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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-512

Filed 21 February 2023

Iredell County, No. 16JT227

IN THE MATTER OF:

C.M.S.

Appeal by petitioner-appellants from disposition order entered 25 March 2022 by Judge Christine Underwood in Iredell County District Court. Heard in the Court of Appeals 10 January 2023.

Spidell Family Law, by Megan E. Spidell, for petitioners-appellants.

Rebekah W. Davis for respondent-appellee.

GORE, Judge.

Petitioners-appellants, the paternal grandparents of the juvenile, initiated a private termination of the parental rights of the juvenile's mother. The trial court determined grounds existed to terminate the parental rights during the adjudication hearing, but ultimately determined it was not in the best interests of the juvenile at the dispositional stage. Petitioner-appellants now appeal various issues from the trial court's denial of their petition to terminate the parental rights of the juvenile's

mother. Upon review of the parties' briefs and the record, we discern no abuse of the trial court's discretion and therefore, we affirm.

I.

The juvenile was born in 2016 and soon after his birth, Iredell County Department of Social Services ("DSS") petitioned for non-secure custody on the basis of abuse and neglect. Both parents struggled with substance abuse and the child was adjudicated as abused and neglected on 25 January 2017 after the parents consented to the order. DSS soon placed the juvenile in his paternal grandparents' home but continued to maintain custody over the child until the father received custody on 19 December 2018. On 27 August 2020, petitioners-appellants filed for Ex Parte Emergency Custody due to the father's death on 8 August 2020. Petitioners-appellants received emergency custody and, on that day, filed for termination of the parental rights of the mother, respondent-appellee.

Respondent-appellee filed a motion for review in Iredell County and on 18 November 2020, the parties along with DSS and the Guardian ad Litem ("GAL"), entered into a Consent Order ("Guardianship Order") that granted guardianship to petitioners-appellants. The parties stipulated to the following finding of fact in the Guardianship Order:

The Court has considered whether adoption should be pursued and, if so, any barriers to the juvenile's adoption. Specifically, the Court finds that adoption should not be pursued, as there exists an appropriate relative or other suitable person who is willing to provide permanency for the juvenile in the context of a guardianship arrangement. The filing

of a petition or motion to terminate parental rights by DSS would be inconsistent with the juvenile's best interest."

Additionally, the Guardianship Order stated, "the permanent plan for the juvenile shall be guardianship." This Guardianship Order was entered into while the private termination proceeding was pending.

Petitioners-appellants argued during the dispositional hearing that their permanent plan for the juvenile is adoption by the paternal aunt. The GAL did not recommend termination of the mother's parental rights. Petitioners-appellants sought judicial notice of the prior GAL's report along with the case files of the mother's other two children, which the trial court granted. On 25 March 2022, the trial court entered a disposition order stating it considered all the evidence presented and included extensive findings of fact and conclusions of law based upon the best interests of the child factors within Section 7B-1110(a). N.C. Gen. Stat. § 7B-1110(a) (2022). The findings of fact included details about the paternal aunt, the Guardianship Order, the mother's attempts to visit with the child since the Guardianship Order, and actions by petitioners-appellants to deter the mother's visits. Petitioners-appellants timely filed a notice of appeal.

II.

Petitioners-appellants raise the following issues to contest the denied disposition order: (1) whether the trial court's finding of fact 3 is supported by competent evidence; (2) whether the trial court abused its discretion by considering

the Guardianship Order as a permanent plan when entered after the commencement of the petition for the termination of parental rights; (3) whether it considered all relevant evidence presented; and (4) whether the trial court abused its discretion by determining it was not in the best interest of the child to terminate the mother's parental rights.

A.

Petitioners-appellants first challenge the finding of fact 3 that states, "The likelihood of adoption of the juvenile is fair." We review a challenge to "the trial court's dispositional findings of fact" by "determin[ing] whether they are supported by competent evidence." *In re J.J.B.*, 374 N.C. 787, 793, 845 S.E.2d 1, 5 (2020). Unchallenged findings are presumably "supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Petitioner-appellants argue the probability was "high" instead of "fair" because the plan was for the paternal aunt, L. Simms, to adopt the child. The trial court included in findings of fact 4–27 details about the paternal aunt, her fiancé, and the child's connection; it also discussed the Guardianship Order with the permanent plan for the child. The court included in the dispositional findings the parties' consideration of adoption within the Guardianship Order and the parties' determination adoption should not be pursued, because an "appropriate relative" exists and "is willing to provide permanency for the juvenile" through a guardianship

relationship “which would not necessitate the severance of the parent-child relationship.” Further the court included in its dispositional findings that both parties consented to the following finding of fact in the Guardianship Order, “The best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time is guardianship, pursuant to N.C.G.S. § 7B-600(b).”

The court found the mother had made efforts to build a relationship with the child since the Guardianship Order was entered, and specifically that petitioners-appellants made it difficult for the mother “to build a stronger bond.” The court made multiple findings pointing to petitioners-appellants actions as a cause for frustrating attempts by the mother to build a strong bond with the child.

