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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-297

Filed: 21 January 2020

Mecklenburg County, Nos. 17 JA 155, 157, 211-12

IN THE MATTER OF: V.T., Z.B., A.B., I.B.L.

Appeal by Respondent-Mother from Orders entered 14 December 2018 by Judge Ty Hands in Mecklenburg County District Court. Heard in the Court of Appeals 19 December 2019.

No brief filed by petitioner-appellee Mecklenburg County Youth and Family Services.

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

Lisa Anne Wagner for respondent-appellant mother.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Mother appeals from an Order captioned “Subsequent Permanency Planning Hearing #2 Order” (Permanency Planning Order) and a Guardianship Order, which Orders eliminated reunification as a permanent plan for

her minor child “Victor”¹ and awarded guardianship of Victor to his foster father (Foster Father). The following facts and procedural history are derived in part from this Court’s opinion in *In re Z.B., A.B., V.T., I.B.L.*, ___ N.C. App. ___, 819 S.E.2d 416, slip op. at 1 (16 Oct. 2018) (unpublished):

In the Spring of 2017, Mecklenburg County Youth and Family Services (YFS) obtained nonsecure custody of then-nine-year-old Victor and his siblings “Zachary,” “Amy,” and “Ivy” and filed juvenile petitions alleging neglect and dependency. The petitions alleged that Victor had excessive unexcused absences from school; that Respondent-Mother falsely reported to school officials that Victor was “bullied and had his teeth knocked out at the school”; and that Respondent-Mother was not registered to homeschool Victor, failed to follow through with the Day Treatment Program for homebound students—which was authorized by Victor’s physician—and declined to meet with school personnel to develop reentry and attendance plans for Victor. They further alleged Ivy had disclosed to a YFS social worker “that [Victor] was subjected regularly to corporal punishment[,]” that he “was sexually molesting [Amy],” and that Respondent-Mother was aware Victor was molesting his seven-year-old sister but had not addressed it.

The trial court adjudicated Victor and his siblings to be neglected but ruled YFS had failed to prove dependency. *Id.* at 3. In its November 2017 dispositional

¹ A pseudonym chosen by the parties pursuant to N.C.R. App. P. 42(b). We use additional pseudonyms to protect the privacy of juveniles discussed in this opinion.

order, the trial court maintained Victor in YFS custody and ordered Respondent-Mother to comply with her Family Services Agreement, submit to a parenting capacity evaluation, and continue her mental health treatment. *Id.* at 4.

Respondent-Mother appealed. In our opinion in *In re Z.B.* filed 16 October 2018, we affirmed Ivy’s adjudication and disposition but concluded the trial court “failed to enter sufficient findings of fact to support its adjudications of neglect for Zachary, Amy, and Victor.” *Id.* at 10. We vacated these children’s adjudications and the resulting dispositions and remanded to the trial court for entry of a new adjudicatory order with appropriate findings and conclusions and for entry of a new dispositional order if the court adjudicated the children as neglected. *Id.* at 10-11.

While Respondent-Mother’s appeal in *In re Z.B.* was pending, the trial court held permanency planning hearings for Victor on 12 December 2017, 19 March 2018, 25 June 2018, and 10 October 2018. *See* N.C. Gen. Stat. §§ 7B-906.1(a), -1003(b) (2017).² Although the resulting orders are not included in the Record on Appeal, YFS’s court summaries reflect that the trial court initially established a primary permanent plan of reunification for Victor with a secondary plan of guardianship. The trial court later changed Victor’s primary permanent plan to guardianship with

² Section 7B-906.1 was amended effective 1 October 2019; however, we cite the version of the statute effective at the time of these hearings. *See* 2019 N.C. Sess. Law 33, § 10 (N.C. 2019).

a secondary plan of reunification at the 10 October 2018 hearing or one of the two preceding hearings. *See* N.C. Gen. Stat. § 7B-906.2 (2017).³

On remand from *In re Z.B.*, the trial court entered a combined Adjudicatory Hearing Order and Dispositional Hearing Order (Adjudication and Disposition Order) on 14 December 2018 “nunc pro tunc to September 1, 2017 as to adjudication, and nunc pro tunc to September 20, 2017 as to disposition.”⁴ The trial court adjudicated Victor and his two siblings to be neglected and dependent juveniles,⁵ making additional findings of fact that described Respondent-Mother’s volatile and inappropriate verbal and physical disciplining of the children and her failure to provide for Victor’s regular school attendance or homeschooling. The trial court restated the provisions of its original dispositional order.

