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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1033

Filed: 17 April 2018

Mecklenburg County, No. 15 JA 613

IN THE MATTER OF: J.O.

Appeal by respondent-father from orders entered 26 June 2017 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 22 March 2018.

Associate County Attorney Marc S. Gentile for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

David A. Perez for respondent-appellant father.

Marie H. Mobley for guardian ad litem.

ZACHARY, Judge.

Respondent-father appeals from orders awarding guardianship of his minor child J.O. ("Julia")[1] to a non-relative, "Ms. Markham." After careful consideration, we reverse and remand.

Background

[1] Pseudonyms are used throughout to protect the identity of the juvenile and for ease of reading.

On 9 November 2015, the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") filed a petition alleging Julia to be a neglected and dependent juvenile. The petition cited multiple reports of domestic violence that occurred between respondent and the mother of one of his children, respondent's involvement in drug trafficking and prostitution, and a history of social services involvement with the family. The petition further cited an investigation opened in Georgia on 24 August 2015 related to the care Julia received while living with her paternal grandmother, "Ms. Walters." The allegations included substance abuse by Ms. Walters, domestic violence between Ms. Walters and her husband, and injury to Julia arising from lack of proper supervision. The trial court awarded YFS nonsecure custody of Julia the same day.

Following a 19 and 23 February 2016 hearing, the trial court entered an order on 7 April 2016 adjudicating Julia to be neglected and dependent. The trial court held a permanency planning hearing on 29 November 2016 and 8 December 2016, after which the court entered an order on 8 December 2016 establishing a primary permanent plan of guardianship with a secondary plan of reunification. Following a 23 May 2017 permanency planning hearing, the trial court entered orders on 26 June 2017 awarding guardianship of Julia to Ms. Markham. Respondent timely filed notice of appeal.

On appeal, respondent argues that the trial court erred when it awarded guardianship of Julia to a non-relative without properly considering Ms. Walters as

a relative placement. We conclude that, because the trial court failed to make the required findings prior to awarding guardianship to a non-relative, the orders must be reversed and the matter remanded for further fact-finding.

Discussion

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citations omitted). Conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

A juvenile's relatives are to be given priority in placement. N.C. Gen. Stat. § 7B-903(a1) provides:

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. . . .

N.C. Gen. Stat. § 7B-903(a1) (2017). The priority to be given a relative placement applies to all review and permanency planning hearings following an initial dispositional hearing. *In re L.L.*, 172 N.C. App. 689, 700-03, 616 S.E.2d 392, 399-400 (2005).

The juvenile statute provides a two-pronged approach to the consideration of a relative placement. N.C. Gen. Stat. § 7B-903(a)(2)(c) "first requires the trial court to determine whether the relative in question is *willing and able* to provide proper care and supervision in a safe home" before determining whether the relative placement is in the best interest of the juvenile. *In re T.H.*, 232 N.C. App. 16, 29, 753 S.E.2d 207, 216 (2014). "Failure to make specific findings of fact explaining [that] the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citing *L.L.*, 172 N.C. App. at 704, 616 S.E.2d at 401).

In the instant case, the trial court made the following findings relevant to its determination that guardianship should be awarded to Ms. Markham:

> [Julia's] family relationships include Ms. [Walters] who [Julia] knows, loves and with whom she clearly has a bond; her mother with whom she also has a clear bond and is doing the best she can with her limited resources; and to her siblings, one of whom ("Jenny"]) is placed with her in Ms. [Markham's] home. [Julia] and [Jenny] have a clear bond and are important parts to each other's lives. They have shared experiences and will be able to provide strength, hope, and encouragement to each other. Ms. [Markham] has provided a safe, stable and nurturing home for [Jenny] and [Julia] both. Ms. [Markham] has also had consistent contact with mother. The Court also has to consider Ms. [Walters'] pre-custody involvement with [Julia]--she nearly drowned, she was withheld from YFS when Ms. [Walters] knew YFS had taken non-secure custody, and she needed significant dental care. Guardianship being awarded to Ms. [Markham] is in [Julia's] best interest.

The trial court failed to satisfy either prong of the requisite analysis. While the trial court expressed concern over incidents in the past regarding Ms. Walters's care of Julia, the court did not make a finding as to whether Ms. Walters was willing and able to provide proper care and supervision for Julia.

Moreover, the trial court failed to find that it would be contrary to Julia's best interests to be placed with Ms. Walters. The trial court found that "[g]uardianship being awarded to Ms. [Markham] is in [Julia's] best interest." However, N.C. Gen. Stat. § 7B-903(a1) does not task the trial court with determining, as between a relative and non-relative, who would better serve the juvenile's interests. Rather, the statute explicitly provides that the court must find that it is contrary to the juvenile's best interests to be placed with the relative before the court considers placement with a non-relative. *See L.L.*, 172 N.C. App. at 703, 616 S.E.2d at 400 (holding that "the trial court was required to first consider placing [the juvenile] with [her maternal relatives] unless it found that such a placement was not in [the juvenile's] best interests").

In that the trial court awarded guardianship to a non-relative without first finding that there was no relative willing and able to provide proper care to Julia or that it was contrary to Julia's best interests to be placed with any relative who had been identified as willing and able to provide proper care to Julia, we must reverse the trial court's orders and remand for further fact-finding. On remand, "[w]e leave

to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009).

Conclusion

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

REVERSED AND REMANDED.

Judges ELMORE and HUNTER, Jr. concur.

Report per Rule 30(e).