

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-24

Filed 5 November 2024

Davidson County, Nos. 22 CVD 560; 20 JA 31

HEATHER MARIE FITZGERALD, Plaintiff,

v.

SAVANNAH FORTNER, TYLER HIBBETT, DONNA PERRELL, MICHAEL (TODD) PERRELL, THOMAS B. GRUBBS, and COURTNEY GRUBBS, Defendants.

Appeal by plaintiff from order entered 30 May 2023 by Judge Jon W. Welborn in Davidson County District Court. Heard in the Court of Appeals 12 June 2024.

Robinson & Lawing, LLP, by Attorney Christopher M. Watford, for plaintiff-appellant.

Spidell Family Law, by Attorney Harvey W. Barbee, Jr., for defendant-appellees Thomas B. Grubbs and Courtney Grubbs.

THOMPSON, Judge.

Katherine,¹ a minor, was removed from her biological parents' custody and placed in a kinship placement with her maternal great-grandmother (Guardian). Unfortunately, modification to the guardianship/custody of Katherine was not determined before Guardian passed away. Both appellant and appellees have demonstrated interest in obtaining custody of Katherine. As such, the juvenile court determined that it was in Katherine's best interest to terminate its jurisdiction and

¹ Pseudonyms or initials are used to protect the identity of the minor child throughout this opinion.

transfer jurisdiction to the Chapter 50 court. After careful review, we reverse the Chapter 50 court's 30 May 2023 order and the juvenile court's 17 June 2023 orders, and remand for further proceedings.

I. Factual Background and Procedural History

On 17 February 2020, the Davidson County Department of Social Services (DSS) filed a juvenile abuse/neglect/dependency petition regarding Katherine in the Juvenile Division of Davidson County District Court (juvenile court). On 22 July 2020, the juvenile court adjudicated Katherine a neglected juvenile, and a permanent plan of care was established wherein the primary plan was guardianship and the secondary plan was reunification with Katherine's parents.

On 26 April 2021, the juvenile court entered a review and permanency planning order. Pursuant to this order, Guardian was appointed as Katherine's legal guardian.

After Guardian was diagnosed with a terminal illness, she and Katherine moved in with Donna Perrell (Guardian's daughter) and Todd Perrell (Guardian's son-in-law) (the Perrells) so that the Perrells could help take care of both Katherine and Guardian. However, the Perrells had several children of their own and asked the appellees, Thomas and Courtney Grubbs, to help take care of Katherine. The record is void of any effort by DSS or Guardian to address these changes to Katherine's placement and caretaker arrangements for almost a year. On 18 February 2022, the appellees filed a motion for review and to dissolve Guardian's guardianship. Within

this document, the appellees alleged that based on Guardian's chronic illness, Guardian was "concerned that she may not be able to provide sufficiently for" Katherine and that Guardian asked the appellees "to help her plan for [Katherine]'s care and implement that plan." The appellees further indicated that Katherine began living with them around Christmas 2021 and would visit Guardian and call her on the telephone. Guardian passed away on 23 March 2022. Again, there is no indication from the record that the juvenile court's secondary plan of reunification with Katherine's parents was ever brought back to the juvenile court's review.

On 24 March 2022, Heather Fitzgerald (appellant) filed a complaint for custody and a motion for temporary custody order for Katherine.² In her complaint, appellant alleged that "[c]ircumstance[s] exist[ed] to warrant an expedited hearing in th[e] matter for the entry of a temporary custody order[.]" because of Guardian's death.

On 17 June 2022, the appellees' motion for dissolution of the guardianship came on for hearing in the juvenile court. As a result, the juvenile court made, *inter alia*, the following finding of fact:

30. Following the death of the Guardian, it is appropriate for further Orders of the Court to be made pursuant to Chapter 50 of the North Carolina General Statutes and that a copy of this Order be placed in the resulting civil file with the parties hereto named as necessary parties therein. Pursuant to N.C. [Gen. Stat.] §[] 7B-911, the persons to whom this Court awards custody must be parties in the civil action for child custody.

