IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1270

Filed: 5 July 2017

Johnston County, Nos. 14 JA 49–51

IN THE MATTER OF: M.B., B.B., and J.B.

Appeal by respondents from orders entered 2 June 2016 by Judge Paul A. Holcombe III in Johnston County District Court. Heard in the Court of Appeals 22 June 2017.

Holland & O'Connor, P.L.L.C., by Jennifer S. O'Connor, for petitioner-appellee Johnston County Department of Social Services.

Marie H. Mobley for guardian ad litem.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant mother.

The Tanner Law Firm, by James E. Tanner III, for respondent-appellant father.

ELMORE, Judge.

Respondent-parents appeal from permanency planning orders awarding guardianship of their three adopted children, M.B. (Matt), B.B. (Barb), and J.B. (Joe),[1] to the maternal grandparents. We affirm.

I. Background

On 14 April 2014, the Johnston County Department of Social Services (DSS) filed two separate juvenile petitions. The first petition alleged that Matt was a neglected juvenile. The second petition alleged that Barb and Joe were abused, neglected, and dependent juveniles. By order entered 31 December 2014, all three juveniles were adjudicated neglected. Barb and Joe were placed in the custody of their maternal grandparents while Matt remained in the custody of respondents.

On 25 November 2015, after a series of permanency planning hearings, the trial court entered an order (1) terminating its jurisdiction in Matt's case and awarding custody of Matt to respondents; and (2) retaining jurisdiction in Barb's and Joe's cases under a permanent plan of reunification and allowing them to remain in the custody of their maternal grandparents.

On 21 December 2015, DSS filed a new petition alleging that Matt was a neglected juvenile. Matt was removed from the home and placed in nonsecure custody with DSS. After adjudication and disposition hearings, the trial court entered orders adjudicating Matt neglected and placing him in the custody of his

[1] Stipulated pseudonyms are used to protect the identities of the juveniles and to promote ease of reading.

maternal grandparents. Respondents appealed, and on 21 March 2017, this Court filed an unpublished opinion affirming the orders. *In re M.B.*, No. COA16-788 (N.C. Ct. App. Mar. 21, 2017).

On 2 June 2016, while respondents' first appeal was being perfected, the trial court entered two permanency planning orders—one in Matt's case and the other in Barb's and Joe's cases—awarding guardianship of the juveniles to the maternal grandparents. Respondents' appeals of those orders are now before us.

II. Discussion

"All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citation omitted). "This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235 (2002)). If the findings "are supported by any competent evidence, they are conclusive on appeal." *Id.* (citing *In re Weiler*, 158 N.C. App. at 477, 581 S.E.2d at 137). "The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (citing

In re Pittman, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 123 S. Ct. 1799, 155 L. Ed. 2d 673 (2003)). "We review a dispositional order only for abuse of discretion." *Id.* (citing *In re Pittman*, 149 N.C. App. at 766, 561 S.E.2d at 567).

First, respondents argue that the trial court erred by awarding guardianship to the maternal grandparents absent findings that respondents are unfit as parents or have acted inconsistently with their constitutionally protected status as parents.

A parent has a "constitutional right to custody and control of his or her children." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001). A parent may forfeit this right "if he or she is found to be unfit or acts inconsistently 'with his or her constitutionally protected status.' " *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). Before a district court grants guardianship of a child to a non-parent, the "court must 'clearly address whether [the] respondent is unfit as a parent or if [the respondent's] conduct has been inconsistent with [his or her] constitutionally protected status as a parent." *In re R.P.*, No. COA16-856, slip op. at 5 (N.C. Ct. App. Mar. 21, 2017) (quoting *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015)). "Once a parent cedes his or her protected status, custody issues must be resolved based on the best interests of the child." *In re A.C.*, ___ N.C. App. ___, ___, 786 S.E.2d

728, 735 (May 17, 2016) (No. COA15-1114) (citing *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534–35 (1997)).

Neither DSS nor the guardian *ad litem* disputes that the trial court failed to find respondents were unfit as parents or acted inconsistently with their protected status as parents. Instead, they contend that respondents may not raise this constitutional issue for the first time on appeal, not having first presented it to the trial court. On this point, we believe our decision in *In re R.P.* is instructive.

In *In re R.P.*, the respondent argued on appeal that the trial court erred in granting guardianship of his minor child to a non-parent "without first determining that [the respondent] was unfit or acted inconsistently with his constitutionally protected parental status." *In re R.P.*, No. COA16-856, slip op. at 5. Addressing the propriety of the respondent's challenge, this Court first explained that "a parent's right to findings regarding her constitutionally protected status is waived if the parent does not raise the issue before the trial court." *Id.* at 5–6 (citing *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011)). Although the respondent failed to raise "his constitutional argument" below, we "decline[d] to find waiver" in light of irregularities at the permanency planning hearings. *Id.* at 6–8. At an initial hearing, the trial court had instructed the parties "that it would 'proceed with guardianship at the *next* date,' " but at the subsequent hearing, the court refused to consider evidence of guardianship, "stating that guardianship had been determined at the

prior hearing." *Id.* at 7–8. Because the "respondent was not afforded the opportunity to raise an objection at the permanency planning review hearing," the Court concluded that he had not waived his constitutional challenge. *Id.*

