

No. COA06-842

TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

IN RE:)
)
S.M., C.E., E.E.)

From Wake County
(05-J-485)

APPELLEE GUARDIAN AD LITEM'S BRIEF

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STATEMENT OF FACTS

Cindy and Sarah are five and six years old, respectively.¹ (R.p. 2). In November of 2005, four months after the girls came into the custody of Wake County Human Services (“WCHS” or “DSS”), their brother, Evan, was born. (R.p. 41). The children’s mother, Ethel E. (“Appellant Mother” or “Ms. E.”), has fifteen-year history of substance abuse and, despite participating in at least three substance abuse treatment programs, has failed to overcome her addiction. (R.p. 91). Ethel E. is currently enrolled in a substance abuse program that permits only limited visitation with her children her children for two years and allows for only limited telephone contact for most of the first year of treatment. (R.p. 91, T.pp. 74-77). As a result of her history of substance abuse, Ms. E. has an extensive child protective services history and her parental rights to three older children have been terminated. (R.p. 92, 27).

Cindy and Sarah’s family had been receiving services through DSS since April of 2004. (R.p. 3). In February of 2004, there was a substantiated report of sexual abuse of Sally by Appellant’s husband, Michael E., which occurred while Appellant Mother was incarcerated for food stamp fraud. (R.p. 18). All told, WCHS received seven reports of neglect of the children since 2001. (R.p. 18). The report that resulted in WCHS filing the petition in the girls’ case was filed on

¹ S.M., C.E. and E.E.’s real names have been changed in order to preserve confidentiality and in compliance with the North Carolina Rules of Appellate Procedure.

February 24, 2005. (*Id.*). Among other things, the report alleged, drug use in the home and prostitution by the mother outside the home. (*Id.*).

Immediately before the girls were taken into DSS custody in June of 2005, Ms. E.'s adult daughter took the children out of Wake County to her home in Beaufort County. (R.p. 92, 27). At that time, DSS determined that Ms. E.'s daughter's home was not an appropriate placement for the children, and the children were placed with their paternal grandmother, Belinda W. (*Id.*).

At the time of the permanency planning hearing, Cindy and Sarah continued to exhibit behavioral problems that likely resulted from the girls' lack of a stable home environment. (R.p. 97, 103). Cindy had difficulty completing tasks and napping at her daycare, and Belinda W. reported that Sally had "begun having nightmares again." (R.p. 103). In part as a result of the girls' behavioral problems, the girls were to be moved from their grandmother's home to a pre-adoptive foster home around the time of the permanency planning hearing. (R.p. 104).

On November 4, 2005, the juvenile court entered an order adjudicating Cindy and Sarah neglected, and adjudicating Cindy dependent.² (R.p. 31). At adjudication, Ms. E. stipulated to a finding that she "continue[d] to use illegal drugs and had failed to establish stability." (R.p. 27). At the time the adjudication order was entered, Ms. E. was incarcerated in the Women's Correctional Facility in

² The adjudication of dependency was based upon Cindy's father's "inability to provide for her care or supervision due to mental incapability" and lack of "an appropriate alternative child care arrangement." (R.p. 31). Mr. E. has not appealed the permanency planning order.

Raleigh, North Carolina, following an incident in which someone was shot in her home, and the police subsequently found drugs on the premises.³ (R.p. 26, T. pp. 55-56). It was during this period of incarceration that Evan was born. (R.p. 41).

At the permanency planning hearing which is the subject of this appeal, Appellant Mother informed the court that all criminal charges pending against her had been dismissed, and that she had entered TROSA, a two-year drug treatment program in Durham, North Carolina. (T.pp. 42, 45-46). Ms. E. testified that the TROSA Program permitted her little or no physical contact, and only limited telephone contact, with her young children for the first year or two of treatment. (T.p. 61). At the conclusion of the hearing, the trial court ordered that reunification efforts with Ms. E. cease, and that the permanent plan for the children be changed to adoption. (R. pp. 88-95).⁴

STANDARD OF REVIEW

Appellee agrees with Appellant that the appropriate standard of review of a permanency planning order is abuse of discretion. However, where a party fails to take exception to findings of fact, those findings of fact are deemed supported by competent evidence and are conclusive on appeal. *See In re Smith*, 56 N.C. App. 142, 149, 287 S.E.2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E. 2d 212 (1982).

³ Although the charges that resulted in Ms. E.'s incarceration in late 2005 were later dismissed, Ms. E. admitted that the police found drugs in her house, and that someone had been shot in her home. (T.pp. 55-56).