Also, on 14 December 2018, after a hearing held on 3 December 2018, the trial court entered its Permanency Planning Order granting guardianship of Victor to Foster Father and suspending reunification efforts as to Victor. The Order awarded

³ Section 7B-906.2 was amended effective 1 October 2019; however, we cite the version of the statute effective at the time of these hearings. *See* 2019 N.C. Sess. Law 33, § 10 (N.C. 2019).

⁴ Although the trial court purported to enter its Adjudication and Disposition Order “nunc pro tunc” to 1 and 20 September 2017 for adjudication and disposition, respectively, we note that designating this Order as “nunc pro tunc” is not a proper *nunc pro tunc* order and does not have the effect of retroactively determining the adjudication and disposition of these children as of the September 2017 dates. *See generally Elmore v. Elmore*, 67 N.C. App. 661, 666-67, 313 S.E.2d 904, 907-08 (1984) (discussing a trial court’s *nunc pro tunc* powers).

⁵ As we noted in *In re Z.B.*, the trial court previously ruled YFS had failed to prove dependency, and YFS did not appeal this portion of the trial court’s order. Slip op. at 3. On remand, despite hearing no additional evidence, the trial court nevertheless adjudicated Victor, Zachary, and Amy to be dependent. Because Respondent-Mother has not appealed from the new Adjudication and Disposition Order, we do not address this error by the trial court.

Respondent-Mother visitation consistent with a “Visitation Agreement” introduced into evidence at the hearing. The separate Guardianship Order filed on 14 December 2018 reiterated the trial court’s award of guardianship to Foster Father and its adoption of the terms of the Visitation Agreement. Respondent-Mother appealed the Permanency Planning and Guardianship Orders to this Court.

Petition for Writ of Certiorari

Victor’s guardian *ad litem* (GAL) moved to dismiss Respondent-Mother’s appeal as to the trial court’s subsequent Permanency Planning Order because the Notice of Appeal included in the settled Record designates for appeal only the “Final Guardianship Order . . . entered in this action on December 14, 2018.” This Court denied the GAL’s Motion and allowed Respondent-Mother’s Motion to Amend the Record to include a copy of her additional Notice of Appeal filed 11 January 2019, which designated for appeal the “Subsequent Permanency Planning Hearing #2 Order” entered on 14 December 2018. Before amending the Record, Respondent-Mother had filed a Petition for Writ of Certiorari as an alternative basis for this Court’s review of the Permanency Planning Order. *See* N.C.R. App. P. 21(a)(1). Because the Record now includes Respondent-Mother’s timely filed Notice of Appeal from the 14 December 2018 Permanency Planning Order, we dismiss her Petition for Writ of Certiorari as moot.

Permanency Planning Order

Our “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. & M.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009) (alteration in original) (citation and quotation marks omitted). Here, Respondent-Mother contends, “[t]he trial court erred by awarding guardianship of Victor to [Foster Father] where the findings of fact supported by competent evidence did not support its conclusion that guardianship was necessary.”

“When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show that it considered the best interest of the child.” *In re Chasse*, 116 N.C. App. 52, 62, 446 S.E.2d 855, 861 (1994) (citation omitted). We have held that “best interest determinations are conclusions of law because they require the exercise of judgment.” *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). “Our review of a trial court’s conclusions of law is limited to whether they are supported by the findings of fact.” *Id.* (citation omitted). A trial court’s assessment of a juvenile’s best interest is otherwise discretionary and will not be disturbed absent an abuse of that discretion. *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007) (citation omitted). “An abuse of discretion occurs when the trial court’s ruling is so arbitrary that it could not have been the result of a reasoned decision.” *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and quotation marks omitted), *aff’d per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

We note the GAL argues that we should consider the Findings in the trial court's Adjudication and Disposition Order together with the Findings in the Permanency Planning Order in assessing their sufficiency to support the guardianship award. However, we reject this argument because the Findings in the Adjudication and Disposition Order are based on the evidence adduced at the adjudicatory hearings held May and June of 2017 and describe the circumstances extant at the time YFS filed its petition on 18 April 2017. *Cf.* N.C. Gen. Stat. § 7B-802 (2017); *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) (designating “the time period between the child’s birth and the filing of the petition as the relevant period for the adjudication”).

