timely notice of appeal of the order.

**II. Jurisdiction**

At the time the court ceased reunification efforts as to Respondent, N.C. Gen. Stat. § 7B-507(c) provided that “[a]t any hearing at which the court orders that reunification efforts shall cease, the affected parent, guardian, or custodian may give notice to preserve the right to appeal that order in accordance with G.S. 7B-1001.” N.C. Gen. Stat. § 7B-507(c) (2013) (repealed effective Oct. 1, 2015 by 2015 N.C. Sess. Laws 320, ch. 136, § 7). Giving “notice to preserve the right to appeal” under N.C. Gen. Stat. § 7B-1001(b) allowed the party to appeal the order ceasing reunification efforts “together with an appeal of the termination of parental rights order[.]” N.C. Gen. Stat. § 7B-1001(a)(5)(a) (2013). Moreover, “[a] party who is a *custodian* or

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guardian shall have the right to *immediately appeal* the order” ceasing reunification efforts. N.C. Gen. Stat. § 7B-1001(a)(5)(c) (2013) (emphasis added). However, the statute did not indicate a custodian or guardian is *required* to take an immediate interlocutory appeal. *Cf. Dep’t of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) (“[W]here a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so.”). In fact, the provision in N.C. Gen. Stat. § 7B-507(c) allowing the affected party to “give notice to preserve the right to appeal” contemplates that the party bringing an appeal from an order ceasing reunification efforts will combine it with an appeal from the termination order under N.C. Gen. Stat. § 7B-1001(a)(5).

Citing the statutory definition of “return home or reunification” as “[p]lacement of the juvenile in the home of either parent . . . or custodian from whose home the child was removed by court order[.]” DSS contends Respondent does not have a right to appeal the order ceasing reunification because Agatha was not in Respondent’s primary physical custody and was not residing with her at the time Agatha was removed. N.C. Gen. Stat. § 7B-101(18b) (2015). DSS submits the court should have limited reunification to the parents and should have considered Respondent only as a relative to whom guardianship or custody may be granted. The fact remains, however, the court did order reunification with Respondent as a permanent plan and the court changed that plan to cease reunification. The statute

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permitting appeal states “[a] party who is a custodian” has “the right to immediately appeal the order [ceasing reunification].” N.C. Gen. Stat. § 7B-1001(a)(5)(c) (2015).

Having properly preserved her right to appeal under then N.C. Gen. Stat. § 7B-507(c), Respondent had a right to appeal from the order ceasing reunification efforts at the time she filed notice of appeal on 17 August 2016. However, in that notice of appeal, Respondent identified the cease reunification order as the order from which she was appealing but failed to identify the termination of parental rights order. As noted above, N.C. Gen. Stat. § 7B-1001(a)(5)(a) directs that this Court shall review both the cease reunification order “together with an appeal of the termination of parental rights order.” Thus, because North Carolina Rule of Appellate Procedure 3(d) requires the appellant to “designate the judgment or order from which appeal is taken,” the notice of appeal is defective.<sup>1</sup> *Cf. State v. Miller*, 205 N.C. App. 724, 725, 696 S.E.2d 542, 542 (2010) (dismissing appeal from order denying motion to suppress under N.C. Gen. Stat. § 15A-979(b) where the notice of appeal designated only the denial of Defendant’s motion to suppress without also designating the final “judgment of conviction”). Nonetheless, we determine the failure to identify the termination of parental rights order in the notice of appeal is error on the part of counsel and due to no fault of Respondent. Considering that Respondent complied with statutory

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<sup>1</sup> Although this is a qualifying juvenile case under North Carolina Rule of Appellate Procedure 3.1, “all other existing Rules of Appellate Procedure shall remain applicable[,]” except as provided by Rule 3.1. N.C.R. App. P. 3.1.(a) (2016). Because Rule 3.1 makes no provision as to the content of the notice of appeal, Rule 3(d) remains applicable.

requirements as to appealing a cease reunification order in effect at the time, we allow the petition in our discretion.