² Appellant is Katherine's paternal aunt.

The juvenile court concluded that:

1. The Court has jurisdiction over the parties and over the subject matter of this action, pursuant to Chapter 7B of the North Carolina General Statutes.
2. Upon the death of the appointed guardian of the person of the minor child, the Guardianship previously ordered in this juvenile proceeding is dissolved.
3. It is in the best interests of the minor child[] to maintain stability in her care until such time as the Court may receive home studies on the Movants, [the appellees], and the paternal aunt, [appellant], each of whom has expressed an interest in being awarded custody of the minor child, to place the minor child in the temporary custody of her respite care providers, [the Perrells].
4. It is in the best interest of the minor child and in the best interest of justice, pursuant to N.C. [Gen. Stat.] §7B-911, that the jurisdiction in this juvenile proceeding should be terminated and custody of the juvenile awarded to an appropriate person, as set forth below.
5. This matter should be filed in the civil action relating to the custody of the minor child in Davidson County file number 22 CVD 560, with the parties and caption set forth below.

Also on 17 June 2022, the juvenile court entered an order acknowledging that the juvenile court terminated its jurisdiction and transferred jurisdiction of the consolidated issues—namely, appellees’ motion to dissolve the guardianship and appellant’s complaint for custody of Katherine—to the Civil Division of the Davidson County District Court (Chapter 50 court).

On 17 August 2022, the Chapter 50 court ordered that appellant, appellees, and Katherine's biological parents attend mediation. On 21 September 2022, appellant and her attorney, Katherine's biological parents, and the appellees and their attorney attended a mediation conference, which resulted in an impasse and left the issue of custody of Katherine remaining for trial.

On 30 May 2023, the Chapter 50 court entered a custody order pertaining to Katherine. Pursuant to this order, the court granted the appellees sole legal and physical custody of Katherine and ordered, *inter alia*, a gradual decrease in visitation with appellant unless mutually agreed upon between the parties.

On 26 June 2023, appellant entered timely written notice of appeal.

II. Appellate Jurisdiction

As a threshold matter, we address whether this Court has jurisdiction to review the child custody order. Appellant-petitioner filed an amended petition for writ of certiorari (PWC) contemporaneously with this appeal in the event that the lower court's purported lack of subject matter jurisdiction deprived this Court of the authority to review the appeal. However, the Chapter 50 court's 30 May 2023 child custody order constitutes a final resolution of the parties' custody claims over Katherine. Thus, this appeal is properly before us. *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (explaining that an order that completely decides the merits of an action constitutes a final judgment for the purposes of appeal). As

such, we dismiss as moot appellant-petitioner's PWC and get to the merits of the matter on appeal.

III. Discussion

A. Standard of Review

“Whether a trial court has subject[]matter jurisdiction is a question of law, reviewed de novo on appeal.” *McMillan v. McMillan*, 267 N.C. App. 537, 542, 833 S.E.2d 692, 695 (2019) (citation omitted). Subject matter jurisdiction “derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.” *Id.* Moreover, “the trial court’s subject[]matter jurisdiction may be challenged at any stage of the proceedings.” *Id.* (citation omitted).

B. N.C. Gen. Stat. § 7B-911

Appellant first argues that the juvenile court failed to properly terminate its jurisdiction under N.C. Gen. Stat. § 7B-911, and thus, the Chapter 50 court lacked subject matter jurisdiction to enter the 30 May 2023 custody order. We agree.