Further, the case upon which the GAL relies, *In re L.M.T.*, 367 N.C. 165, 752 S.E.2d 453 (2013), is inapplicable. In *In re L.M.T.*, our Supreme Court applied the “plain language” of N.C. Gen. Stat. § 7B-1001(a)(5) (2011),⁶ a statute requiring the appellate court to “ ‘review the order to cease reunification [efforts] *together* with an appeal of the termination of parental rights order[.]’ ” *Id.* at 170, 752 S.E.2d at 456 (quoting former N.C. Gen. Stat. § 7B-1001(a)(5)). No similar statutory language authorizes this Court to review a permanency planning order “together with” an order

⁶ The statute was amended effective 1 January 2019 to provide a right of appeal directly to our Supreme Court from an order terminating parental rights as well as from a preceding order eliminating reunification from the juvenile’s permanent plan. N.C. Gen. Stat. § 7B-1001(a1)(1)-(2) (2017). The language applied in *In re L.M.T.* now appears in subsection (a2). N.C. Gen. Stat. § 7B-1001(a2) (providing “the Supreme Court shall review the order eliminating reunification together with an appeal of the order terminating parental rights”).

adjudicating abuse, neglect, or dependency. Accordingly, we examine only the trial court's Findings in the Permanency Planning Order.

The Permanency Planning Order includes the following Findings of Fact potentially germane to an assessment of Victor's best interest:

4. **Unsupervised** visitation between the juvenile(s) and the mother **is** desirable;
5. Pursuant to NCGS § 7B-906.2(d), the court makes the following specific findings regarding:
 - a. Whether the parent is making adequate progress within a reasonable period of time under the plan:
The mother is making adequate progress within a reasonable period of time under the plan.
 - b. Whether the parent is actively participating in or cooperating with the plan, YFS, and the GAL:
The mother is actively participating in and cooperating with the plan, YFS and the GAL.
 - c. Whether the parent remains available to the Court, YFS, and the GAL:
The mother remains available to the Court, YFS and the GAL.
 - d. Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile(s):
The mother is not acting in a manner inconsistent with the health or safety of the juveniles.
-
6. It is not possible for the juvenile(s) **[Victor and Ivy]**

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to be returned home immediately or within 6 months nor is it in the juvenile(s)' best interest to return home because: **of the strained relationship between the mother and [Ivy], and reunification not being desired by the juveniles.**

7. Because the juvenile(s)' return home is unlikely within 6 months, the court has considered whether the juvenile should remain in the current placement or be placed in another permanent living arrangement, and finds: **[Victor] shall remain in his current placement, which is safe and appropriate and in his best interest. . . .**
8. Because the juvenile(s)' return home is unlikely within 6 months, the court has considered whether legal guardianship or custody with a relative or some other suitable person should be established . . . and finds: **it is [Victor's] best interest that guardianship be established with [Foster Father].**

. . . .
17. At this time, **the juveniles'** continuation in or return to his/her home is contrary to his/her health and safety.

. . . .
19. The best plan of care to achieve a safe, permanent home for the juvenile(s) within a reasonable period of time is . . . guardianship for **[Victor]**

. . . .
21. **[Foster Father]** stands ready and able to accept the guardianship . . . of the juvenile, **[Victor]**. [Foster Father] understands the legal significance of the appointment and has adequate resources to care

appropriately for the juvenile

See N.C. Gen. Stat. §§ 7B-906.1(e)(1)-(4), (j); -906.2(d)(1)-(4). The bolded text reflects the entries made by the trial court onto the pre-printed order form.

