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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1294

Filed: 5 July 2017

Onslow County, Nos. 13 JA 255-56

IN THE MATTER OF: L.H., A.H.

Appeal by respondent-father from order entered 18 August 2016 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 8 June 2017.

*Gail E. Carelli and Richard A. Penley for petitioner-appellee Onslow County Department of Social Services.*

*Leslie Rawls for respondent-appellant father.*

*Smith Moore Leatherwood LLP, by Kip D. Nelson, for guardian ad litem.*

INMAN, Judge.

Respondent (“Father”) appeals from an order granting legal and physical custody of his minor children L.H. (“Lucy”) and A.H. (“Adam”)<sup>1</sup> to Onslow County Department of Social Services (“DSS”). The mother (“Mother”) and legal father are not parties to this appeal. We affirm the trial court’s order.

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<sup>1</sup> Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

**I. Factual and Procedural History**

Father is the biological father of Adam and purported biological father of Lucy. On 4 September 2013, DSS filed a petition alleging that the children were neglected after an incident wherein Father, in an attempt to stop Mother from leaving during an argument, smashed the rear window of her car with a baseball bat. The children were sitting in the rear seat of the car at the time, and both parents had been drinking. The children were initially placed with a family friend, and subsequently went to live with their maternal grandmother. On 19 February 2014, DSS was awarded full legal custody of the children, who continued to reside with the maternal grandmother.

In a hearing on 8 May 2014, the trial court returned the children to Father's custody and entered a memorandum order to that effect. A full and complete order was thereafter entered on 26 June 2014. Both orders provided that Mother's visitation was to be supervised by a designee agreed upon by DSS and Father. Following a 29 July 2014 permanency planning hearing, the trial court ordered the children returned to DSS custody after a 28 June 2014 incident in which Father and Mother left the children locked in a car in a Food Lion parking lot with an outside temperature of approximately ninety degrees. The children were then placed in foster care. As with the first hearing and orders, the trial court entered a brief

memorandum order on 30 July 2014 that reflected the change of custody, and entered a more detailed order on 15 August 2014.

Father attempted to cooperate with DSS and engage with services. Following a permanency planning hearing on 2 December 2014, the children were returned to Father for a trial placement between December 2014 and 16 July 2015. Even though the trial court did not enter an order until 9 March 2015, the trial placement with Father commenced immediately after the hearing. The written order provided DSS supervised visitation to Mother, which Father was ordered *not* to supervise. DSS retained legal custody of the children.

On 16 July 2015, at the conclusion of another permanency planning hearing, the trial court allowed the children to remain in Father's custody and indicated that Father would be awarded full legal and physical custody. The trial court entered a brief memorandum order reflecting the custody award. Although the memorandum order did not reference Mother or the restrictions on her contact with the children, a social worker for DSS cautioned Father that consistent with the trial court's earlier order, Father was prohibited from allowing Mother contact with the children without DSS supervision.

Later in July 2015, Father, without informing DSS, allowed Mother to spend the night with him and the children. The next day, she refused to leave and Father

called law enforcement to report that she had stolen his medication. Mother was charged with theft.

In August 2015, without informing DSS, Father listed Mother as a person who could pick up the children from their school. Also in August 2015, without informing DSS, Father allowed Mother to visit the children under his supervision. An altercation ensued in which Mother threw household items at Father in the presence of the children.

On 13 January 2016, the children came home from school to a locked house; after knocking on “several” neighbors’ doors in freezing temperatures, the children were able to find shelter with a neighbor after an “unknown” period of time. When Father returned home late that evening, at least four neighbors reported he slurred his words, spat in one neighbor’s face, was aggressive towards them, and smelled of alcohol; as a result, one neighbor called law enforcement.

DSS was informed of the incident on 14 January 2016, the day before a previously scheduled permanency planning hearing. At the conclusion of the 15 January 2016 hearing, the trial court ordered that DSS take legal and physical custody, cease reunification efforts, and pursue a primary permanent plan of custody with a relative and a secondary plan of adoption. The court entered its written permanency planning order on 18 August 2016. Father appeals from the trial court’s order.

## **II. Analysis**

Father contends the trial court's findings of fact in the 18 August 2016 order do not support its decision to award DSS physical and legal custody of Lucy and Adam. We disagree.

