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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-140

No. COA21-251

Filed 1 March 2022

New Hanover County, No. 20JA48

IN THE MATTER OF:

K.W-M.

Appeal by respondent-father from judgment and order entered 7 January 2021 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 21 September 2021.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for appellant-respondent-father.

Jennifer Cooke for petitioner-appellee New Hanover County Department of Social Services, no brief.

Matthew D. Wunsche for the Guardian ad Litem.

GORE, Judge.

¶ 1 Respondent-father appeals from an adjudication judgment and disposition order denying him visitation with his son Keith.[1] We affirm the trial court's order.

I. Background

¶ 2 Keith is a 12-year-old boy diagnosed with autism, attention deficit

[1] Pursuant to N.C.R. App. P. 42(b), a pseudonym is used to protect the identity of the juvenile.

hyperactivity disorder, and mood disorder. Since 2011, he has been the subject of multiple Child Protective Services ("CPS") reports and extensive custody litigation between his parents. Prior to New Hanover County Department of Social Services ("DSS") filing a petition alleging Keith was a neglected juvenile, respondent-parents shared joint custody of Keith. Respondent-mother had primary physical custody, and respondent-father had visitation every Wednesday and every other weekend. Respondent-father has a history of serious medical issues including heart attacks, stroke, and infections. He is a double amputee and uses a wheelchair.

¶ 3 On 10 February 2020, DSS social worker Alexandra Glynn received a CPS report initiated by respondent-mother. The report alleged respondent-mother checked Keith's phone and discovered he had downloaded the Pornhub app. Keith told his mother that respondent-father makes him watch pornography, including videos of respondent-father and his girlfriend having sex. Keith also alleged respondent-father abused and sold prescription medication.

¶ 4 On 11 February 2020, Glynn went to Keith's school and interviewed him alone. Keith confirmed the substance of the allegations in the CPS report. Keith specifically described respondent-father's drug use and reported the presence of a Glock pistol and two BB guns in the home. Glynn referred Keith to The Carousel Center, a nonprofit child advocacy center, for further interviews and treatment.

¶ 5 On 21 February 2020, Keith went to The Carousel Center and met with

forensic interviewer and child therapist Gina Warren. Keith further described exposure to pornography, respondent-father's drug use, and stated respondent-father had "specific codes" for him to retrieve guns kept in the house. Keith told Warren he was having nightmares about his father. Based on this interview, Warren recommended Keith receive an assessment for trauma-focused cognitive behavioral therapy ("TF-CBT").

¶ 6 Following the forensic interview with Warren, Keith received a medical evaluation from nurse practitioner Kristin Johnson. Johnson's medical examination was non-diagnostic for physical sexual abuse. However, Johnson documented concerns about sexual abuse due to exposure to pornography, and concerns about neglect based on Keith reporting lack of food, lack of supervision, and witnessing respondent-father crushing and snorting pills. Johnson recommended no contact or limited contact with respondent-father.

¶ 7 Also on 21 February 2020, Glynn and law enforcement officers interviewed respondent-father at his home. Respondent-father denied all the allegations against him. He reported Keith learned about pornography from another boy at school, and Keith was involved in a "masturbation club." Later, Glynn contacted a social worker at Keith's school and confirmed the masturbation club did not exist. However, Keith was involved in an incident where another boy bullied him into sending a Snapchat of his genitals.

¶ 8 On 9 March 2020, respondent-father took a drug screen at Glynn's request. He tested positive only for medications prescribed to him.

¶ 9 On 19 March 2020, DSS filed a petition alleging Keith was a neglected juvenile. The trial court granted non-secure custody of Keith to DSS and approved placement with respondent-mother. After further non-secure custody hearings on 25 March 2020 and 1 April 2020, the trial court made findings that it is not in Keith's best interests to have contact with respondent-father and ordered no visitation.

¶ 10 At a pre-adjudication hearing on 11 September 2020, the trial court found that Keith was anxious and overwhelmed regarding this case. Keith stated that if he saw his father during his testimony, "he would jump off the highest building." Keith experienced a self-described "mental breakdown," and expressed thoughts of "wanting to die because he was feeling too much pain." Keith "felt it was easier to be dead or run away for a year or until everyone forgot about him than testify in Court." The trial court further found that Keith was unavailable to testify, and accepted hearsay statements from Glynn, Warren, and Johnson.

¶ 11 The adjudication and disposition hearings occurred on 19 and 28 October, 18 November, and 18 December 2020. During the adjudication phase, the trial court heard testimony from Warren, Johnson, and Glynn regarding Keith's statements over the course of their investigation. Respondent-mother and respondent-father also testified. On 18 December 2020, the trial court adjudicated Keith a neglected

juvenile. It then conducted a dispositional hearing and heard testimony from Keith's individual therapist at The Carousel Center, Tabitha O'Briant Cox ("O'Briant"), and foster care social worker Jennifer Walton. DSS and Guardian ad Litem ("GAL") predispositional reports were offered and accepted into evidence.

¶ 12 In an order filed 7 January 2021, the trial court granted legal custody of Keith to respondent-mother. It concluded that it is not in Keith's best interests to have contact with respondent-father and prohibited visitation. On 14 January 2021, respondent-father filed written notice of appeal.

II. Issue on Appeal

¶ 13 On appeal, respondent-father argues the trial court abused its discretion at disposition by denying him visitation with Keith. We disagree.

III. Denial of Visitation

¶ 14 The Juvenile Code provides that "[a]n order that removes custody of a juvenile from a parent . . . shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." N.C. Gen. Stat. § 7B-905.1(a) (2019).

