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NO. COA11-422

NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

IN THE MATTER OF:

P.W.

Lenoir County
No. 09 JA 78

Appeal by respondent-mother from order entered 14 January 2011 by Judge Elizabeth A. Heath in Lenoir County District Court. Heard in the Court of Appeals 10 October 2011.

Annette W. Turik for petitioner-appellee, Lenoir County Department of Social Services.

Lisa Skinner Lefler for respondent-appellant mother.

Pamela Newell for the Guardian ad Litem.

BRYANT, Judge.

Where the trial court's findings of fact support its conclusion that respondent-mother is unfit to have custody and has forfeited her constitutionally protected status as a parent, we uphold the trial court's ruling. Where a trial court's award

of guardianship is supported by a reasoned decision, we find the trial court did not abuse its discretion.

On 3 February 2009, the Lenoir County Department of Social Services ("DSS") received a report alleging that P.W. ("Patty")¹, then eight years old, had been sexually assaulted by her fourteen-year-old cousin, D.D. ("David"). At the time of the assault, C.W. ("respondent"), Patty, Patty's cousin David, David's mother, and respondent's mother ("the grandmother") all lived together in the grandmother's home. Patty was placed with her maternal aunt and uncle ("the Whitmores"²), and DSS began providing services to the family on 26 February 2009. However, respondent was unable to find independent housing and continued to live with the grandmother and David. DSS filed a juvenile petition on 7 August 2009, alleging that Patty was a neglected juvenile.

After a hearing on 1 September 2009, the trial court entered an adjudication order on 2 October 2009 concluding Patty was a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15). In a separate disposition order entered that same day,

¹ In order to protect the identity of the child, and for ease of reading, we use "Patty" as a pseudonym for P.W. and David for Patty's juvenile cousin D.D.

² In order to protect the identity of the guardians, we use the name "Whitmores."

the trial court found that returning Patty to respondent's home would not be in Patty's best interest because respondent did not have "a stable living environment for herself and [Patty] in that [respondent] continues to live in the home with the cousin who sexually assaulted [Patty]." The court continued Patty's placement with the Whitmores and granted respondent and the Whitmores joint custody of Patty. The trial court also ordered respondent to cooperate and maintain regular contact with DSS and the Guardian ad Litem (GAL); obtain a mental health assessment and follow all recommendations for treatment; obtain and maintain stable housing and employment; and, if not employed, actively pursue her GED.

On 21 December 2009, the trial court entered a review order, finding that Patty was doing well in her placement with the Whitmores. The trial court also found that respondent had not been complying with the court's disposition order in that she had not obtained her mental health assessment, housing, or employment, and was not regularly attending GED classes. The court concluded that respondent and the Whitmores should retain joint custody of Patty, with placement of Patty remaining with the Whitmores.

The trial court held a second review hearing on 16 February 2010, and entered its order from that hearing on 19 March 2010. The court found that respondent had completed her mental health evaluation on 27 January 2010, but she had not begun therapy. The trial court further found that respondent reported she was taking a GED class online, but she did not provide any evidence of attendance at any GED classes. Additionally, the trial court found that respondent continued to reside in the grandmother's house with David. The court concluded that Patty's best interests would be served by granting legal guardianship of Patty to the Whitmores. Respondent appealed from this order, and we reversed and remanded for the trial court to make additional findings regarding whether respondent was an unfit parent or had acted in a manner inconsistent with her constitutionally protected status as a parent, and for the entry of an appropriate visitation plan. *In re P.W.*, ___ N.C. App. ___, 702 S.E.2d 554 (2010) (unpublished).

The trial court held a hearing on remand on 11 January 2011. During this hearing, the trial court allowed the parties to present arguments regarding a visitation plan, but the trial court took no additional evidence from respondent. The court

entered its order from the hearing on remand on 14 January 2011. Respondent appeals.

On appeal, respondent raises the following issues: whether the trial court erred in (I) changing the joint custody arrangement between the respondent and her relatives to a guardianship arrangement; and (II) in awarding guardianship to the Whitmores.

I.

Respondent first argues the trial court erred in changing the joint custody arrangement between herself and the Whitmores to guardianship with the Whitmores. Respondent contends that petitioner failed to present clear, cogent, and convincing evidence that the mother had acted in a manner that would forfeit her constitutionally-protected rights to the care, custody, and control of Patty. We disagree.