⁴ Although WCHS did not ask to cease reunification efforts at permanency planning, WCHS had no objection to the GAL's recommendation that efforts should cease. (T.p. 9).

The permanency planning order in this case was entered on April 18, 2006, and contains 30 findings of fact. (R. pp. 88-95) In her brief, Appellant Mother does not assign error to any of these facts but argues generally that the findings do not support the trial court's order ceasing reunification efforts and changing the permanent plan of the children to adoption. Since all of the trial court's findings in this case are deemed supported by competent evidence and are conclusive on appeal, this Court's review is limited to a determination of whether there is competent evidence to support the findings of fact and whether based on those findings, the conclusions of law were proper. *See Starco, Inc. v. AMG Bonding & Ins. Servs., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996).

ARGUMENT

I. THE TRIAL COURT'S ORDER CONTAINS AMPLE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO N.C.G.S. § 7B-907 TO SUPPORT ITS DETERMINATION THAT REUNIFICATION EFFORTS WITH APPELLANT MOTHER SHOULD CEASE AND THAT THE PERMANENT PLAN FOR THE CHILDREN BE CHANGED TO ADOPTION.

In the case now before this Court, the trial court determined that reunification efforts with Appellant Mother were "futile and inconsistent with [the children's] safety and need for a safe home within a reasonable amount of time" and that adoption was the appropriate permanent plan for the children. (R.p. 92-93). In making this determination, the trial court properly took into account the

requirements of N.C.G.S. § 7B-907, and made appropriate findings of fact to support its conclusions of law.

N.C.G.S. § 7B-907(c) provides clear guidance to trial courts with respect to determinations in permanency planning hearings:

(b) At any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian ad litem, and any other person or agency which will aid it in the court's review. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

(1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;

(2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;

(3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;

(4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;

(5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for

the juvenile;

(6) Any other criteria the court deems necessary.

N.C.G.S. § 7B-907(b)(2006).

Despite Appellant's arguments to the contrary, the trial court's order in this case is replete with findings of fact which satisfy the statutory mandate. In support of its conclusion regarding the futility of reunification efforts and the appropriateness of a permanent plan of adoption, the trial court found:

22. That the mother has enrolled in the TROSA Program which will not allow her to visit with her children for at least one year and it would be two years before the children would have any possibility of even being reunited with her.

24. That the mother has participated or enrolled in a minimum of three treatment programs before enrolling in TROSA. That the mother has not successfully completed a substance abuse program and has relapsed in substance abuse after attending various substance abuse treatment programs. That the mother reports that she has a 15-year substance abuse history.

26. That given the ages of the children, 6 years, 4 years and 3 months, it is not reasonable to ask the children to wait two years or more for their mother to be in a position to parent the children.

28. That a court of competent jurisdiction has terminated the mother's rights to three other children.

29. That the best plan of care to achieve a safe, permanent home for the child within a reasonable time is: adoption. The only barrier to adoption is that the parents' parental rights have not been terminated.

30. That the following facts demonstrate that reunification efforts would be futile or inconsistent the [children's] safety and need for a safe home within a reasonable time: a) The mother has chosen to attend a two-year substance abuse program which will not allow her children to visit with her regularly until at least one year has lapsed and will not be

able to have her children reside with her for at least two years. Moreover, the mother is unable to provide any other family support or relatives who could care for the children while she completes the TROSA Program. The mother has a serious history of substance abuse that has lasted over 15 years. The mother has been enrolled in various treatment facilities over her 15-year substance abuse history; however, she has not been able to maintain sobriety from abusing substances. The mother has indicated to the Court that she is committed to this program knowing it is a two-year program and it would be at least two years before her children could reside in her home. A Court of competent jurisdiction terminated the mother's parental rights to three other children.

(R.pp. 90-92). The above findings are detailed and comport with the requirements of N.C.G.S. § 907.

II. THE TRIAL COURT PROPERLY CONSIDERED CHANGED CIRCUMSTANCES IN DETERMINING THAT REUNIFICATION EFFORTS WITH THE MOTHER SHOULD CEASE AND THAT ADOPTION WAS THE APPROPRIATE PLAN FOR THE CHILDREN.

As Appellant Mother notes in her brief, courts must consider “several factors, including but not limited to any substantial change after non-secure custody is obtained” in making permanency determinations pursuant to N.C.G.S. § 7B-907. *In re T.K., D.K. & J.K.*, __ N.C. App. ____, 613 S.E.2d 739, 740 (2005). Here, Appellant argues that the trial court failed to consider Ms. E.’s release from jail shortly before the permanency planning hearing and her participation in the TROSA program. (Appellant’s Brief, p. 9). Despite Appellant’s arguments to the contrary, the record in this case demonstrates that the trial court did, in fact, consider all of these “changed circumstances” in ordering the permanent plan for

the children be changed to adoption and in ordering that reunification efforts with Ms. E. cease.