> The standard of review that applies to an assignment of error challenging a dispositional finding is whether the finding is supported by competent evidence. A finding based upon competent evidence is binding on appeal, even if there is evidence which would support a finding to the contrary. For challenged conclusions of law, we determine whether the trial court's facts support the challenged

> conclusion. We review a trial court's determination as to the best interest of the child for an abuse of discretion.

In re B.C.T., 265 N.C. App. 176, 185, 828 S.E.2d 50, 57 (2019) (citations and quotation marks omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted).

A. Challenged Findings of Fact

¶ 15 Respondent-father argues the trial court's findings of fact 36, 41, 42, and 43 are not supported by competent evidence. We address each of the challenged findings in turn.

1. Finding of Fact 36

¶ 16 Respondent-father challenges a portion of finding of fact 36, which states, "[Keith] is depressed and suffers from panic attacks." However, finding of fact 5 is not challenged on appeal, and includes a statement that "[Keith] has [panic] attacks a couple times per week." Thus, a finding that Keith "suffers from panic attacks" is supported by competent evidence. *See id.*

¶ 17 Respondent-father further contends Keith had never been diagnosed with depression, and the only evidence supporting this finding comes from the hearsay statement in the DSS report, "Ms. O'Briant reported [Keith] is very depressed . . . ." Moreover, O'Briant's actual testimony at disposition did not corroborate this

statement in the report.

¶ 18 While the DSS report does contain hearsay, an initial dispositional hearing is not governed by our formal rules of evidence, *In re J.H.*, 244 N.C. App. 255, 270, 780 S.E.2d 228, 239 (2015) (citation omitted), and the trial court is authorized to "consider any evidence, including hearsay . . . ." § 7B-901(a) (2019). However, for the DSS report to constitute competent evidence supporting the trial court's findings of fact, some oral testimony must be presented as well. *See In re S.P. & J.*, 267 N.C. App. 533, 536, 833 S.E.2d 638, 641 (2019) (holding that "[w]hile 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."). "At a dispositional hearing, a trial court may consider written reports and make findings based on these reports so long as it does not broadly incorporate these written reports from outside sources as its findings of fact." *In re J.N.S.*, 207 N.C. App. 670, 679, 704 S.E.2d 511, 517 (2010) (*purgandum*).

¶ 19 This is not a case where the trial court merely incorporated summaries from the DSS and GAL reports without making independent findings, or where it made findings in sole reliance upon the reports and arguments of counsel without hearing any oral testimony whatsoever. Here, the DSS report was admitted into evidence without objection. The trial court heard testimony from O'Briant and Walton; both witnesses were available for cross-examination. The trial court made independent

findings of fact after reviewing the reports and hearing witness testimony. Thus, a finding that Keith is "very depressed" is based on competent evidence.

2. Findings of Fact 41 & 42

¶ 20 Respondent-father challenges that trial court's findings of fact 41 and 42 in their entirety as follows:

> 41. Respondent-Father has not demonstrated any interest in working a case plan of reunification with [Keith].
>
> 42. Respondent-Father has not contacted the Department to inquire regarding [Keith's] well-being throughout the entire case.

¶ 21 Regarding the trial court's finding of fact 41, Walton testified respondent-father entered into a case plan where he was asked to complete a comprehensive clinical assessment; a psychological evaluation and follow those recommendations; random hair and urine drug screens; a parenting class; and to allow DSS access to his medical providers. Respondent-father did not comply with any aspect of his case plan. With respect to finding of fact 42, Walton further testified respondent-father did not call to check on Keith. When asked whether respondent-father ever inquires about "[Keith] and how he's doing[,]" Walton only reported respondent-father wants visitation. Each telephone conversation lasted approximately thirty seconds to one minute before respondent-father ended the call. The above testimony is competent evidence supporting the trial court's findings of fact 41 and 42.

3. Finding of Fact 43

¶ 22 Respondent-father challenges finding of fact 43, which states:

> 43. It is not safe for [Keith] to have any contact with Respondent-Father at this time. [Keith] needs to engage in [TF-CBT] prior to resuming contact with Respondent-Father. [TF-CBT] cannot be as effective as needed if contact with Respondent-Father resumes at this time. Visitation with Respondent-Father can be reviewed after trauma therapy is completed.

¶ 23 Respondent-father offers minimal support for his argument that safety concerns were uncorroborated and/or easily mitigated by imposing conditions of visitation. He attacks the credibility of "hearsay statements admitted under Rule 804(b)(5) and attributable to an autistic 12-year-old boy[.]" To that effect, he impermissibly asks this Court to "re-weigh the evidence in his favor," *Laprade v. Barry*, 253 N.C. App. 296, 302, 800 S.E.2d 112, 116 (2017) (citation omitted), when it is the province of the trial court to pass upon "the credibility of the witnesses and determine[] the weight to be accorded their testimony." *In re Hughes*, 74 N.C. App. 751, 756, 330 S.E.2d 213, 217 (1985) (citation omitted). Here, the trial court expressly found that Keith was credible, and respondent-father was not.

¶ 24 At disposition, O'Briant testified TF-CBT "is not effective in helping children deal with and overcome their trauma if they still have contact with the named perpetrator." While she further stated TF-CBT "can still be used if there is contact[,]" she clarified "it's not as efficient[.]" O'Briant did not believe it was her role as Keith's therapist to recommend no contact, but her testimony is competent evidence

supporting the trial court's finding that contact between respondent-father and Keith would risk the effectiveness of Keith's TF-CBT treatment.

IV. Conclusion

¶ 25 We discern no abuse of discretion in this case. Competent evidence supports the trial court's findings, and those findings in turn support a conclusion that it is not in Keith's best interests to have contact with respondent-father.

AFFIRMED.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).