It is well-established that a parent has a constitutional right to the care, custody, and control of her children. See *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). However,

[a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the

parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (internal citations omitted). Thus, "a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

On remand, we instructed the trial court to address whether respondent was an unfit parent or had acted in a manner inconsistent with her constitutionally protected status as a parent. In its order on remand, the trial court made the following finding of fact regarding respondent's fitness and constitutionally protected status:

21. The respondent mother is unfit in that this juvenile was neglected because she did not receive proper care, supervision or discipline from her parent and lived in an environment injurious to her welfare, as consented to by the respondent mother in the adjudication. In addition, the respondent mother was further unfit and neglectful in that she failed to obtain, offer or provide any habitable or appropriate housing whatsoever over a period in excess of one year, in which the respondent mother and the 8 year old female juvenile could reside without the perpetrator of sexual abuse upon the juvenile also residing there. The respondent mother was also unfit and neglectful in that she failed to comply with the orders of the court requiring her to obtain mental health treatment after it was recommended for her, or obtain her GED or employment after she was given ample opportunity to do so. The respondent mother's failure to obtain, offer or provide habitable, appropriate or safe housing free from the perpetrator of sexual abuse upon her 8 year old daughter, her failure to obtain mental health treatment after it being recommended for her and her being ordered to do so, and her failure to obtain employment or a GED so that she might be in position to obtain habitable, appropriate, safe housing free from the perpetrator of sexual abuse upon her 8 year old daughter, is all conduct inconsistent with the respondent mother's constitutionally protected status as a parent and the respondent mother therefore forfeited her constitutionally protected status as a parent.

Respondent has not challenged this finding of fact, and it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408

S.E.2d 729, 731 (1991)). As a result, we hold this finding of fact supports the trial court's conclusion that respondent "is unfit to have custody of the juvenile and she has forfeited her constitutionally protected status as a parent to have custody of the juvenile." Therefore, having found respondent had forfeited her right to custody, the trial court did not err in changing the custody arrangement. Respondent's argument is overruled.

II.

Respondent next argues the trial court abused its discretion in awarding guardianship to the Whitmores. We disagree.

"We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.'" *In re P.O.*, ___ N.C. App. ___, ___, 698 S.E.2d 525, 529 (2010) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997)). If the trial court's findings of fact are supported by competent evidence, then they are binding on appeal despite evidence to

the contrary. *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004). Further,

"[t]he trial court's custody decisions must be based upon the best interests of the children. The custody order shall include sufficient findings of fact to support its conclusions of law concerning the best custody placement for the children. Broad discretion is given to the trial court in its fact-finding duties and in making ultimate custody determinations."

O'Connor v. Zelinske, 193 N.C. App. 683, 687, 668 S.E.2d 615, 617 (2008). "This Court will not disturb a trial court's findings absent a clear showing that the trial court abused its discretion." *Id.* (citing *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 671-72 (1984)).

Respondent contends that Patty's best interests are not served by appointing a guardian for her at a hearing held only six months after the inception of the case. However, respondent's arguments are misplaced. While it had only been six months from the time of the filing of the neglect petition until the review hearing awarding guardianship of Patty to the Whitmores, over a year had lapsed since DSS first became involved with respondent and Patty.

Because the trial court found respondent unfit and that she had forfeited her constitutionally-protected status as Patty's

parent, the trial court properly applied the best interest of the child test in determining whether to modify respondent's custody of Patty. See *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) ("[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit. . . ." (citing *Price*, 346 N.C. at 79, 484 S.E.2d at 534)). In applying this test, the trial court found that respondent was unable to obtain appropriate independent housing, did not show significant progress toward obtaining her GED, did not provide consistent support for her daughter or show that she would be able to provide such support, and did not comply with recommended mental health therapy. At the time of the review hearing, respondent still lived with the grandmother and her nephew who sexually assaulted Patty. Further, respondent failed to maintain contact and communication with DSS despite DSS's efforts to reunify respondent with Patty.

On the other hand, the trial court found that Patty was thriving in her placement with the Whitmores based on evidence that Patty attended school regularly, made straight A's, and was well-cared for by the Whitmores. Accordingly, the trial court

found that guardianship with the Whitmores was in Patty's best interest.

Therefore, we cannot find the trial court's award of guardianship of Patty to the Whitmores so arbitrary that it was not the result of a reasoned decision. Respondent's argument is overruled, and the order of the trial court is affirmed.

Affirmed.

Judge Elmore and Judge Ervin concur.

Report per Rule 30(e).