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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1265

Filed: 17 April 2018

Lee County, No. 17 JA 13

IN THE MATTER OF: J.D.L.

Appeal by respondent-father from orders entered 27 June 2017 by Judge Joy A. Jones and 14 September 2017 by Judge O. Henry Willis, Jr. in Lee County District Court. Heard in the Court of Appeals 22 March 2018.

Elizabeth Myrick Boone for petitioner-appellee Lee County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Annick Lenoir-Peek for respondent-appellant.

ZACHARY, Judge.

Respondent-father appeals from orders adjudicating "Jerry"[1] to be a neglected and dependent juvenile, maintaining the child in the custody of petitioner Lee County Department of Social Services ("DSS"), and relieving DSS of reunification efforts. As respondent-father does not challenge Jerry's adjudications on appeal, we affirm the "Juvenile Adjudication Order Pursuant to Memorandum" entered by the trial court

[1] The parties use this pseudonym to refer to the juvenile.

on 27 June 2017 ("Adjudication Order"). We also affirm in part the "Juvenile Disposition Order Pursuant to Memorandum" entered on 14 September 2017 ("Disposition Order"), but reverse the order insofar as it denies visitation to respondent-father and remand for further proceedings consistent with this opinion.

Background

In February 2017, DSS obtained non-secure custody of the newborn Jerry and filed a juvenile petition alleging neglect and dependency. The petition alleged, *inter alia*, that respondent-mother refrained from obtaining prenatal care and delivered the baby at home in order to avoid DSS involvement. Nevertheless, on 20 February 2017, DSS received a report of Jerry's birth at 32 weeks' gestation, weighing just three pounds. Jerry was hospitalized in neo-natal intensive care with no discharge date. The petition further alleged that respondent-mother suffers from post-traumatic stress disorder, bipolar disorder, defiant mood disorder, schizophrenia, anxiety, and depression; she also has "a history of violent outburst[s] when not on medication." Three older children had been removed from respondent-mother's custody as a result of her untreated mental illnesses.

The petition named respondent-mother's live-in boyfriend, "Mr. C.," as Jerry's putative father and alleged that he was unable to serve as primary caretaker due to his work schedule and that he had no alternative child care plan. With the consent of the parties, the trial court ordered that the petition be amended to include

respondent-father as a second putative father and ordered DSS to arrange for paternity testing. The court ordered both putative fathers to submit to paternity testing and to attend at least one hour per week of supervised visitation with Jerry at the hospital.

On 23 May 2017, the parties executed a consent order adjudicating Jerry to be neglected and dependent. In its Adjudication Order entered on 27 June 2017, the trial court made findings consistent with the consent order and the petition filed by DSS. While noting that Jerry's paternity had yet to be established, the court found that respondent-father's parental rights to Audrey, another child conceived with respondent-mother, had been terminated by the Lee County District Court, a decision that was "under appeal by [respondent-father]."[2] *See In re L.D.*, __ N.C. App. __, 808 S.E.2d 620, 2018 WL 256462 (Jan. 2, 2018) (unpublished) (affirming order terminating respondent-father's parental rights to Audrey in Lee County District Court, File No. 15 JT 27). The trial court scheduled a dispositional hearing for 18 July 2017 and decreed the following:

> That [respondent-father] shall have one visitation with [Jerry] on May 25, 2017 . . . . After said visit, he shall have no further visitation with the juvenile unless/until he is determined to be the father. If so determined, he shall contact Lee County DSS to develop case/visitation plans. . . . .

[2] Respondent-mother relinquished her parental rights to Audrey in February 2017.

The hearing was subsequently continued to 8 August 2017.

At the beginning of the dispositional hearing, DSS asked the trial court to remove Mr. C. as a party-respondent in the case based on DNA test results that established respondent-father's probability of paternity of Jerry at 99.99%. The court granted the request. The court then received into evidence a written report prepared by DSS and heard live testimony from Jerry's foster care social worker, respondent-father, and respondent-mother.

In its Disposition Order filed on 14 September 2017, the trial court maintained Jerry in DSS custody and granted the agency ongoing placement authority. The court ceased reunification efforts as to both respondent-mother and respondent-father. The court also terminated the parents' visitation with Jerry, finding that it "would be inconsistent with the juvenile's health and safety." The court established a primary plan of adoption with a secondary plan of guardianship or custody with a court-approved caretaker, "pending a permanency planning hearing" to be held on 5 September 2017 "or as soon thereafter as possible."

Respondent-father filed timely notice of appeal from the Adjudication Order and Disposition Order. *See* N.C. Gen. Stat. § 7B-1001(a)(3) (2017). On appeal, however, he does not challenge Jerry's adjudications as a neglected and dependent juvenile.

Discussion

Respondent-father first maintains that the trial court erred in its initial Disposition Order by terminating the efforts of DSS at reunification as concerns him based on findings under N.C. Gen. Stat. § 7B-901(c). As discussed below, we find respondent-father has failed to show reversible error by the trial court.

