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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-387

Filed: 7 November 2017

Orange County, Nos. 16 JA 55, 17 CVD 81

IN THE MATTER OF: S.A.

Appeal by respondent-mother from order entered 20 January 2017 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 5 October 2017.

*Holcomb and Stephenson, LLP, by Angenette Stephenson, for petitioner-appellee Orange County Department of Social Services.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant mother.*

*Womble Carlyle Sandridge & Rice, LLP, by Beth Tyner Jones and Rebecca C. Fleishman, for guardian ad litem.*

DIETZ, Judge.

Respondent appeals from an order awarding custody of her minor child Sadie<sup>1</sup> to the child's father, closing jurisdiction in the juvenile action, and initiating a civil custody action.

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<sup>1</sup> A pseudonym is used to protect the identity of the juvenile and for ease of reading.

*Opinion of the Court*

While we reject Respondent's argument that the trial court neglected the requirements of the Americans with Disabilities Act and the Rehabilitation Act of 1973 in child custody cases, we agree that the trial court erred in terminating its juvenile court jurisdiction. As a result, we affirm the trial court's order awarding custody of Sadie to her father, but vacate the portion of the order terminating juvenile court jurisdiction and remand to the trial court for further proceedings.

**Facts and Procedural History**

Respondent has Friedreich's Ataxia, a form of muscular dystrophy, and is confined to a wheelchair. Respondent's daughter, Sadie, is ten years old and is diagnosed with static encephalopathy and microcephaly, two brain disorders. Sadie's conditions result in fine and gross motor movement difficulties, as well as severe intellectual, emotional, and behavioral difficulties. Sadie has a history of running off and wears an ankle bracelet at all times to aid in locating her if she is lost or missing. Before this legal proceeding began, Respondent had full custody of Sadie, and Sadie's father had visitation two to three times a week.

On 27 June 2016, the Orange County Department of Social Services received a report regarding improper supervision of Sadie by Respondent. A social worker conducted an assessment and reported concerns about Respondent's substance abuse. The social worker returned to the home on 8 July 2016, and during the visit, Sadie went missing while Respondent was inside the trailer asleep. Sadie's older brother

found her and brought her home. The social worker observed that the home was near active railroad tracks and was in poor condition. The interior of the home had odors stemming from flea-infested pets, mold, and cigarette smoke.

On 14 July 2016, DSS filed a petition alleging that Sadie was neglected and dependent. DSS obtained nonsecure custody the same day. Following a 1 September 2016 hearing, the trial court entered an order on 5 October 2016 adjudicating Sadie dependent and placing her in the temporary custody of her father. The trial court held a permanency planning hearing on 1 December 2016, after which it entered a 20 January 2017 order awarding custody of Sadie to her father, closing jurisdiction in the juvenile action, and initiating a civil custody action. Respondent appealed.

### **Analysis**

#### **I. Americans with Disabilities Act**

Respondent first contends that the trial court's findings of fact do not support its conclusion of law that DSS engaged in reasonable reunification efforts. Essentially, Respondent contends that, because she is a person with a disability afforded protections under the Americans with Disabilities Act and the Rehabilitation Act of 1973, the trial court was required to find that DSS provided individualized services to Respondent to give her a meaningful opportunity to regain a custodial relationship with Sadie. As explained below, we hold that DSS complied with these statutory protections for disabled individuals.

*Opinion of the Court*

“Appellate 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.” *In re J.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009). “Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.” *In re P.A.*, 241 N.C. App. 53, 58, 772 S.E.2d 240, 245 (2015).

Title II of the Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Likewise, Section 504 of the Rehabilitation Act of 1973 provides that a qualified person with a disability shall not, “solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>2</sup> 29 U.S.C. § 794(a).

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<sup>2</sup> We focus on Respondent’s claim under the Americans with Disabilities Act because Respondent does not point to a specific “program or activity receiving Federal financial assistance,” which is a necessary prerequisite to triggering the protections afforded under Section 504. *See* 29 U.S.C. § 794(a). Additionally, other courts have treated the requirements of both Section 504 and the Americans with Disabilities Act as parallel. *See, e.g., In re Hicks*, 890 N.W.2d 696, 705 (Mich. Ct. App. 2016) (stating that “[t]wo principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity”).

*Opinion of the Court*

In *In re C.M.S.*, this Court rejected the respondent-mother's argument that the Americans with Disabilities Act precluded the State from terminating her parental rights. 184 N.C. App. 488, 491–92, 646 S.E.2d 592, 594–95 (2007). In so doing, the Court held that when DSS follows the mandates of the Juvenile Code by making “reasonable efforts to prevent or eliminate the need for placement of the juvenile,” then DSS complies with the Americans with Disabilities Act. *Id.* at 492–93, 646 S.E.2d at 595. As a result, when the trial court finds that DSS made such reasonable efforts, the court necessarily finds that DSS has complied with the Americans with Disabilities Act requirement that the parent not be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

Here, as in *C.M.S.*, the trial court found that DSS made reasonable efforts to reunify Respondent with her child, and that finding is supported by the record. Accordingly, under *C.M.S.*, the trial court's findings of fact were sufficient to show that DSS satisfied the requirements of the Americans with Disabilities Act.