At the permanency planning hearing, the trial court heard testimony from Ms. E., two representatives of TROSA, the WCHS social worker and the guardian ad litem. With respect to the changed circumstances of Ms. E.'s release from jail, Appellant Mother's own testimony in this case belies the futility of pursuing reunification efforts in this case.

At the hearing, Appellant deflected a number of questions regarding her responsibility for the conditions leading to an individual being shot in her home and the subsequent discovery of illegal drugs on the premises. (T.pp. 54-58).

Particularly telling is the following exchange between the DSS attorney and Appellant:

Q: You don't feel responsible for somebody getting shot in your house, for somebody having drugs in your house, and for . . . somebody selling [drugs] out of your house?

A: Well, I don't feel responsible. That's why the charges was dismissed 'cause I was not responsible.

Q: I'm not talking from a criminal perspective. I'm talking from a moral, parent perspective. . . . don't you have some responsibility?

A: Yes, I have responsibility.

Q: Okay. So . . . what was your role in this? Why did you let this happen?

A: Why did I let this happen?

Q: At this time you knew your kids were in the custody of Wake County Human Services.

A: Thank God my kids wasn't there to the house.

(T.pp. 56-57). This testimony, coupled with Appellant's own admission of her fifteen-year history of drug abuse, more than adequately supports the trial court's determinations regarding reunification and the permanent plan.

With respect to Ms. E.'s participation in TROSA, Appellee respectfully submits that enrolling in TROSA is hardly a "changed circumstance." Appellant Mother had been a drug addict for fifteen years. (R.p. 91, T.p. 69). Ms. E. testified that she had participated in a number of drug treatment programs over the past few years, and that she not only was unsuccessful in dealing with her drug addiction, she had left each program before its completion. (R.pp. 66-68).

In ruling that reunification efforts cease and the permanent plan be changed to adoption, Judge Monica M. Bausman unmistakably took TROSA into consideration. In her remarks at the close of evidence, Judge Bausman said:

I am going to cease reunification efforts, finding that it is inconsistent with the children's health, safety, and need for a safe permanent home within a reasonable amount of time. I simply do not think that two years is a reasonable amount of time . . .

Part of it is that she's in a two-year program. While she's in that two-year program, I'm not sure that there are really efforts that could be provided from the Agency. They can't provide . . . financial services, they can't provide visitation services, they're not going to be providing substance abuse evaluations or treatment or parenting classes. Those are things that are going to be provided by TROSA.

(T.pp. 97-98)⁵. The Judge also considered the fact that Appellant Mother had her rights to three other children terminated, Ms. E.’s long history of drug abuse, her failure to take responsibility for her actions and her failure to protect her three youngest children. (T.pp. 93-99).

In her brief, Appellant Mother argues that the court put Ms. E. “in the impossible position of choosing between intensive drug treatment and pursuing reunification with her children.” (Appellant’s Brief, p. 10). Given the mother’s long history of drug abuse and failed drug treatment programs, this statement is disingenuous. This statement is also indicative of the Appellant’s continued failure to take responsibility for her drug addiction and treatment. The juvenile court did not put Ms. E. in the “impossible position of choosing between intensive drug treatment and reunification with her children”: That choice has been, and will always remain, the Appellant’s choice.

CONCLUSION

For these reasons, Appellee Guardian ad Litem respectfully asks this Court to affirm the trial court’s permanency planning order ceasing reunification efforts with Appellant Mother and changing the children’s permanent plan to adoption.

⁵ Although Appellant argues that, “No reason appears as to why the court might not have continued reasonable efforts with the mother,” the trial court plainly expresses just such a reason here. (See Appellant’s Brief, p. 9).

Respectfully submitted this 28th day of August, 2006.

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CERTIFICATION OF COMPLIANCE
OF WORD COUNT

The undersigned attorney certifies that the foregoing brief in the above-entitled action, in accordance with Rule 28(j)(2)(A)(2) of the North Carolina Rules of Appellate Procedure, contains 2,533 words, which is less than the word count limit of 8,750 for briefs using Times New Roman proportional type (excluding cover, index, table of authorities, certificate of service, certification of compliance). The undersigned relies on the word count reported by Microsoft Word Processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing APPELLEE'S BRIEF was served by enclosing the same in an envelope, with postage fully prepaid and by depositing said envelope in a United States Post Office mailbox, addressed to:

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