"We review a trial court's disposition order only for an abuse of discretion." *In re L.Z.A.*, __ N.C. App. __, __, 792 S.E.2d 160, 170 (2016). "If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citation omitted). However, " '[i]ssues of statutory construction are questions of law, reviewed *de novo* on appeal. Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *In re J.B.*, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 256242, *3 (2018) (quoting *State v. Coakley*, 238 N.C. App. 480, 492, 767 S.E.2d 418, 426 (2014)). "When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion." *State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) (citation omitted).

A trial court may cease reunification efforts in an initial disposition order under certain circumstances. N.C. Gen. Stat. § 7B-901(c) provides:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling

> evidence warranting continued reunification efforts:
>
> (1) A court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> . . . .
>
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; (iii) has committed a felony assault resulting in serious bodily injury to the child or another child of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c) (2017).

This Court recently interpreted the statutory directive concerning circumstances permitting or requiring cessation of reunification efforts at the

disposition stage. In *In re G.T.*, we held that the legislature's use of "the present perfect tense *in subsections (c)(1) through (c)(3)* . . . indicates that the determination [that qualifying circumstances exist] must have already been made by a trial court" in "a prior court order." *In re G.T.*, ___ N.C. App. ___, ___, 791 S.E.2d 274, 279 (2016), *aff'd per curiam*, ___ N.C. ___, 808 S.E.2d 142 (2017) (emphasis added).

In the instant case, the trial court made the following findings of fact in support of its decision to cease reunification efforts under N.C. Gen. Stat. § 7B-901(c):

> 19. That reunification shall not be required with the mother and father.
>
> 20. That the parental rights of the mother were involuntarily terminated to her son, [M.L.], in Chatham County on March 22, 2012.
>
> 21. That aggravated circumstances exist because the parents have committed or encouraged the commission of, or allowed the continuation of acts, practices and conduct that increased the enormity and added to the injurious consequences of the neglect of the juvenile.
>
> . . . .
>
> 33. That there is no compelling evidence that warrants continued reunification efforts with the mother or father.

It is clear that reunification efforts need not be continued with respondent-mother. We note that the court's finding that "the parental rights of the mother were involuntarily terminated to her [other] son. . ." satisfies N.C. Gen. Stat. § 7B-901(c)(2).

Moreover, when this finding is combined with Finding 33's pronouncement that "no compelling evidence . . . warrants continued reunification efforts with the mother," the cessation of reunification efforts with respondent-mother is mandated. *See* N.C. Gen. Stat. § 7B-901(c) (2017) (providing "the court *shall direct* that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required" if certain findings are made) (emphasis added)).

Respondent-father asserts that the finding "[t]hat aggravated circumstances exist because the parents have committed or encouraged the commission of, or allowed the continuation of acts, practices and conduct that increased the enormity and added to the injurious consequences of the neglect of the juvenile" in Finding 21 does not support the trial court's decision to cease reunification efforts as to him under N.C. Gen. Stat. § 7B-901(c)(1)(f). As we explained in *In re G.T.*, the determination required by subdivision (c)(1) "must have already been made by a trial court – either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court." *In re G.T.*, __ N.C. App. at __, 791 S.E.2d at 279. Here, the Adjudication Order contained no finding that respondent-father "committed or encouraged the commission of, or allowed the continuation of, any . . . act, practice, or conduct that increased the enormity or added to the injurious consequences of the . . . neglect" of Jerry. N.C. Gen. Stat. § 7B-901(c)(1)(f) (2017). Rather, the findings in the Adjudication Order focused on

respondent-mother's failure to obtain prenatal care and her decision to deliver Jerry at home, all which occurred prior to respondent-father having discovered that respondent-mother was pregnant. The record shows respondent-mother moved out of respondent-father's home three months before Jerry was born and lived with Mr. C. for the remainder of the pregnancy. In adjudicating Jerry as dependent, the court found that Mr. C. "cannot be the primary caregiver of the child due to employment" and that "[t]he mother and [Mr. C.] did not have an adequate plan of care for the juvenile." Accordingly, the trial court erred in ceasing reunification efforts as to respondent-father pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(f).

Nonetheless, "[a] correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. The ruling must be upheld if it is correct upon any theory of law." *Manpower of Guilford County., Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979) (citations omitted). Our Supreme Court has "repeatedly held that 'if the correct result has been reached, the judgment should not be disturbed even though the court may not have assigned the correct reasons for the judgment entered.' " *In re Pendergrass' Will*, 251 N.C. 737, 746, 112 S.E.2d 562, 568 (1960) (quoting *East Lenoir Sanitary Dist. v. City of Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958)). We agree with the assertion of the guardian *ad litem* that the trial court's reliance on N.C. Gen. Stat. § 7B-901(c)(1)(f) was harmless error.

In addition to the findings quoted above, the trial court found the following with regard to the prior termination of respondent-father's parental rights to Audrey:

> 27. That the parental rights of the father were terminated to [Audrey] on February 21, 2017. The order has been appealed. It is not a final order and cannot be used as a basis to cease reunification efforts . . . .

