

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1079

Filed: 15 October 2019

Mecklenburg County, No. 15 JA 613

IN THE MATTER OF: J.O.

Appeal by respondent-father from orders entered 5 July 2018 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 17 September 2019.

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.

Administrative Office of the Courts, GAL Appellate Counsel Matthew D. Wunsche for guardian ad litem.

BRYANT, Judge.

Herein, the unchallenged findings of fact set forth in the trial court's guardianship order and supplementary order awarding guardianship of a juvenile to

a non-relative support the trial court's conclusions. Therefore, we affirm the award of guardianship to a non-relative.

This matter was heard before this Court on 22 March 2018 and a factual background giving rise to the action is provided in *In re J.O.*, No. COA17-1033, 2018 WL 1802024 (N.C. Ct. App. Apr. 17, 2018) (unpublished) (hereinafter "*J.O. I*"). In *J.O. I*, respondent-father appealed a Mecklenburg County District Court's 26 June 2017 guardianship order, which awarded guardianship of his daughter "Julia"¹ to a non-relative, "Ms. Markham." Citing General Statutes, section 7B-903, this Court noted that in awarding guardianship of a juvenile, the juvenile's relatives are to be given priority. This Court held that

the trial court awarded guardianship to a non-relative without first finding 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 for Julia[.]

J.O. I, 2018 WL 1802024, at *3. Thus, we reversed the trial court's 26 July 2017 guardianship order and remanded the matter for further findings of fact. *Id.* The decision of whether to hear additional evidence was left in the discretion of the trial court. *Id.*

¹ Pseudonyms are used for the juvenile, the guardian, and the paternal grandmother to protect the identity of the juvenile.

Julia was then in the legal custody of the Mecklenburg County Department of Social Services, Youth and Family Services (hereinafter “YFS”), but her placement remained with Ms. Markham.

The matter was heard in Mecklenburg County District Court on 25 May 2018, before the Honorable Elizabeth T. Trosch, Judge presiding. The court did not hear additional evidence from any party, but elected to make findings of fact from the existing record. On 5 July 2018, the court entered two orders, a guardianship order—again awarding Julia’s guardianship to Ms. Markham—and a supplementary order—providing findings of fact in support of the guardianship award. Respondent-father appeals.²

On appeal, respondent father argues that the trial court erred by granting guardianship of Julia to a non-relative without again properly considering Julia’s paternal grandmother, “Ms. Walters.” We disagree.

“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

² Respondent-father filed with this Court a motion to strike a portion of a Rule 9 supplement to the printed record filed with this Court by YFS. The YFS Rule 9 supplement contains an order from a related matter that provides a better understanding of the current action and the context out of which the current issues on appeal arise. See N.C.R. App. P. 9(a)(1)j. (2019) (“[C]opies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal . . .”). Accordingly, we deny respondent-father’s motion to strike. However, upon review of the issues presented in respondent-father’s appellant brief, the contested order contained in the YFS Rule 9 supplement was not germane to our analysis.

the conclusions of law.” *In re C.M.*, 230 N.C. App. 193, 194, 750 S.E.2d 541, 542 (2013) (citation omitted). “Unchallenged findings of fact are binding on appeal.” *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Per the unchallenged findings of fact, the trial court adjudicated Julia neglected and dependent on 23 February 2016. Between 9 November 2015 and 23 May 2017, Julia was in foster care and placed with Ms. Markham. On 23 May 2017, the trial court awarded guardianship of Julia to Ms. Markham. The trial court’s 26 July 2017 guardianship order was reversed and the matter remanded to the trial court for further findings of fact. Although YFS was Julia’s legal custodian, Julia continued in her placement with Ms. Markham. In its guardianship order and supplementary order entered 5 July 2018, the trial court again awarded guardianship of Julia to Ms. Markham.

“The purpose of a permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.” *In re E.K.*, 202 N.C. App. 309, 312, 688 S.E.2d 107, 109 (2010) (citation omitted). Pursuant to General Statutes, section 7B-903 (“Dispositional alternatives for abused, neglected, or dependent juvenile”),

[i]n 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

Opinion of the Court

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).

In the supplementary order entered 5 July 2018, the trial court made findings of fact and incorporated findings set forth in its 26 June 2017 permanency planning order. The trial court's findings of fact as provided in its 26 June 2017 permanency planning order included the following:

[N]either parent had made sufficient progress in alleviating the conditions that led YFS to take custody of the juvenile. In light of the lack of case plan or behavioral progress on the part of the [respondent-]father, he is not a fit and proper person to have custody of this child. With regard to the mother, the progress that she has made is positive for her and for the child. The [c]ourt must consider the whole picture with regard to the mother and the child, however. Mother has an extensive CPS history and there are notable deficiencies contained within her PCE. Her mental health issues remain unresolved. She has two prior TPR orders for two of her older children for similar issues as those that exist in this matter. She has not demonstrated that she can provide a safe and permanent home within a reasonable period of time while also managing her mental health symptoms/issues. Overall, she has failed to make reasonable progress. Both parents are acting in a manner inconsistent with their Constitutionally protected status as parents. In general, children need continuity in their family relationships when they've previously been exposed to abuse/neglect and suffer from chronic stress and trauma. [Julia]'s family relationships include [Ms. Walters, her paternal grandmother,] . . . who [Julia] knows, loves and with whom

Opinion of the Court

she clearly has a bond; her mother with whom she also has a clear bond and is doing the best she can with limited resources; and to her siblings, one of whom[, a sister,] is placed with [Julia] in [Ms. Markham]'s home. [Julia] and [her sister] 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 [Julia and her sister] both. [Ms. Markham] has also had consistent contact with [the sibling's mother]. The [c]ourt also has to consider [paternal grandmother Ms. Walters'] pre-custody involvement with [Julia]—she nearly drowned, she was withheld from YFS when [paternal grandmother 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. [Ms. Markham] provides [Julia] with the most support and the most consistent contact with her mother.

