IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-541

No. COA22-44

Filed 2 August 2022

Person County, No. 19JA27

IN THE MATTER OF:

P.A.B.

Appeal by respondent-mother from order entered 5 October 2021 by Judge Benjamin S. Hunter in Person County District Court. Heard in the Court of Appeals 7 June 2022.

Anne C. Wright for respondent-appellant-mother.

Raleigh Divorce Law Firm, by Katelyn Bailey Heath and Sidney P. Overby, for the Guardian ad Litem.

Thomas L. Fitzgerald for petitioner-appellee Person County Department of Social Services, no brief.

GORE, Judge.

¶ 1 Respondent-mother appeals from the trial court's 5 October 2021 Permanency Planning Review Order changing custody of the minor child Piper.[1] This Court has

[1] A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 42(b)(1).

jurisdiction pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2021) ("Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.").

¶ 2 Respondent-mother raises four issues on appeal pertaining to the trial court's grant of guardianship without a finding that respondent-mother was unfit or acted inconsistently with her constitutionally protected parental status; visitation conditions; waiver of further review hearings; and best interests determination. Upon review, the trial court's order does not contain the necessary findings required by our case law. We vacate and remand for further proceedings.

I.

¶ 3 According to medical records, Piper had a traumatic birth. She was born testing positive for amphetamines and methamphetamines. She had to be placed on scheduled doses of morphine every twelve hours after having three rescue doses of morphine for withdrawal symptoms. She experienced withdrawal symptoms at high levels that required morphine for several days before she could be slowly weaned. Respondent-mother and Piper's father tested positive for numerous substances at levels indicating high frequency of use, including amphetamine and methamphetamine.

¶ 4 Initially, both parents were in denial about Piper's withdrawal symptoms. Respondent-mother and father went several days without visiting Piper, and neither parent could be contacted by phone when it was time to plan Piper's discharge from

the hospital.

¶ 5 The Person County Department of Social Services ("DSS") became formally involved with respondent-mother and Piper three weeks after Piper's birth. DSS filed a Juvenile Petition on 25 June 2019 based on grounds of neglect, and a nonsecure custody order for Piper was also entered the same day. DSS continued to have nonsecure custody of Piper through July 2019, when respondent-mother could neither be found nor contacted by DSS, nor did she offer a temporary placement option for Piper.

¶ 6 An adjudication and disposition hearing was held on 30 August 2019, with the resulting order being entered on 4 November 2019. Pursuant to that order, respondent-mother was allowed visitation for at least one hour per week and was ordered to follow the recommendations of the Family Services Agreement, complete the Parents as Teachers Program, undergo a substance use assessment and follow all recommendations, and submit to random drug testing within two hours of the request.

¶ 7 Following a review hearing and subsequent order entered 25 November 2019, Piper remained in DSS custody after the trial court determined that there were multiple barriers to respondent-mother meeting the permanency goals. The DSS recommendation at the time was reunification with a concurrent plan of guardianship

with a relative. Piper was placed with a relative and relative's spouse, the Carters,[2] following a 17 January 2020 hearing.

¶ 8 Prior to the Permanency Planning hearing, respondent-mother and her fiancé tested positive for methamphetamine in May 2021. A hair follicle test was taken on 9 July 2021, in which respondent-mother and her fiancé again tested positive for methamphetamine.

¶ 9 The Permanency Planning hearing took place on 3 September 2021, with a judgment and order entered 4 October 2021 determining that Piper would remain in the care of her familial placement, Mrs. Carter, and established guardianship over Piper to the Carter family. No further hearings were set in this matter and counsel was released as attorney of record. Respondent-mother timely filed notice of appeal.

II.

¶ 10 This Court reviews permanency planning orders to determine "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). Review of a trial court's conclusion of law that a parent has acted inconsistently with their constitutionally protected status must be conducted under a *de novo* standard. *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017).

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[2] We use a pseudonym for the foster family.

III.