Respondent also contends that DSS did not provide her services necessary to comply with the Americans with Disabilities Act. In *In re Terry*, which this Court relied upon in *C.M.S.*, the respondent contended that the trial court erred in terminating her parental rights because she had not been offered appropriate services as required by the Americans with Disabilities Act. 610 N.W.2d 563, 569 (Mich. Ct.

*Opinion of the Court*

App. 2000). The *Terry* court noted that claims that DSS violated the Americans with Disabilities Act must be asserted at the time the service plan is adopted to be preserved for appeal. *Id.* at 570. The *Terry* court found that “respondent did not raise a challenge to the nature of the services or accommodations offered until her closing argument at the hearing regarding the petition to terminate her parental rights” and held that it “was too late in the proceedings to raise the issue.” *Id.* at 570–71.

We are persuaded that the reasoning in *Terry* should apply here. Respondent did not object to the adequacy of the services being offered by DSS before the permanency planning hearing. Likewise, Respondent’s counsel did not object on this ground at the permanency planning hearing, instead arguing that Respondent needed more time to work toward reunification in light of her disability.

Moreover, Respondent did not participate in the services that DSS offered, and in some cases refused to acknowledge that there was a need for services at all. In the DSS report accepted into evidence at the permanency planning hearing, the social worker wrote that “the biggest and most glaring concern . . . is [Respondent’s] unwillingness to accept any responsibility for [Sadie] coming into care. Each time [the social worker] meets with her the conversation starts out very well [but] quickly deteriorates when it comes to how [Sadie] can be returned to her care.” The social worker further noted that “any criticism or concerns regarding [Respondent’s] ability to keep [Sadie] safe is met with the phrase, ‘I can take care of my daughter!’” In short,

the record indicates that Respondent not only failed to object to the adequacy of services offered by DSS but also often denied that any services were necessary at all. Thus, Respondent waived this argument on appeal.

## **II. Juvenile Court Jurisdiction**

Respondent's final contention is that the trial court erred when it terminated juvenile court jurisdiction and transferred the case to a new civil court action without making a determination regarding the need for continued State intervention. We agree.

N.C. Gen. Stat. § 7B-911 provides that, in an order in which the trial court terminates juvenile court jurisdiction and initiates a civil custody action, the court must make a finding that “[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.” N.C. Gen. Stat. § 7B-911(c)(2)(a). This Court has previously recognized that the trial court need not make an explicit finding regarding the need for continued State intervention where the order contains “findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary.” *In re J.D.R.*, 239 N.C. App. 63, 72, 768 S.E.2d 172, 178 (2015).

In *In re A.S.*, the respondent-mother appealed from an order awarding the respondent-father exclusive custody of the children, terminating juvenile court jurisdiction, and transferring the matter to civil court. 182 N.C. App. 139, 141, 641

*Opinion of the Court*

S.E.2d 400, 402 (2007). This Court held that the trial court made the finding required under N.C. Gen. Stat. § 7B-911(c)(2)(a) where it found that: (1) the parents were able to coordinate visitations between themselves; (2) the parents both had suitable homes for visitation and custody of the children; (3) the mother was capable of properly supervising and disciplining the children and keeping them safe while in her care and custody; and (4) DSS wished to be relieved of further involvement in the case. *Id.* at 144, 641 S.E.2d at 403–04.

In this case, the trial court did not make an ultimate finding that there was no need for continued State intervention on behalf of the child. And, in contrast to the trial court in *A.S.*, the trial court here did not make findings from which this Court could infer that the court considered the extent to which continued State intervention was necessary. Indeed, the trial court made *none* of the findings that this Court found sufficient in *A.S.* to support an ultimate finding under N.C. Gen. Stat. § 7B-911(c)(2)(a). Accordingly, we are constrained to hold that the trial court's order did not make the findings required by statute. N.C. Gen. Stat. § 7B-911(c)(2)(a).

We therefore affirm the portion of the trial court's order awarding custody of Sadie to her father, but vacate the portion of the order terminating this juvenile proceeding. We remand for the trial court to make findings concerning the need for continued State intervention on behalf of the juvenile in this proceeding. On remand,

IN RE: S.A.

*Opinion of the Court*

the trial court, in its discretion, may hold a new hearing or may enter an order with additional findings based on the existing trial court record.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).