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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-322

Filed: 17 March 2020

Mecklenburg County, No. 15 JA 612

IN THE MATTER OF: D.S.

Appeal by respondent-father from order entered 20 December 2018 by Judge Elizabeth T. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 27 February 2020.

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

David A. Perez for respondent-appellant father.

Stephen M. Schoeberle for guardian ad litem.

ARROWOOD, Judge.

Respondent-father, the father of the juvenile D.S., (“Diana”)¹, appeals from the trial court’s order appointing a guardian for the juvenile. After careful review, we affirm in part and dismiss in part.

I. Background

¹ A pseudonym is used to protect the identity of the juvenile and for ease of reading. See N.C.R. App. P. 42(b)(1) (2020).

This case is before us for a third time. *In re D.S.*, No. COA 17-290, 2017 WL 4126964 (N.C. Ct. App. Sept. 19, 2017) (“*In re D.S. I*”); *In re D.S.*, __ N.C. App. __, 817 S.E.2d 901 (2018) (“*In re D.S. II*”). Proceedings to determine the appropriate placement and care of Diana were first initiated by the Mecklenburg County Department of Social Services, Division of Youth and Family Services (“YFS”), by the filing of a juvenile petition on 9 November 2015. In the petition, YFS alleged that respondent-father “and Diana’s mother had engaged in domestic violence in Diana’s presence, that the mother admitted to using crack cocaine, and that [respondent-father] was engaged in drug trafficking and procuring or promoting prostitution.” *In re D.S. I*, 2017 WL 4126964, at *1. YFS alleged that Diana was neglected and dependent and obtained non-secure custody of Diana. Diana was subsequently adjudicated a neglected and dependent juvenile.

On 20 December 2016, following a permanency planning hearing, the trial court entered an order setting a permanent plan of guardianship for Diana, appointing M.G. (“Ms. Green”) as her guardian, and entering a visitation plan for respondent-father and the mother. Respondent-father appealed. This Court vacated and remanded the trial court’s order after concluding the trial court’s finding that Ms. Green had adequate resources to provide appropriate care for Diana was not supported by competent evidence at the hearing. *Id.* at *3.

On 16 October 2017, the trial court held a hearing on remand to address the issue of whether Ms. Green had the financial resources to provide appropriate care for Diana. On 2 November 2017, the trial court entered a “Supplementary Order” from the hearing in which it found that Ms. Green was able to meet the financial obligations of raising Diana and understood the legal significance of being appointed as her guardian. The court ordered that the permanent plan for Diana would be guardianship, appointed Ms. Green to be her guardian, reincorporated a detailed visitation schedule for Diana’s parents and her paternal grandmother, and relieved the parents’ attorneys of further responsibility in this matter. *In re D.S. II*, __ N.C. App. at __, 817 S.E.2d at 903-904. Respondent-father appealed.

On appeal, respondent-father argued that the trial court erred by appointing Ms. Green, a non-relative caretaker of Diana, as Diana’s guardian without first making a finding indicating that it properly considered and rejected her paternal grandmother as a viable candidate for guardianship. *Id.* at __, 817 S.E.2d at 904. This Court agreed and remanded the matter for a new permanency planning hearing. *Id.* at __, 817 S.E.2d at 906.

On remand, the trial court held a permanency planning review hearing on 31 October 2018. On 20 December 2018, the trial court entered a permanency planning review order in which it determined that further reunification efforts should be suspended, the primary permanent plan should be changed to guardianship, and

Ms. Green should again be appointed as Diana’s guardian. Per our instructions on remand, the order included findings explaining that “[Diana’s] paternal grandmother has been willing to provide a placement for [Diana], but she has demonstrated that she is not able to provide a safe and appropriate home for [Diana].” The trial court entered a separate guardianship order appointing Ms. Green as Diana’s guardian. Respondent-father appeals.