¶ 11 The first issue presented is whether the trial court erred by granting guardianship of Piper to the Carters without first determining whether respondent-mother was unfit or acted inconsistently with her constitutionally protected parental status. Respondent-mother has "preserved this issue for appellate review by her evidence, arguments, and opposition to guardianship at the trial." *In re B.R.W.*, 278 N.C. App. 382, 399, 863 S.E.2d 202, 216 (2021).

¶ 12 The trial court cannot grant guardianship of a child to a nonparent unless it "clearly address whether the respondent is unfit as a parent or if [her] conduct has been inconsistent with [her] constitutionally protected status as a parent." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (*purgandum*). "Although there may be evidence in the record to support a finding that [a] [r]espondent acted inconsistently with [her] custodial rights, it is not the duty of this Court to issue findings of fact." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). "[A] finding that a parent is unfit or acted inconsistent with his or her constitutionally protected status is nevertheless required, even when a juvenile has previously been adjudicated neglected and dependent." *In re R.P.*, 252 N.C. App. at 304, 798 S.E.2d at 430 (citation omitted).

¶ 13 Here, the trial court concluded that it was in Piper's best interests for her guardianship to be placed with the Carters. However, it failed to issue a finding that

respondent-mother was unfit or acted inconsistently with her constitutionally protected status before making that determination. As a result, we must vacate and remand this matter for further proceedings. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings the court deems necessary. Because we vacate and remand on this basis, it is unnecessary to address respondent-mother's remaining arguments.

IV.

¶ 14 For the foregoing reasons, we vacate the trial court's Permanency Planning Review Order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judge COLLINS concurs.

Judge ARROWOOD concurs by separate opinion.

Report per Rule 30(e).

ARROWOOD, Judge, concurring in part and concurring in the result.

¶ 15 I agree with the majority that the trial court's order should be remanded. However, for the following reasons, I believe it would be helpful to specify how and where the trial court erred below.

I. Guardianship

¶ 16 "[P]arents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017) (citation and quotation marks omitted) (alteration in original). "[A] parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child." *Id.* (citation and quotation marks omitted) (alteration in original).

¶ 17 "This Court has mandated that the trial court must *clearly* address whether the parent is unfit or if their conduct has been inconsistent with their constitutionally protected status as a parent prior to considering granting custody or a guardianship to a nonparent." *In re A.W.*, 280 N.C. App. 162, 2021-NCCOA-586, ¶ 13 (citation and quotation marks omitted) (emphasis added). "Determining whether a parent has forfeited their constitutionally protected status is a fact specific inquiry. In making such a determination, the trial court must consider both the legal parent's conduct and his or her intentions *vis-à-vis* the child." *Id.* ¶ 17 (citation and quotation marks omitted).

¶ 18 "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by *clear and convincing evidence*." *In re R.P.*, 252 N.C. App at 301, 798 S.E.2d at 430 (citation and quotation marks omitted) (emphasis added) (alteration in original). "[T]he trial court *must be clear* that it is applying the 'clear, cogent, and convincing' standard when it determines a parent has acted inconsistently with their paramount right to parent their children." *In re N.Z.B.*, 278 N.C. App. 445, 2021-NCCOA-345, ¶ 19 (citation and some quotation marks omitted) (emphasis added) (alteration in original).

¶ 19 In *In re A.W.*, the trial court had found "by clear, cogent, and convincing evidence that neither parent is a fit and proper parent[,] . . . that the parents are acting inconsistent with the child's health and welfare[,]" and that "the parents have not made themselves readily available to JCDSS or the GAL program." *In re A.W.*, ¶ 18. On appeal, this Court concluded that:

> The trial court's conclusion to cease reunification efforts does not satisfy the requirement that before a court may award permanent custody of a child to foster parents and waive further review, the court must determine whether the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents.
>
> . . . .
>
> The trial court states, "neither parent is fit or proper," but this assertion, whether a finding or a conclusion, is not based upon clear and convincing evidence of how either parent was presently "unfit" to exercise their constitutional

> right to parent Andrea. Further, the court's order contains no mention of how either parent acted inconsistently with their constitutionally protected status as parents. The court's findings must reflect how the parents were unfit or acted inconsistently "*vis-à-vis* the child."

