

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1190

Filed: 1 October 2019

Surry County, Nos. 17 JA 48-49

IN THE MATTER OF: S.P. and J.P.

Appeal by Respondent-Father from order entered 21 August 2018 by Judge William F. Southern, III in Surry County District Court. Heard in the Court of Appeals 5 September 2019.

Susan Curtis Campbell for petitioner-appellee Surry County Department of Social Services.

Peter Wood for respondent-appellant father.

James N. Freeman, Jr. for guardian ad litem.

MURPHY, Judge.

Respondent-Father (“Edouard”¹) appeals from an order appointing the Johnsons as guardians of his minor children, Arthur and Cesar. Because no oral testimony was received at the hearing, we vacate the trial court’s order and remand for further proceedings.

BACKGROUND

¹ Pseudonyms are used for all relevant persons throughout this opinion to protect the juveniles’ identities and for ease of reading.

On 11 July 2017, the Surry County Department of Social Services (“DSS”) filed petitions alleging that Arthur and Cesar were neglected juveniles. DSS alleged the children did not receive proper care, supervision, or discipline from their parents and lived in an environment injurious to their welfare due to their parents’ significant substance abuse. DSS obtained nonsecure custody of the children and placed them with the Johnsons, a couple related to the children’s mother.

After a hearing on 17 August 2017, the trial court entered an order on 12 September 2017 adjudicating the children to be neglected juveniles. In its disposition order, entered the same day, the trial court continued custody of the children with DSS, ordered the parents to comply with the Family Services Case Plans they had entered into with DSS, and granted the parents bi-weekly supervised visitation with the children.

The trial court entered review hearing orders on 31 January 2018 and 22 March 2018. It found the children were doing well in their placement with the Johnsons and that the parents were making only limited progress on the requirements of their case plans. The trial court continued custody of the children with DSS and directed they remain in placement with the Johnsons. The parents were ordered to comply with DSS requests and the provisions of their case plans and to submit to immediate drug screening. The trial court modified visitation to two visits per month to be supervised by the Johnsons.

On 27 June 2018, the trial court conducted a permanency planning hearing. The trial court entered its order from that hearing on 23 July 2018 and entered an amended order on 21 August 2018. In that order, the trial court found the parents had not made satisfactory progress on their case plans. The trial court set the primary plan for the children as guardianship and the secondary plan as reunification and appointed the Johnsons as guardians of the children. The trial court relieved DSS from further responsibility in the case, discharged the guardian ad litem for the children, released the parents' appointed counsel, and held no further hearings were required in the case. The parents were granted a minimum of one two-hour visit with the children each month, to be supervised by the Johnsons, and the Johnsons were authorized to expand visitation in their discretion. Edouard filed timely notice of appeal.

ANALYSIS

Edouard argues the trial court erred by (1) delegating “its judicial responsibility by granting the [Johnsons] excessive discretion over [his] visitation rather than setting specific terms[,]” (2) “awarding guardianship to nonparents without verifying that the guardians understood the legal significance and had adequate resources[,]” and (3) terminating “juvenile court custody without [following] the mandates of [N.C.G.S.] § 7B-911 or opening a case under . . . Chapter 50.”

We first address Edouard's argument challenging the trial court's decision to award guardianship to the Johnsons. Our review of a permanency planning hearing is well established:

This Court's 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. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions are reviewable de novo on appeal.

In re P.O., 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal citations and quotation marks omitted).

N.C.G.S. § 7B-906.1(j) states:

(j) If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C.G.S. § 7B-906.1(j) (2017).

We have previously addressed the requirement of testimony at the permanency planning hearing to support a permanency planning order. *In re J.T.*, 252 N.C. App. 19, 796 S.E.2d 534 (2017); *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010); *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004). In *In re J.T.*, at the permanency planning hearing, the trial court heard statements from attorneys and

“accepted into evidence court reports submitted by the guardian ad litem and a DSS social worker and incorporated those reports by reference in its orders.” *In re J.T.*, 796 S.E.2d at 536. We stated that “reports incorporated by reference in the absence of testimony are insufficient to support the trial court’s findings of fact.” *Id.* Accordingly, we held that “[b]ecause the trial court did not hear evidence at either of the permanency planning hearings, the findings in the court’s orders were unsupported by competent evidence, and its conclusions of law were in error.” *Id.*

In so holding, we found support in *In re D.Y.* and *In re D.L.*:

The determinative facts of the present case are indistinguishable from those in this Court’s prior decisions in *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010), and *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004), in which court reports were the only admissible evidence offered by DSS at the permanency planning hearings. The trial court’s findings of fact thus were based only on the court reports, prior orders, and the arguments of counsel. In both cases, this Court held that the trial court’s conclusions of law were in error without additional evidence offered to support the trial court’s findings of fact, and this Court reversed the permanency planning orders.

Id. at 21, 796 S.E.2d at 536 (citations omitted).

This case is indistinguishable from the aforementioned cases. Here, the only evidence before the trial court consisted of the reports offered by DSS and the guardian ad litem. The trial court heard no testimony at the permanency planning hearing. The entirety of the evidentiary portion of the permanency planning hearing consists of the following:

THE COURT: If we can have the preparers of the report sworn?

(The preparers of the report were sworn.)

The trial court then asked if DSS had anything further, whereupon counsel presented their arguments to the court. While the trial court could consider the reports as evidence, these reports and arguments made by counsel alone, without testimony, are insufficient to support the trial court's findings of fact. *See In re J.T.*, 796 S.E.2d at 536. Thus, the trial court's conclusions of law were erroneous. We vacate the order and remand for further proceedings. Because we must vacate the trial court's order, we need not address Edouard's remaining arguments.

CONCLUSION

For the reasons stated herein, the trial court's order is vacated and remanded.

VACATED AND REMANDED.

Chief Judge McGEE and Judge COLLINS concur.