The trial court's Findings thus establish only that (1) Respondent-Mother is making reasonable and timely progress on her case plan, is cooperating with the trial court and the parties, and is behaving in a manner that is not inconsistent with Victor's health or safety, which makes *unsupervised* visitation "desirable"; (2) Foster Father is providing a "safe and appropriate" foster placement for Victor and is willing and able to serve as his guardian; and (3) the sole issue precluding Victor's reunification with Respondent-Mother within the next six months is his lack of desire for reunification. These Findings provide no basis, other than eleven-year-old Victor's stated preference, for the trial court's decision to appoint a guardian for Victor in lieu of returning him to his mother's home. While the court may consider a child's wishes with regard to custody, they are not determinative of the child's best interest. See *Mintz v. Mintz*, 64 N.C. App. 338, 340-41, 307 S.E.2d 391, 393 (1983) (stating that "[i]f the child is of the age of discretion, the child's preference on visitation may be considered, but his choice is not absolute or controlling[,] and approving the general principle that "[t]he nearer the child approaches the age of 14, the greater is the weight which should be given to the child's custodial preference" (citation and quotation marks omitted)).

Further, a trial court considering a juvenile's best interest cannot wholly disregard the potential benefit accruing to the juvenile from the preservation of the family unit. *Cf. In re T.K., D.K., T.K. & J.K.*, 171 N.C. App. 35, 39, 613 S.E.2d 739, 741 ("In determining the best interests of the child, the trial court should consider the parents' right to maintain their family unit, but if the interest of the parent conflicts with the welfare of the child, the latter should prevail." (citation and quotation marks omitted)), *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005); N.C. Gen. Stat. § 7B-100(4) (2017) (articulating public policy of "preventing the unnecessary or inappropriate separation of juveniles from their parents"). Absent any findings by the trial court to explain why reunification with Respondent-Mother—and possibly his siblings⁷—is not in Victor's best interest, we hold the trial court abused its discretion in awarding guardianship of Victor to Foster Father. *See Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (noting that "a lack of specificity of facts underlying the trial court's decision [as to the child's best interests can] necessitate a reversal of the [custody] order"); *cf. In re T.K.*, 171 N.C. App. at 41, 613 S.E.2d at 743 (affirming order ceasing reunification efforts where "the court properly made findings of fact as to the respondent-mother's progress (or lack

⁷ While leaving the children in the legal custody of YFS, the Permanency Planning Order placed Amy with Respondent-Mother and announced the trial court's "desire is to transition [Amy] home." The Order also directed "YFS [to] make plans for a trial home placement for [Zachary] to occur during this next review period, in consultation with the GAL, unless it is determined to be unsafe or inappropriate for [Zachary]."

thereof) and as to the best interest of the children”). Accordingly, we vacate the Permanency Planning Order and remand for a new permanency planning hearing. *See In re D.S.*, ___ N.C. App. ___, ___, 817 S.E.2d 901, 906 (2018). Because we vacate the Permanency Planning Order, which awarded guardianship of Victor to Foster Father, we also vacate the Guardianship Order.⁸

In addition, because the issue may recur on remand, we also address Respondent-Mother’s claim challenging the visitation plan included in the Permanency Planning Order. *See generally In re D.M.*, 211 N.C. App. 382, 386, 712 S.E.2d 355, 357 (2011) (“address[ing] some other issues which will likely recur on remand, in the hope of avoiding future appeals in this case”). Respondent-Mother contends the trial court improperly delegated its authority with regard to visitation under N.C. Gen. Stat. § 7B-905.1(a) (2017)⁹ by giving Victor “unfettered discretion over visitation with [her].”

Under N.C. Gen. Stat. § 7B-905.1(a), “[a]n order that . . . continues the juvenile’s placement outside the home shall provide for appropriate visitation as may

⁸ We note the Guardianship Order contained in our Record is not signed by the trial judge. Under our Rules of Civil Procedure, an order is not deemed entered until “it is reduced to writing, *signed by the judge*, and filed with the clerk of court[.]” N.C. Gen. Stat. § 1A-1, Rule 58 (2017) (emphasis added); *see also West v. Marko*, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573 (1998) (“A[n order] is not enforceable between the parties until it is entered.” (citation omitted)); *Worsham v. Richbourg’s Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (holding an order not properly entered was neither “complete for purposes of appeal . . . [nor] enforceable between the parties” (citation omitted)).