Our review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 [(2015)], the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.

*In re J.H.*, \_\_ N.C. App. \_\_, \_\_, 780 S.E.2d 228, 238 (2015) (internal quotation marks and citations omitted).

Father acknowledges the standard of review of a permanency planning order. However, Father argues that the trial court's order lacked findings related to any "changes in circumstances" as required by N.C. Gen. Stat. § 7B-1000(a). This argument is without merit.

N.C. Gen. Stat. § 7B-1000(a) provides in relevant part:

Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of

changes in circumstances or the needs of the juvenile.

N.C. Gen. Stat. § 7B-1000(a) (2015).

The permanency planning order did not result from a “motion in the cause or petition,” which is a prerequisite to a review hearing pursuant to N.C. Gen. Stat. § 7B-1000(a). *See, e.g., In re A.C.*, \_\_ N.C. App. \_\_, \_\_, 786 S.E.2d 728, 732-34 (2015) (reviewing the trial court’s order under N.C. Gen. Stat. § 7B-1000(a) where the hearing and order stemmed from an intervenor’s motion to modify custody). Instead, the order resulted from a review hearing scheduled by the trial court. Following the 16 July 2015 permanency planning hearing, the court ordered that “this matter shall be reviewed for a subsequent permanency planning hearing within six months.” The trial court then held its subsequent permanency planning hearing in January 2016 and indicated in its resulting 18 August 2016 order that the hearing was conducted pursuant to N.C. Gen. Stat. § 7B-906.1. *See In re J.S.*, \_\_ N.C. App. \_\_, \_\_, 792 S.E.2d 861, 863-64 (2016) (rejecting the respondent’s contention that the trial court’s order should be reviewed under N.C. Gen. Stat. § 7B-1000(a) where “the permanency planning order states, appropriately, that it is entered pursuant to N.C. Gen. Stat. § 7B-906.1”). Father’s argument on this point is without merit.

Father challenges findings of fact 4, 5, 6, 7, 9, 12, and 13 in the 18 August 2016 order as unsupported by competent evidence, and argues that the unchallenged findings are insufficient to support the change in custody.

Father challenges findings 4, 5, and 6, which he contends found him at fault for allowing Mother to spend time with the children in his presence. He contends the trial court had not specified that he could not supervise her visitation.

The trial court's written order entered on 9 March 2015 allowed Mother only DSS supervised visitation with the children, and ordered that Father was not allowed to supervise the visitation. At the conclusion of the 16 July 2015 permanency planning hearing, the court entered a memorandum order which provided, "among other things," that Father was awarded full legal custody of the children. The memorandum order included no reference to DSS or to Mother's visitation, but a DSS social worker reminded Father of the prior restrictions.

On 15 September 2015, with no further order having been entered by the trial court following the 16 July 2015 permanency planning hearing, and following altercations between Mother and Father in the presence of the children, DSS filed a motion seeking clarification of visitation parameters. In its motion, DSS noted that Father had continued to supervise the contact between the children and Mother, resulting in law enforcement being called to the home on multiple occasions. On 3 November 2015, the trial court held a hearing to consider DSS's motion. The court acknowledged the vagueness of its memorandum juvenile order and clarified that Father was not to supervise visitation between the children and Mother.

Father contends that the trial court could not fault him for supervising visitation between the children and Mother between 16 July and 3 November 2015 given that the court's memorandum order entered on 16 July 2015 awarded him custody without restrictions. Father's argument is unpersuasive because he has not challenged the order entered in March 2015 prohibiting him from supervising Mother's visitation and he has cited no order relieving him of that restriction. Furthermore, Father's argument ignores evidence that at the time the memorandum order was entered, DSS reminded him of the previously ordered restrictions. Finally, the challenged findings establish actions by Father that support cessation of reunification efforts regardless of whether he violated a court order.

Finding of Fact 4 simply recites in detail an order based upon the 16 July 2015 hearing but signed and filed in April 2016. Father has noted the lengthy gaps between the rendering of orders and their entry and has conceded that the parties all understood they were required to abide by orders even before they were entered.

"Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2015). The only thing the 16 July 2015 memorandum order purported to change from its 9 March 2015 permanency planning order was to transfer legal custody to Father. It did not indicate any change to the visitation requirements listed in the 9 March 2015 order, which explicitly provided that Father

was not to supervise visitation between the children and Mother. Father does not contend that anything the trial court stated during the 16 July 2015 permanency planning hearing would have reasonably led him to believe that the court intended to alter the existing visitation requirements; indeed, Father was informed by DSS to still abide by those requirements. Furthermore, the fact that the memorandum states that the court was ordering, “among other things,” that Father be given custody of the children, demonstrates that the court did not intend to enter an order simply changing custody without addressing other issues involved in the case. Indeed, the memorandum order was facially invalid to modify the 9 March 2015 order because it did not contain necessary findings of fact. *See* N.C. Gen. Stat. § 7B-906.1 (2015) (requiring the trial court to make findings of fact concerning enumerated criteria if relevant, including whether a visitation plan should be modified). The memorandum order simply functioned to document that the children could remain in Father’s custody beyond the previously ordered trial period, pending entry of a formal order. To the extent Father took the trial court’s silence in the memorandum order on the issue of visitation to mean that visitation limitations no longer existed, that inference was not reasonable and could not absolve him of his failure to abide by the visitation requirements that remained operative under the trial court’s 9 March 2015 permanency planning order.

Further, findings of fact 5 and 6 cite conduct by Father that was detrimental to the welfare of the children regardless of whether it violated any court order and which find ample support in the record. Given the couple's history of domestic violence, Father's decision in July 2015 to allow Mother to spend the night with the children was unreasonable, as was reflected by the fact that she refused to leave the next day and was charged with stealing Father's medication. Following that incident, Father's decision to allow Mother visitation with the children in his home and without third party supervision in August 2015 was unreasonable, as was reflected by the altercation in which she threw household items at Father while the children were present. With the knowledge that the children had been removed from Mother's custody and adjudicated neglected by her, and his recent call to law enforcement to remove her from his home, Father acted unreasonably in granting written permission to school staff to release the children to Mother. All of Father's actions addressed in these factual findings supported the trial court's decision to return the children to DSS custody and cease reunification efforts, independent of whether he violated prior court orders.

Father next challenges finding of fact 7, which states in pertinent part:

7. That on the Wednesday night the children were removed, it was between twenty-nine and thirty-two degrees outside. That nine year old [Lucy] and seven year old [Adam] got off the school bus, and their father was not home. They walked to several neighbor's (sic) homes, in the cold, and finally found a neighbor at home. It is

unknown how long they were out in the cold . . . .

Father first appears to contend that the trial court erred in disregarding his testimony as to what occurred that day, but then acknowledges that “[t]he function of trial judges in nonjury trials is to weigh and determine the credibility of a witness.” See *Matter of Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996). To the extent Father finds error in the trial court’s disregard of his testimony, his contention is without merit.

Father next contends that the trial court’s statement that the children “walked to several neighbor[s] homes” was not supported by the evidence. More specifically, Father contends that, in common parlance, “several” means “more than two or three,” and that the evidence at the hearing showed that the children went to two different neighbors. Our review of the transcript reveals that a DSS social worker testified that the children went to the houses of three neighbors. Thus, there was evidence that the children went to “more than two” houses, which, according to Father’s proffered definition, is “several.” Father’s challenge to this portion of finding of fact 7 is without merit.

Father also challenges the trial court’s statement that “[i]t is unknown how long [the children] were out in the cold.” Father argues that, while this statement is technically true, “[t]he language in the order suggests that it was not possible to determine the amount of time, and that they were outside a long time.” We will not

overturn a finding Father admits is true simply because the inferences Father draws from the finding would not be supported by the evidence. Father's challenge is without merit.

In his challenge to findings of fact 9, 12, and 13, Father contends that, "when the unsupported and improper findings are discarded," these ultimate findings of fact are similarly unsupported. Given that Father's challenge to these findings rely on the premise that findings 4 through 7 are unsupported by the evidence, and given our determination that those findings are, in fact, supported by the evidence, Father's challenge to findings 9, 12, and 13 are without merit.

Similarly, Father's challenge to the trial court's conclusions of law rely on the premise that the challenged findings are unsupported by the evidence. Given that we have upheld the findings Father challenges, Father fails to demonstrate any error in the trial court's conclusions of law. The trial court's order is affirmed.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).