Id. ¶¶ 19, 22 (citations omitted).

¶ 20 In the case *sub judice*, the trial court made the following written findings of fact regarding respondent-mother:

> 16. The mother, even though she is in treatment for substance abuse, continues to test positive for amphetamines and methamphetamines;
>
> . . . .
>
> 18. The mother and father were both active users of methamphetamines during the mother's pregnancy;
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> . . . .
>
> 23. A prior test for drugs in May, 2021 showed a continuing use of Methamphetamine by the mother and her fiancé[;] . . . .
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> 24. [Respondent-mother] provided a hair follicle test on July 9, 2021 . . . and the test . . . came back positive for methamphetamines;
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> . . . .
>
> 32. [Respondent-mother] was shown the two LabCorp . . . lab results, both of which showed she was positive for Methamphetamine;
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> 33. She agreed with the first (earliest) exhibit, yet denied the second positive drug test (July 14, 2021); she could not provide an explanation why she would so disagree;

. . . .

35. Upon review of the evidence provided, the Court stated in open Court, AND FINDS AS A FACT: "It defies logic that both you and your fiancé's tests from this past July are positive for meth from the same lab (LabCorp) that has been doing this all along, you have a long-standing meth problem; your child was born with withdrawals from meth, and then this past July you test positive for meth and it's a mistake by the lab (LabCorp[ ]), or some conspiracy against you; my experience is the simplest answer is usually the right one and in this case I find that you are still using meth at least as recent to test positive this past July, 2021";

. . . .

38. Barriers to achieving the permanent goal of reunification:

    -[Respondent-mother]'s recent positive drug screen;

    -[Respondent-mother]'s fiancé's positive drug screen;

    . . . .

    -[Respondent-mother] has a long history of substance use and has not begun substance use treatment;

. . . .

39. [Piper] has never resided with the mother and father during her lifetime, as she had a lengthy hospital stay, and was placed in foster care upon her release from the hospital[.]

¶ 21 These extensive findings are supported by the evidence presented to the trial court, as the majority cites. Although I believe these findings would have been more than sufficient to support a conclusion of law that respondent-mother acted

inconsistently with her constitutionally protected parental status, the trial court did not make such a conclusion of law nor an ultimate finding reflecting the same. Indeed, the trial court failed to clearly "determine whether the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents[,]" *see id.* ¶ 19 (citation omitted), and also failed to make any findings that "reflect how the parents were unfit or acted inconsistently *vis-à-vis* the child." *See id.* ¶ 22 (citation and quotation marks omitted).

¶ 22 Additionally, though respondent-mother does not clearly raise this issue on appeal, both the trial court's ruling in open court and the written order fail to articulate and apply the standard of proof—clear and convincing evidence. "[W]hen a trial court fails to apply the clear and convincing evidence standard when making findings of fact in support of a conclusion that a parent has acted inconsistently with their constitutionally protected status, the case must be remanded for findings of fact consistent with this standard of evidence." *In re A.C.*, 280 N.C. App. 301, 2021-NCCOA-280, ¶ 11 (citation and quotation marks omitted).

¶ 23 Accordingly, I would remand on the issue of guardianship, not for further proceedings, but to remedy these errors based upon the record and evidence previously presented.

II. Visitation

¶ 24 N.C. Gen. Stat. § 7B-906.1 provides that the trial court shall consider and make written findings regarding "[r]eports on visitation that has occurred and whether there is a need to create, modify, or enforce an appropriate visitation plan in accordance with G.S. 7B-905.1." N.C. Gen. Stat. § 7B-906.1(d)(2) (2021). In turn, N.C. Gen. Stat. § 7B-905.1 provides:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation. The court may specify in the order conditions under which visitation may be suspended.
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> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised*. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1 (2021) (emphasis added). Additionally, "the trial court may not delegate its judicial function of awarding visitation to the custodian of a child." *In re C.S.L.B.*, 254 N.C. App. 395, 399, 829 S.E.2d 492, 495 (2017) (citation omitted).