⁹ Although Section 7B-905.1(a) was amended effective 1 October 2019, we apply the statute in existence at the time of the trial court’s Order. 2019 N.C. Sess. Law 33, § 9 (N.C. 2019).

be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a). "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) (citations omitted). However, we have held that "[t]he awarding of visitation of a child is an exercise of a judicial function, and a trial court may not delegate this function to the custodian of a child." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 652 (2005) (citation omitted), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 23-24 (N.C. 2013), *as recognized in In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 570 (2015).

The trial court's Order¹⁰ provided Respondent-Mother a minimum of four hours per month of unsupervised visitation with Victor as well as additional unsupervised visitation on birthdays and holidays and unsupervised telephone calls. However, the Order explicitly leaves all visitation and phone contact "at the discretion of [Victor]." As this Court has refused to countenance the trial court's delegation of authority over a parent's visitation rights to the child's custodian,

¹⁰ The Permanency Planning Order incorporates by reference a Visitation Agreement signed by the trial judge on 14 December 2018 and detailing the terms of Respondent-Mother's visitation with Victor. The purported Agreement is not signed by the parties, and Respondent-Mother's consent to its terms does not appear anywhere in the Record. Respondent-Mother specifically objected to Victor having the discretion to deny her visitation, testifying, "I don't think it should be up to him, because the only time it's up to him is when it's something I'm doing financially. It shouldn't be up to him Thanksgiving we didn't see him, but . . . my family came from California to see my kids."

Respondent-Mother insists the trial court cannot be allowed to delegate this authority to her eleven-year-old child.

In response, the GAL calls attention to this Court’s unpublished opinion in *In re K.Q.R.*, concluding “the trial court did not abuse its discretion by granting [the thirteen-year-old juvenile] the discretion to decline visitation with [his] mother.” 248 N.C. App. 121, 789 S.E.2d 569, slip op. at 8 (21 June 2016) (unpublished). While acknowledging the doctrine that bars delegating authority over visitation to the child’s custodian, we found in N.C. Gen. Stat. § 7B-905.1(a) “no outright prohibition against granting a juvenile the right to decline visitation.” *Id.* Absent such a blanket prohibition, we held the visitation plan in *In re K.Q.R.* to be a proper exercise of the trial court’s discretion as supported by its findings of fact:

[T]he trial court made detailed findings regarding [the juvenile’s] social and academic needs. In particular, the trial court cited his improvements in school and his increased participation in social and extra-curricular activities since he was removed from mother’s custody and placed with father. The trial court also found that visitation between mother and [the juvenile] was problematic.

. . . .

[I]n light of the permanent plan that reunification efforts should cease, [the juvenile’s] age, and the trial court’s findings of fact regarding [the juvenile’s] needs and mother’s continuing difficulties, we conclude the trial court’s visitation plan is not manifestly unsupported by reason. . . . [T]he order reflects the court’s proper exercise of discretion based on its assessment of [the juvenile’s] best

interests, and we conclude the trial court did not abuse its discretion by granting [the juvenile] the discretion to cancel visits with mother.

Id. at 8-9.

As an unpublished opinion, *In re K.Q.R.* “does not constitute controlling legal authority.” N.C.R. App. P. 30(e)(3). It is also distinguishable from the case at bar. Unlike the juvenile in *In re K.Q.R.*, Victor was just eleven years old when the trial court entered the Permanency Planning Order. More significantly, the Findings in the Permanency Planning Order provide no reasoned basis for the conclusion that it is in Victor’s best interest to allow him the discretion to decline any and all contact with Respondent-Mother. We therefore conclude the trial court abused its discretion under N.C. Gen. Stat. § 7B-905.1(a) by delegating authority over her visitation to the child.

Conclusion

Accordingly, for the foregoing reasons, we vacate the Permanency Planning Order and Guardianship Order and remand this matter to the trial court for a new permanency planning hearing and entry of a new order establishing a permanent plan, including reconsideration of whether guardianship is an appropriate permanent plan.

VACATED AND REMANDED.

Judges STROUD and DIETZ concur.

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Report per Rule 30(e).