Under North Carolina law, “[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent.” N.C. Gen. Stat. § 7B-200(a) (2023). And “[w]hen the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of [eighteen] years or is otherwise emancipated, whichever occurs first.” N.C. Gen. Stat. § 7B-201(a). Furthermore, this Court has recognized

that there are certain cases that “originate[] as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes,” but over time, DSS’s involvement becomes unnecessary “and the case becomes a custody dispute between private parties which is properly handled pursuant to the provisions of Chapter 50.” *Sherrick v. Sherrick*, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011). Moreover, “there is a clear dividing line between the exercise of the juvenile court’s jurisdiction and the [Chapter 50] court’s jurisdiction, and that line is drawn by N.C. Gen. Stat. § 7B-911.” *Id.*

N.C. Gen. Stat. § 7B-911 “provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action.” *Id.* The procedure outlined in this statute provides the juvenile protection, and the juvenile’s custodial situation stability, throughout the transition from juvenile court to Chapter 50 court. *Id.* Thus, N.C. Gen. Stat. § 7B-911 “requires that the juvenile court enter a permanent order prior to termination of its jurisdiction[,]” *id.*, and the order must satisfy the following:

- (1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to [N.C. Gen. Stat. §] 50-13.7.
- (2) Make the following findings:
 - a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.
 - b. At least six months have passed since the court made a determination that the juvenile’s placement with

the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911(c).

Here, the juvenile court exercised its jurisdiction over the neglect proceeding pursuant to N.C. Gen. Stat. §§ 7B-200, 7B-201, and 50A-201, and continued to have jurisdiction until its 17 June 2022 Order that purported to, *inter alia*, terminate jurisdiction pursuant to N.C. Gen. Stat. § 7B-911. While the record evidences the juvenile court's valiant attempt at complying with N.C. Gen. Stat. § 7B-911 under the circumstances, the juvenile court neglected to make findings that speak to N.C. Gen. Stat. § 7B-911(c)(2)(b). The order states in relevant part:

1. [Katherine] had been placed in the physical custody of [Guardian], with respite care provided by [the Perrells] and has been in such custody for a period in excess of six months next preceding the filing of the motion.
2. In a Review and Permanency Planning Order entered in this matter on [5 October] 2021, the [juvenile c]ourt ordered that [Guardian], maternal great-grandmother, remain appointed guardian of the person of the minor child, [Katherine], pursuant to N.C. [Gen. Stat. §] []7B-600. The said [juvenile c]ourt Order further provided, 'In the event the Guardian wishes to return custody to any parent or third party, the matter must be brought back before the [j]uvenile [c]ourt for Davidson County, North Carolina.'
3. In about November 2021, [Guardian] . . . was diagnosed with cancer and moved herself and [Katherine] into the home of [the Perrells]. Donna Perrell is the

Guardian's daughter and Todd [] Perrell is the Guardian's son-in-law. The Davidson County [DSS] had previously conducted a home study and approved the home of [the Perrells] as a *respite resource* for [Katherine]. (Emphasis added.)

....

7. [Katherine] was adjudicated to be a neglected juvenile on [22 July] 2020. The [juvenile c]ourt granted guardianship of [Katherine] to Guardian on [17 March] 2021.

8. The Guardian passed away on [23 March] 2022.

9. The [g]uardianship dissolved by death of the appointed Guardian in this matter.

10. The [DSS] and the Guardian *Ad Litem* agree that it is in the best interests of [Katherine] to establish a temporary custody order to avoid the need to return [Katherine] to the custody of the [DSS].

....

17. The best interest of [Katherine] continues to be served by retaining [Katherine] in her current placement, namely in the home of the Perrells.

....

25. Mr. Perrell testified that it was the wish of the Guardian and [the Perrells] that the [appellees] be either substituted as [g]uardians or awarded custody of [Katherine].

....

29. There is not a need for continued State intervention on behalf of [Katherine] through a juvenile court proceeding.

30. Following the death of the Guardian, it is appropriate for further Orders of the Court to be made pursuant to Chapter 50 of the North Carolina General Statutes and that a copy of this Order be placed in the resulting civil file with the parties hereto named as necessary parties therein. Pursuant to N.C. [Gen. Stat. §] 7B-911, the persons to whom this [c]ourt awards custody must be parties in the civil action for child custody.