### **III. Standard of Review**

At each review hearing in a juvenile case, the trial court is to consider certain criteria and make written findings of fact regarding those that are relevant, including whether “efforts to reunite the juvenile 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.” N.C. Gen. Stat. § 7B-906.1(d)(3) (2013)<sup>2</sup>. “This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court’s conclusions, and whether the trial court abused its discretion with respect to disposition.” *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citation omitted). A discretionary decision will be disturbed only if it is “manifestly unsupported by reason” or “so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

### **IV. Analysis**

Respondent contends the court abused its discretion in ceasing reunification efforts between her and Agatha because Respondent was in substantial compliance

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<sup>2</sup> The General Assembly amended the statute in 2016 to replace the word “futile” with the word “unsuccessful.” See 2016 N.C. Sess. Laws 94, ch. 94, § 12C.1(g).

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with her reunification plan, she was having unsupervised visits with the child, there was a significant bond between Respondent and the child, and it was the desire of the juvenile to reside with Respondent long term. She also maintains the court abused its discretion because the determination “was based on an isolated incident that reflected no significant long-term safety concerns for Agatha and could have been addressed with less restrictive measures given that the court had not ceased reunification efforts with Agatha’s father.” In support of her contention, Respondent “denies” or “takes issue with” the court’s findings she was more committed to Mr. W. than Agatha, she had exposed Agatha to Mr. W., she had two years to end her relationship with Mr. W. but failed to do so, and Mr. W. is a sex offender.

At a review hearing, the court may consider information from any person or agency that will help the court’s review, including hearsay evidence, if the court finds it “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) (2015). The court’s findings of fact “are conclusive on appeal if supported by any competent evidence.” *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (citation omitted). A finding of fact that is not challenged on appeal 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).

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Turning first to the challenged findings, we find ample evidence to support the court's findings of fact. First, despite Respondent's contention she no longer has a relationship with Mr. W., there is evidence to the contrary. Respondent testified she has known Mr. W. for eighteen years, and knows everyone in his family. Respondent admits accepting a ride from Mr. W. and he subsequently stayed the night at her home, leading up to the 12 October 2013 incident. Further, Agatha's social worker testified Mr. W. characterized Respondent as his "girlfriend" to Agatha's father and they both were working to regain custody of Agatha.

Second, evidence was received from multiple witnesses to show Mr. W. had contact with Agatha in violation of the adjudication order. Agatha's social worker testified Agatha revealed to her therapist she had seen Mr. W. during a previous visit to Respondent's home. The social worker testified Mr. W. gave Agatha a hug because he hadn't seen her in some time, and Agatha sat on Mr. W.'s lap while they watched a scary movie. Agatha's foster mother testified Agatha told her Respondent left her alone with Mr. W. while Respondent washed clothes, and she watched a "scary movie" sitting on Mr. W.'s lap. Both the social worker and foster mother testified Agatha had a nickname for Mr. W. As Respondent concedes in her brief, the nickname "indicates that [Agatha] had a relationship with [Mr. W]."

Finally, as to Mr. W's status as a sex offender, the evidence shows in 2006 Agatha's mother (Respondent's daughter) was adjudicated a neglected juvenile

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because she had been having sexual relations with Mr. W. since she was thirteen years old. In the order adjudicating Agatha's mother as a neglected juvenile, the trial court found Respondent acknowledged to a social worker she knew about the sexual relationship between Mr. W. and her underage daughter.

Thus, we hold there is competent evidence to support the trial court's findings Respondent was in a relationship with Mr. W., she violated the terms of the adjudication order requiring her to keep Agatha away from Mr. W., and Mr. W. poses a threat of sexual abuse to Agatha. We further hold these findings support the trial court's conclusion of law that it would be contrary to Agatha's welfare to return to Respondent's custody, and hold the trial court did not abuse its discretion in concluding that continuing to work towards reunification with Respondent would be futile and inconsistent with Agatha's need for a safe, stable home within a reasonable time.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).