Unlike the circumstances of *In re R.P.*, respondents had a meaningful opportunity to raise their constitutional challenge at the permanency planning hearing but failed to do so. The transcript of the hearing reveals frequent references by the parties to the recommendation of guardianship. In challenging guardianship as a disposition, however, respondents largely focused on what they considered the best interests of the children—namely, their preference to live with respondents or the grandparents—and the willingness of the grandparents to serve as guardians. At the close of the evidence, respondents continued to argue against guardianship based on the best interests of the children but expressed no concern with the evidence—or lack thereof—showing that they were unfit as parents or acted inconsistently with their protected status as parents. After hearing the arguments of counsel, the trial court dictated its findings and disposition in open court. The court then asked: "Anything else by the parents' attorneys that they would like me to consider?" Respondents, again, failed to object to the absence of findings that they were unfit as parents or acted inconsistently with their protected status as parents. Under these circumstances, we conclude that respondents waived appellate review of their first argument.

Next, respondent-father argues that (1) the trial court's findings of fact do not sufficiently demonstrate that reunification efforts would be unsuccessful or inconsistent with the juveniles' health or safety; and (2) the orders do not sufficiently articulate why guardianship was preferable to custody.

At a permanency planning hearing, the trial court must consider certain statutory criteria and make findings as to those which are relevant, including:

> (1) Services which have been offered to reunite the juvenile with either parent whether or not the juvenile resided with the parent at the time of removal or the guardian or custodian from whom the child was removed.
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> . . . .
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> (3) Whether efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time. The court shall consider efforts to reunite regardless of whether the juvenile resided with the parent, guardian, or custodian at the time of removal. If the court determines efforts would be futile or inconsistent, the court shall consider a permanent plan of care for the juvenile.

N.C. Gen. Stat. § 7B-906.1(d)(1), (3) (2015).[2] If the juvenile is not placed with a parent and such placement is unlikely within six months, the court must also consider and make findings as to "whether legal guardianship or custody with a relative or some other suitable person should be established." *Id.* § 7B-906.1(e)(2).

[2] Amendments to subsection (d)(3) became effective 1 July 2016, after the permanency planning hearing orders were entered. *See* Act of July 14, 2016, S.L. 2016-94, sec. 12C.1.(g1).

In its permanency planning order for Matt, the trial court found that it is not possible for the juvenile to return home immediately or within six months due to the following concerns:

> 5. . . . [DSS] has been working with the family since September 2013, and the [two older children] have been out of the home for approximately over a year and a half, without resolution of the issues, which led to those juveniles' removal. [DSS] has provided any and all services to the family in hopes of reunification with the two older siblings, without success. The parents continue with the same pattern of behavior, which has now led to this child being removed and adjudicated as neglected, even after completing the services on their case plan. The Court finds that although the parents have completed the items and services on their previously developed case plan, there has been no resolution of the protective issues, which places this child at risk of harm if returned to the parents' care. The Court further finds that there has been no change in the parents' parenting or home life and the mother continues to demonstrate a lack of empathy towards the adoptive children. The parents further continue to lack an understanding of the current situation, and the child's ongoing placement out of their home, and their role and responsibility therein. The Court finds that the parents have not made adequate progress within a reasonable period of time under their case plan. The Court finds that reunification would be unsuccessful and inconsistent with these juvenile[s'] health and welfare. The Court further finds that the parents have acted inconsistent with the health and safety of the child.

Nearly identical language appears in the permanency planning order for Barb and Joe. In its Finding of Fact No. 6, also set forth in each order, the court found that the juveniles could not be returned home immediately or within six months, that custody

or guardianship with a relative or nonrelative caregiver should be explored as a permanent plan, that the grandparents are willing and able to provide proper care and supervision in a safe home, that placement in the grandparent's home would be in the juveniles' best interests, that their home was approved as a placement, and that the grandparents are willing to provide permanence through guardianship. We conclude that these findings sufficiently address the statutory criteria.

Finally, respondents challenge the portion of the trial court's order awarding visitation. When a juvenile is placed in the custody or guardianship of a relative, "any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised." N.C. Gen. Stat. § 7B-905.1(c) (2015). Respondents contend that the court violated this statutory mandate by awarding visitation without specifying any minimum frequency or length of the visits.

In each permanency planning order, the court found that "the visitations have gone well" and "the attached visitation plan(s) are appropriate between the juvenile(s) and parents." The visitation plan, however, was omitted from the record on appeal filed with this Court. Upon discovering the omission, DSS and the guardian *ad litem* filed a supplement to the printed record on appeal. This supplement included the visitation plan, which applied to all three juveniles, and a sworn affidavit by a deputy clerk of superior court indicating that the visitation plan

was attached to the permanency planning order in the clerk's files. Respondents filed a motion to strike the supplement, which was referred to this panel for decision. In our discretion, we deny respondents' motion to strike, and we consider the visitation plan. In reviewing the plan, we note that it contains detailed provisions concerning the frequency and length of visits. We conclude, therefore, that the court complied with the statutory requirements.

III. Conclusion

Based on the foregoing, we affirm the permanency planning orders for Matt, Barb, and Joe.

AFFIRMED.

Judges TYSON and BERGER concur.

Report per Rule 30(e).