The trial court found that a court had previously terminated respondent-father's parental rights to another child, one of the grounds provided as a basis to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(2). Though proffered by DSS as a basis to cease reunification efforts, the trial court concluded that the 21 February 2017 order terminating respondent-father's parental rights to Audrey could not be used for this purpose until the order was rendered "final" by being upheld on appeal. In reaching this conclusion, the court misconstrued N.C. Gen. Stat. § 7B-901(c)(2) to include an implicit "finality" requirement not found in the text of the statute.

This Court's holding in *In re G.T.* allows a trial court to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1) based on findings made at an adjudicatory hearing that precedes the initial dispositional hearing in the same cause. *See In re G.T.*, __ N.C. App. at __, 791 S.E.2d at 279 ("[T]he determination must have already been made by a trial court—*either at a previously-held adjudication hearing* or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court." (emphasis added)). Under N.C. Gen. Stat. §

7B-1001(a)(3), a respondent-parent has no right to appeal these adjudicatory findings prior to entry of the initial disposition order. *In re G.T.* thus contemplates the cessation of reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1) based on the court's prior adjudicatory findings before those findings are subject to appellate review. Given the uniformity "in subsections (c)(1) through (c)(3) to define the determination necessary," *id.*, we find no basis to read into N.C. Gen. Stat. § 7B-901(c)(2) a requirement that a parent be afforded the opportunity to appeal a prior order terminating his parental rights to another child before the order may be used as a ground to cease reunification efforts with a different child under N.C. Gen. Stat. §7B-901(c).[3]

Notwithstanding its interpretation of N.C. Gen. Stat. § 7B-901(c)(2), the trial court made findings that require the cessation of reunification efforts as to respondent-father under this provision. The court found that respondent-father's parental rights to another child were terminated on 21 February 2017 and "[t]hat there is no compelling evidence that warrants continued reunification efforts with the . . . father." By statute, "the court *shall direct* that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes" these two written findings. N.C. Gen. Stat. § 7B-901(c)(2017) (emphasis added). Therefore, we conclude

[3] Contrary to the trial court's averment at the disposition hearing, an order terminating parental rights is not automatically "stayed . . . pending disposition on appeal." *See* N.C. Gen. Stat. § 7B-1003(a) (2017).

that the trial court did not err by ceasing reunification efforts with regard to respondent-father.[4]

Respondent-father next claims that the trial court erred by denying him further visitation with Jerry without explaining its finding that such visitation would be "inconsistent with the juvenile's health and safety."

Pursuant to N.C. Gen. Stat. § 7B-905.1(a), "[a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile *consistent with the juvenile's health and safety*." N.C. Gen. Stat. § 7B-905.1(a)(2017) (emphasis added). A parent is entitled to visitation "in the absence of findings that a parent has forfeited her right to visitation or that it is in the child's best interest to deny visitation." *In re C.P.*, 181 N.C. App. 698, 706, 641 S.E.2d 13, 18 (2007) (citing *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971)). "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

In the instant case, the trial court made no explicit finding either that

[4] Although the order terminating respondent-father's parental rights to Audrey was affirmed by this Court, we are cognizant of the fact that a prior determination used as grounds to cease reunification efforts under N.C. Gen. Stat. § 7B-901(c) could subsequently be overturned on appeal. In that circumstance, however, the respondent-parent could pursue a resumption of reunification efforts by way of a motion in the cause. *See* N.C. Gen. Stat.§ 7B-1000(a) (2017); c*f. also In re L.O.K.*, 174 N.C. App. 426, 428-29, 621 S.E.2d 236, 238 (2005) (noting the trial court's order to DSS to resume reunification efforts after a material change in circumstances).

respondent-father forfeited his right to visitation or that it was in Jerry's best interest to deny visitation to respondent-father. The court found and concluded that "visitation shall be ceased with the respondent parents because such [visitation] . . . would be inconsistent with the juvenile's health and safety." Even assuming, *arguendo*, that this finding would suffice to deny visitation given the statutory directive to provide such visitation as is "consistent with the juvenile's health and safety," we find no competent evidence in the record to support the trial court's finding.

The evidence and the pertinent findings made by the court show, not that respondent-father poses a health or safety risk to Jerry, but rather that respondent-father is disengaged and has evinced little interest in developing a relationship with his son. While the findings make reference to respondent-mother's "uncontrollable behaviors" and respondent-father's ongoing relationship with her, the trial court is free to order respondent-father to visit Jerry by himself, or to visit under the supervision of an employee of DSS or other appropriate person.

Accordingly, we reverse this portion of the Disposition Order and remand for entry of further findings to support the denial of visitation to respondent-father or for entry of an appropriate visitation schedule consistent with N.C. Gen. Stat. § 7B-905.1. *See, e.g.*, *In re C.P.*, 181 N.C. App. 698, 706, 641 S.E.2d 13, 18 (2007).

Conclusion

For the reasons explained herein, the trial court's order is

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ELMORE and HUNTER, Jr. concur.

Report per Rule 30(e).