II. Discussion

On appeal, respondent-father argues that: (a) the trial court erred by granting guardianship of Diana to Ms. Green without adequately explaining why placement with her paternal grandmother was inappropriate; and (b) that clerical errors in the trial court’s guardianship order require remand for correction. We find neither argument persuasive.

A. Suitability of Guardianship with Grandmother

Respondent-father first argues that the trial court erred by failing to properly explain in its permanency planning review order why Diana’s paternal grandmother was not willing and able to provide proper care and supervision of her in a safe home, as mandated by N.C. Gen. Stat. § 7B-903(a1) (2019). We disagree.

Our review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 (2019) “is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of

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law.” *In re J.H.*, 244 N.C. App. 255, 268, 780 S.E.2d 228, 238 (2015) (internal quotation marks and citation omitted). Pursuant to N.C. Gen. Stat. § 7B-903(a1):

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).

Under N.C. Gen. Stat. § 7B-903(a1), the trial court must first “determine whether the relative in question is *willing and able* to provide proper care and supervision in a safe home” before assessing whether the relative placement is contrary to the juvenile’s best interest. *In re T.H.*, 232 N.C. App. 16, 29, 753 S.E.2d 207, 216 (2014) (emphasis in original). If the relative is found to be an appropriate caretaker, the trial court’s “[f]ailure 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) (citation omitted).

In the permanency planning order in the instant case, the trial court found that Diana’s grandmother was “willing to provide a placement for [Diana], but she has demonstrated that she is not able to provide a safe and appropriate home for

[her].” Respondent-father first contends that the trial court erred by basing this finding only upon evidence before it at the prior 16 October 2017 permanency planning hearing, and did not address subsequent developments suggesting that the grandmother had since become a more suitable candidate for guardianship. We are not persuaded.

The trial court based its ultimate finding of fact that the grandmother lacked the ability to provide proper care for Diana on the following additional findings:

- (1) “[W]hile [Diana’s sibling] was in the care of the paternal grandmother in June 2015 (so prior to entering YFS custody) she suffered a near-drowning incident.”
- (2) “The paternal grandmother has consistently refused to accept that her son was responsible for, or had a role in, creating the injurious environment in which [Diana] resided prior to entering YFS custody.”
- (3) In interactions with Ms. Green arranging for contact with Diana since her placement with Ms. Green in 2015, “the paternal grandmother was frequently inappropriate and abusive towards Ms. [Green]. . . . The paternal grandmother also made several inappropriate comments to [Diana] during their visitation. The paternal grandmother’s behavior and conduct led this Court to ultimately cease any further contact between the paternal grandmother and . . . [Diana] because such contact between the paternal grandmother and [Diana] was contrary to [her] best interest.”
- (4) The grandmother violated the court’s orders in the following instances:
 - a. “[I]n March 2017, the Court permitted the paternal grandmother to have visitation with [Diana] but also

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ordered that [respondent-father] have no contact with [Diana] during such visitation. This limitation was ordered to ensure [Diana's] safety. The Court advised the paternal grandmother that she was the person responsible for upholding that limitation. Within two weeks of that March 2017 order, the paternal grandmother took a photograph of [respondent-father] visiting with [her] and [Diana]. The photograph was then posted on [her] Facebook page."

- b. Since the trial court's order prohibiting contact between the grandmother and Diana, "Ms. [Green] reports that . . . within six months prior to this hearing[] the paternal grandmother has had two additional visits with [Diana] despite such contact not being permitted."
- (5) "The paternal grandmother's current residence is unknown."
- (6) "The paternal family, as a whole, has continued to engage in dishonest and manipulative behavior that is intended to circumvent orders of the Court that are needed to maintain [Diana's] safety." At a prior hearing in which she requested guardianship of one of Diana's siblings, Diana's paternal aunt gave false testimony about her living situation. "Information learned after that hearing revealed that [the paternal aunt's] testimony . . . was not true . . . and that [she] actually resided with [respondent-father]." The grandmother "[was] in court during that hearing and did not advise the Court" that this testimony was false.