Petitioners-appellants point to multiple cases to support their claim the adoption chance was high rather than fair. However, in each of those cases, a significant distinction exists, there is no permanent plan available through a stable relative/guardian agreement. In *In re A.R.A.*, the juvenile needed a place of permanence since he was in foster care, and the termination of the mother’s parental rights would aid in seeking a permanent plan through adoption. 373 N.C. 190, 200, 835 S.E.2d 417, 424 (2019). In *In re L.M.T.*, the alternative to the termination of parental rights was continued foster care or returning to the parents’ home in which the court stated little to no improvement had been made to change the circumstances. 367 N.C. 165, 172, 752 S.E.2d 453, 458 (2013).

Since the trial court was in the best position to make credibility determinations and since there was competent evidence in the findings of fact to support dispositional finding 3, we will not disturb this finding on appeal, even if petitioners-appellants point to an alternative finding that could be supported by the evidence. *See In re A.U.D.*, 373 N.C. 3, 12, 832 S.E.2d 698, 704 (2019) (stating although there was evidence that could have “supported a contrary decision” it was outside of the Court’s purview to “reweigh the evidence”); *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003) (discussing the trial court’s role as a fact finder and this Court’s appellate role).

B.

Petitioners-appellants also challenge the relevancy of the Guardianship Order, entered after the commencement of the private termination petition as a permanent plan for the child. Petitioners-appellants boldly state our Supreme Court previously held the factor that considers whether termination of the parental rights will aid in the permanent plan is irrelevant in a private termination of parental rights (“TPR”) and cite to *In re A.U.D.* 373 N.C. at 10, 832 S.E.2d at 703. However, our Supreme Court stated, “because this was a private termination proceeding, there was no ‘permanent plan’ for [the juveniles] within the meaning of N.C.G.S. § 7B-1110(a)(3).” *Id.* This was simply one factor of the Court’s reasoning to justify its determination there was no reversible error present, because there was no permanent planning hearing in that case.

Permanent planning hearings are typically conducted after the initial disposition hearing when there is no plan of permanence and reunification efforts are still an option. *See* N.C. Gen. Stat. §§ 7B-906.1, 7B-906.2 (2022). These planning hearings are part of the required procedure in State-initiated abuse, neglect, and dependency cases when custody is taken from the parent, guardian, etc. *See* § 7B-906.1. When these permanent planning hearings are necessary, the court has a statutory duty to “adopt concurrent permanent plans and [must] identify the primary plan and secondary plan.” N.C. Gen. Stat. § 7B-906.2(b). Such permanent planning hearings may not take place in a private termination proceeding when there is already a permanent plan underway, such as adoption. This situation was present in *In re A.U.D.* 373 N.C. at 10, 832 S.E.2d at 703. There was a private adoption service assisting a “prospective adoption family” by seeking termination of the remaining parental rights held by the father. *Id.* at 5, 7, 832 S.E.2d at 700–01. Thus, there was no permanent plan within the statutory meaning of Section 7B-1110(a)(3) because the children were in the care of the adoption service. *Id.* Instead, from the beginning, the private parties initiated and sought termination of the parental rights to accomplish adoption of the juveniles. *Id.* at 10, 832 S.E.2d at 703.

The record reveals this case began through the State-initiated process for abuse and neglect of the juvenile and multiple permanent planning hearings were conducted in the Iredell County District Court, including on 19 December 2018. According to the order from the permanent planning hearing, reunification was the

primary plan and the juvenile was placed in the father's custody. After the father's death, petitioners-appellants sought custody of the child, termination of the mother's parental rights, and subsequently entered into the consensual Guardianship Order while the termination petition was pending. Therefore, *In re A.U.D.* is not applicable, as it relates to the permanent plan to the present case and it is an inaccurate application of the law to assert irrelevancy of the Section 7B-1110(a)(3) factor along with the Guardianship Order.

The Rules of Evidence are generally set aside during dispositional hearings other than the relevancy of the evidence. *See* N.C. Gen. Stat. § 7B-1110(a). Thus, “[e]vidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered during the dispositional stage. . . . [E]ither party may offer relevant evidence as to the child’s best interests.” *In re J.A.O.*, 166 N.C. App. 222, 224, 601 S.E.2d 226, 228 (2004). Further, our Supreme Court stated the following as it relates to the consideration of relative placement during a termination proceeding:

Although the trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding, it may treat the availability of a relative placement as a “relevant consideration” in determining whether termination of a parent’s parental rights is in the child’s best interests, *see* [N.C. Gen. Stat.] § 7B-1110(a)(6), with the extent to which it is appropriate to do so in any particular proceeding being dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available. . . . In the event that such conflicting evidence concerning the availability of a potential relative placement is presented to the trial court at the termination

hearing, the trial court should make findings of fact addressing the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family.

In re S.D.C., 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (quotation marks and citations omitted).