In the trial court's supplementary order, the court made additional findings of fact, which include the following (some of which are challenged):

8. [Julia] has been placed in the home of [Ms. Markham] since she entered YFS non-secure custody in 2015. Prior to entering care, [Julia] was in the physical and legal custody of her father pursuant to a 2012 civil custody order but travelled back and forth to Georgia where she spent time with and was supervised by her paternal grandmother, [Ms. Walters].
9. [Julia]'s family includes [Ms. Walters] with whom [Julia] has a bond and relationship and [Julia]'s sister with whom she lives at [Ms. Markham]'s home and with whom [Julia] has a strong bond and relationship. While [Julia] is at [Ms. Markham]'s residence, she is consistently able to visit with her mother [Julia's mother] does not have the

Opinion of the Court

financial wherewithal to be able to travel to Georgia (where [Ms. Walters] resides) if [Julia] were placed there.

10. Prior to entering YFS non-secure custody and while residing with or being supervised by [Ms. Walters] in Georgia, [Julia] nearly drowned. [Julia] was also withheld from YFS once [Ms. Walters] was aware that YFS had obtained non-secure custody. At the time that [Julia] entered YFS custody, she was in need of significant dental care. Moreover prior to being placed in the guardianship of [Ms. Markham], [Julia] was permitted to have unsupervised overnight visits with [Ms. Walters]. This [c]ourt specifically advised [Ms. Walters] in open court that [respondent-father] was not to be present during such visitation. In contravention of the [c]ourt's order that [respondent-father] not be present, [Ms. Walters] permitted [respondent-father] to visit with [Julia] and then posted pictures documenting this visit on Facebook. [Julia] does not receive proper care or supervision from [Ms. Walters] while in [Ms. Walter]'s care. Additionally, [Ms. Walters] fails to acknowledge the harm caused to [Julia] by [respondent-father's] actions.
11. [Ms. Markham] is available to provide placement for [Julia]. However, based upon the aforesaid improper care and supervision, [Ms. Walters] is not able to provide proper care and supervision for [Julia].
12. Placement of [Julia] with [Ms. Walters] is contrary to [Julia]'s best interest.
13. Placement of [Julia] with [Ms. Markham] is appropriate and [Julia] being placed in guardianship of [Ms. Markham] is in her best interest. [Julia] has been placed with [Ms. Markham] for more than a year and this placement is stable. . . .

On appeal, respondent-father challenges the trial court's findings of fact 10, 11, and 12 as set forth in its 5 July 2018 supplementary order as being unsupported by evidence. Respondent-father specifically argues that the record does not support the trial court's finding that Ms. Walters allowed respondent-father unauthorized contact with Julia, that Ms. Walters posted pictures of the unauthorized visit on Facebook, or that Ms. Walters failed to acknowledge the harm caused to Julia by respondent-father's actions, as set forth in finding of fact 10. However, respondent-father does not contest finding of fact 10's finding that "while residing with or being supervised by [Ms. Walters] in Georgia, [Julia] nearly drowned. [Julia] was also withheld from YFS once [Ms. Walters] was aware that YFS had obtained non-secure custody[, or that] [a]t the time that [Julia] entered YFS custody, she was in need of significant dental care." "Unchallenged findings of fact are binding on appeal." *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733 (citation omitted).

Even if we were to agree with respondent-father's challenge to components of finding of fact 10, there remain unchallenged findings within finding of fact 10 which support the trial court's conclusion as set forth in findings of fact 11 and 12,³ that

³ We acknowledge that what was designated findings of fact 11 and 12 are actually conclusions of law, and we treat them as such. See *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276 (1981) ("[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." (citations omitted)).

“[Ms. Walters] is not able to provide proper care and supervision of [Julia]” and “[p]lacement of [Julia] with [Ms. Walters] is contrary to [Julia]’s best interest.”

Respondent-father’s challenge to findings of fact 11 and 12 rely on the lack of any findings of fact as set forth in finding of fact 10. As there remain unchallenged findings within finding of fact 10 sufficient to support the trial court’s findings of fact and conclusions set forth in findings of fact 11 and 12, we need not review respondent-father’s arguments as to them.

Respondent-father further argues that the trial court erred by failing to hear new evidence. However, we note that the order of this Court, as stated in *J.O. I*, provided that “[w]e leave to the discretion of the trial court whether to hear additional evidence.” *J.O. I*, 2018 WL 1802024, at *3 (alteration in original) (citation omitted). The opinion of this Court in *J.O. I* was filed on 17 April 2018. The trial court’s hearing on remand was conducted on 25 May 2018. During the hearing, respondent-father did not indicate the availability of new evidence nor the need for the trial court to hear any new evidence. Respondent-father cannot establish that the trial court abused its discretion by not hearing new evidence. Therefore, respondent-father’s argument is overruled.

Accordingly, as the trial court’s 5 July 2018 guardianship order and supplementary order comply with General Statutes, section 7B-903(a1), they are

AFFIRMED.

IN RE: J.O.

Opinion of the Court

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).