The juvenile court's first finding of fact mentions that Katherine had been in the physical custody of Guardian, "with respite care provided by" the Perrells for at least six months preceding the filing of the appellees' motion for review. [R p 42] However, this finding is insufficient to satisfy the requirements of N.C. Gen. Stat. § 7B-911(c)(2)(b) because prior to this order, the juvenile court had not determined that placement with the Perrells was a permanent plan for Katherine. Rather, the juvenile court's determination as it relates to a permanent plan for Katherine was, "guardianship with a relative or court approved caretaker[.]" [R p 25]. Further, the juvenile court did not address its previously ordered secondary plan or give sufficient findings of fact about the change in the permanent plan regarding the parents. On review, the juvenile court gave deference to the appellees because the year-long arrangements allowed them to continue bonding and acting in the capacity of Guardian without court intervention or authorization. While the appellees may have stepped up to care for Katherine with the best intentions of providing guardianship or *in loco parentis* custody, Katherine's parents still had constitutional priority and secondary custody consideration once Guardian could no longer fulfill her role.

Reasonable efforts would have placed Katherine's matter before the juvenile court once DSS became aware of Guardian's declining health and Katherine's placement with non-parties to this case.

Thus, we hold that the juvenile court never terminated its jurisdiction and the case was never properly transferred to the Chapter 50 court; therefore, the district court, acting under its Chapter 50 jurisdiction, had no subject matter jurisdiction to enter its 30 May 2023 child custody order.

C. Standing

Appellant next contends that the appellees lacked standing to bring their motion to review and dissolve the guardianship. We agree.

“‘Standing’ refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter.” *Violette v. Town of Cornelius*, 283 N.C. App. 565, 568, 874 S.E.2d 217, 220 (2022) (citation omitted). “Standing is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo.” *Smith v. Forsyth County Bd. of Adjustment*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (internal quotation marks and citations omitted).

Appellant contends that the appellees lacked standing because they were not legal parties to the juvenile proceedings, and the appellees concede this point. After careful review, we hold that the appellees lacked standing to bring their motion.

In addition to the appellees not being legal parties to the juvenile proceeding pursuant to N.C. Gen. Stat. § 7B-401.1, the 26 April 2021 guardianship order explicitly states that, “[i]n the event the Guardian wishes to return custody to any parent or third party, the matter *must* be brought back before the [j]uvenile [c]ourt for Davidson County, North Carolina.” (Emphasis added.) The record indicates that Guardian was still alive at the time the appellees brought their motion for review of the guardianship. More importantly, the appellees put DSS on notice regarding Katherine’s guardianship. The appellees informed DSS of Guardian’s health condition, Guardian’s desire for Katherine to be placed with the appellees, that Katherine had been living with them for a number of months, and the appellees asked DSS what steps needed to be taken to dissolve the guardianship so that they could assume the role of guardians or obtain custody of Katherine. Thus, we hold that the appellees lacked standing and either Katherine’s Guardian or DSS could have brought a motion to review the guardianship.

IV. Conclusion

Based on the foregoing reasons, we hold that the juvenile court failed to properly terminate its jurisdiction over the neglect proceedings, and thus, the Chapter 50 court lacked subject matter jurisdiction to enter its child custody order on 30 May 2023. As such, we vacate the 30 May 2023 child custody order, 17 June 2022 juvenile court order, and the juvenile court’s 17 June 2022 transfer order, and remand for further proceedings consistent with this opinion. On remand, Katherine shall be

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returned to the nonsecure custody of Davidson County DSS pursuant to N.C. Gen. Stat. § 7B-507, and this case remains within the juvenile court's jurisdiction unless and until that court properly terminates its jurisdiction pursuant to N.C. Gen. Stat. § 7B-911. Furthermore, we conclude that the appellees lacked standing to bring their motion for review and dissolution of the guardianship, and thus, the juvenile court lacked subject matter jurisdiction to review said motion.

VACATED AND REMANDED.

Chief Judge DILLON and Judge GORE concur.