The Guardianship Order was relevant evidence that revealed the availability of relative placement and required the court to make findings of fact as stated by our Supreme Court. The findings revealed the trial court could achieve both “competing goals” by continuance of the child’s permanent plan with the paternal grandparents, where the aunt would remain a part of the child’s life and the court could avoid termination of the only remaining parental relationship. *Id.*

While petitioners-appellants argue the Guardianship Order was irrelevant, we conclude the Guardianship Order was highly relevant given the context of its timing and the requirement of the trial court to apply the best interests of the child standard. The Guardianship Order was presented and relied upon during these hearings, thus it was relevant evidence for the trial court to consider in applying the best interests of the child standard. Petitioners-appellants claim securing guardianship was the only option during the global pandemic, yet the language in the Guardianship Order implied a permanent plan beyond short term and immediate relief. Reliance upon the Guardianship Order was not to “be held against petitioners,” but the trial court took seriously the viable option to avoid competing goals since the guardians

consented to a permanent plan to hold custody of the child and preserve the ties between the child and biological mother.

Petitioners-appellants also seek to support their argument by relying upon an unpublished opinion in which this Court stated the trial court was not required to consider a guardianship option as a substitute to termination and adoption. *See In re Z.T.*, COA09-1576, 2010 WL 1542563 (2010) (unpublished). This case is different. The Guardianship Order was in place as a permanent option and provided an avenue for both permanence, stability, and preservation of the parent child relationship. Accordingly, the trial court's ruling was not an abuse of discretion nor manifestly unsupported by reason.

Additionally, petitioners-appellants claim the trial court failed to consider all the evidence after it judicially noticed the previous GAL's report (from the abuse and neglect proceedings) and court files of the mother's other existing children. Petitioners-appellants claim the files were not in the trial court record and therefore could not have been reviewed by the court. Petitioners-appellants rely on *In re Shue*, 311 N.C. 586, 597–98, 319 S.E.2d 567, 574 (1984), to state it was prejudicial error for the trial court to fail to consider all the evidence offered.

In *In re Shue*, the court refused to hear and consider evidence the mother sought to present. *Id.* The instant case differs from *In re Shue*, because the trial court overruled the objections to allowing judicial notice of the previous GAL report and the court filings of the mother's other children. Additionally, in both the

adjudication and disposition orders, the trial court stated it considered the evidence, the testimony presented, and counsels' arguments. Our Supreme Court stated in *In re Shue*, "the trial court was still required to hear and consider all of the evidence tendered to the court by the mother which was competent, relevant and non-cumulative. In failing to do so, the trial court committed prejudicial error." *Id.* at 598, 319 S.E.2d at 574. In the present case, it appears the trial court did consider all the relevant evidence presented under the best interests of the child standard and therefore did not err like the court in *In re Shue*.

C.

Petitioners-appellants challenge conclusions of law 2 and 3 in the disposition order. Conclusion of law 2 states, "It is not in the best interest of the minor child for the parental rights of his mother to be terminated." Conclusion of law 3 states, "This Order is in the best interests of the juvenile." In essence, it appears petitioners-appellants are challenging the trial court's application of the best interests of the child standard. "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re A.U.D.*, 373 N.C. at 6, 832 S.E.2d at 700. "Under this standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re N.C.E.*, 379 N.C. 283, 287, 864 S.E.2d 293, 297–98 (2021) (citations omitted).

At the disposition hearing in a termination of parental rights case, the trial court must determine if it is in the best interests of the child to terminate the parental rights. N.C. Gen. Stat. § 7B-1110(a). To apply this standard, the trial court considers the following factors:

- (1) The age of the juvenile.
- (2) The likelihood of adoption of the juvenile.
- (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
- (4) The bond between the juvenile and the parent.
- (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
- (6) Any relevant consideration.

Id. The trial court included dispositional findings as to the age of the juvenile, his likelihood of adoption, whether the termination of the parental rights would aid in accomplishing the permanent plan for the juvenile, facts relating to respondent-appellee's efforts to establish a bond with the juvenile, the quality of relationship between the juvenile and the paternal grandparents and paternal aunt, and the relevant evidence presented to the court.

Interestingly, although petitioners-appellants seek to distinguish its case from *In re J.A.O.*, it instead supports the trial court's reasoning for the outcome in the disposition order. 166 N.C. App. at 227, 601 S.E.2d at 230. We stated the following in *In re J.A.O.*:

[W]e conclude that the trial court abused its discretion in determining that it was in [the juvenile's] best interest to terminate respondent's parental rights. One of the underlying principles guiding the trial court in the dispositional stage is the recognition of the necessity for any child

to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological parents or legal guardians. . . . As our Supreme Court noted in *In re Montgomery*, the legislature has properly recognized that in certain situations, even where the grounds for termination could be legally established, the best interests of the child indicate that the family unit should not be dissolved.

Id. (quotation marks and citations omitted). The disposition order included extensive findings of fact that gave consideration to the statutory factors in Section 7B-1110(a). Therefore, the trial court did not abuse its discretion in concluding the order to deny the termination of the parental rights of respondent-appellee was in the best interests of the juvenile.

III.

Based upon the foregoing reasons, we discern no abuse of discretion in the trial court's disposition order. Therefore, we affirm.

AFFIRMED.

Judges ARROWOOD and WOOD concur.

Report per Rule 30(e).