Respondent-father only contests the evidentiary bases for the first and sixth of these findings, asserting that competent evidence does not support that the grandmother refused to accept her son's role in his family's circumstances and that

she had any knowledge of, or opportunity to correct, the false testimony given by Diana's aunt at a prior hearing. Respondent-father does not challenge, and indeed concedes, that the remaining findings are supported by evidence. These findings are thus binding on appeal. *In re A.R.H.B. & C.C.H.L.*, 186 N.C. App. 211, 214, 651 S.E.2d 247, 251 (2007) (citation omitted), *appeal dismissed*, 362 N.C. 235, 659 S.E.2d 433 (2008). Review of the trial court's challenged findings of fact is unnecessary, because the unchallenged findings adequately support its conclusion that Diana's grandmother was not a viable candidate for guardianship at the time of the permanency planning hearing. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (citation omitted) (stating that erroneous findings that are unnecessary to support adjudication of neglect do not constitute reversible error).

The trial court's unchallenged findings establish that it was uncertain of the grandmother's current living situation and aware of a prior instance in which Diana's sibling nearly drowned under her supervision. The court was also cognizant of the grandmother's pattern of disregard for the authority of the court and noncompliance with its orders. The court had allowed her unsupervised visitation of Diana. In short order, she flagrantly violated the court's conditions on this visitation by allowing respondent-father to visit with the child and posting pictures of the visit online. She did this despite the court's explicit charge of responsibility for ensuring that Diana

was not contacted by respondent-father, whom the court had expressly found was a risk to Diana's health and safety due to his continuing physical abuse of her mother.

She visited Diana twice within six months of the most recent hearing, despite the court's prohibition of such contact. Even assuming *arguendo* respondent-father's position that the trial court's findings regarding events occurring in 2017 were too remote in time to establish the grandmother's inability to provide care for Diana, these more recent visits exemplify a continuation of her pattern of disregard for the trial court's orders.

The trial court also made an unchallenged finding that respondent-father and Diana's mother

continued to be romantically involved with one another and there is substantial evidence that domestic violence between the two persists. For example, on December 10, 2016, the parents were residing together and engaged in a physical altercation wherein the mother suffered a broken jaw and multiple broken teeth, allegedly due to being pistol whipped by the [respondent-father].

The trial court found another physical altercation occurred on 13 May 2018, resulting in respondent-father being charged with assaulting the mother.

In light of the trial court's unchallenged findings noting the historical facts of this case, respondent-father's continuing domestic violence, and the grandmother's pattern of disregard for the trial court's orders, including allowing respondent-father to visit with Diana in violation thereof, we conclude the trial court did not err by

finding and concluding that the grandmother was not able to provide a safe and appropriate home for Diana, and that placement with the grandmother was not in her best interests. Accordingly, we affirm the trial court's permanency planning review order.

B. Clerical Errors in Guardianship Order

Respondent-father next argues that clerical errors in the guardianship order misstating its effective date require that the order be remanded for correction. We decline to review this argument because it is not properly before us on appeal.

Any party permitted by law to appeal from a judgment or order rendered in a juvenile case, appealable pursuant to N.C. Gen. Stat. § 7B-1001 (2019), must do so by filing an appropriate notice of appeal. N.C.R. App. P. 3.1(a) (2020). Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, notice of appeal must "designate the judgment or order from which appeal is taken[.]" N.C.R. App. P. 3(d) (2020). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (internal quotation marks and citation omitted). Here, respondent-father's notice of appeal only references the permanency planning order. It does not specifically designate the separately entered guardianship order. *See In re A.V.*, 188 N.C. App. 317, 321, 654 S.E.2d 811, 813-14 (2008) (dismissing juvenile's challenge to trial court's disposition

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order for violation of Rule 3(d) jurisdictional requirements where notice of appeal designated error only in court's adjudication order). Accordingly, we dismiss respondent-father's purported appeal from the guardianship order because we are without jurisdiction to review it.

AFFIRMED IN PART, DISMISSED IN PART.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).