¶ 25 Here, the trial court made the following findings of fact regarding visitation:

> 17. [Respondent-mother] attends bi-weekly visits, engages with [Piper] at such visits and is attentive to her needs;
>
> . . . .
>
> 56. That visitation between the Respondent mother and the child remains in the best interest of the child, and the Guardians should have discretion to establish appropriate rules for future visits with the parents as the restrictions of the COVID pandemic subside[.]

The trial court then ordered "[t]hat the Guardians maintain the visitation plan between the Respondent mother and her child, to include supervised visitation; such Guardians have the discretion of increasing the character and duration of visitations based on the mother's future circumstances[.]"

Taken together, the findings and order on the issue of visitation show that the trial court misapprehended the applicable law, as it failed to "specify the minimum frequency and length of the visits[,]" *see* N.C. Gen. Stat. § 7B-905.1(c), and also wrongfully delegated its authority to establish the parameters for visitations. *See In re C.S.L.B.*, 254 N.C. App. at 399, 829 S.E.2d at 495 (citation omitted). Accordingly, I would remand on the issue of visitation to remedy this error.

III. Hearing Waiver

¶ 26 Per N.C. Gen. Stat. § 7B-906.1:

> [T]he [trial] court may waive the holding of hearings required by this section . . . if the [trial] court finds by clear, cogent, and convincing evidence each of the

following:

> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that permanency planning hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n).

¶ 27 Here, the trial court, having made no findings with respect to waiver of future hearings, ordered the following:

> 2. The Guardians shall not be required to make any reports to this Court, and shall serve and continue to serve as Guardian of the Person without bond;
>
> . . . .
>
> 7. That the permanent plan for [Piper] has been achieved by placing the child in guardianship with her maternal relatives, so her Guardian ad Litem and Attorney Advocate are no longer required, and therefore they are released from further responsibility or activity in this

> cause;
>
> 8. Likewise, since the permanent plan for [Piper] has been achieved by placing the child in guardianship, Person County DSS and its attorney, along with the attorney previously appointed to represent the mother are also hereby released from further responsibility or activity in this cause.

¶ 28 The trial court's order *de facto* waived future review hearings without articulating and applying the standard of proof and without making any findings under N.C. Gen. Stat. § 7B-906.1. Accordingly, I would remand on the issue of waiver to remedy this error.

IV. Reunification

¶ 29 For a trial court to cease reunification efforts with a respondent-parent, it must first "make[ ] written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2021). Additionally,

> The [trial] court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d).

¶ 30 Regarding reunification specifically, the trial court found the following:

> 38. Barriers to achieving the permanent goal of reunification:
>
> -[Respondent-mother]'s recent positive drug screen;
>
> -[Respondent-mother]'s fiancé's positive drug screen;
>
> -[Respondent-mother]'s lack of independent parenting experience;
>
> -[Respondent-mother] has a long history of substance use and has not begun substance use treatment;
>
> -[Respondent-mother] is not self-sufficient[.]

¶ 31 Additionally, aside from the forementioned findings regarding mother's substance use, the trial court found that "[t]he parents have not made adequate progress within a reasonable period of time under the plan to achieve their goal of reunification" and that "[i]t is not possible for the juvenile to be returned to the mother's . . . home within the next six months[.]"

¶ 32 The trial court also found the following regarding mother's efforts toward achieving reunification:

> 13. That Person County DSS informed the Court that the Permanency Planning Goal established by the Court for this child has been[:]
>
> guardianship with a relative with a concurrent plan of reunification;
>
> . . . .
>
> 15. The Respondent mother is aware of this goal and has been working with DSS to achieve the goal in the following manner:
>
> She has obtained independent housing, and has become employed; she has been participating in the Triple P Parenting Class online; the mother seems motivated to reach all of her goals, and constantly expresses her desire to have her daughter back with her;
>
> . . . .
>
> 17. [Respondent-mother] attends bi-weekly visits, engages with [Piper] at such visits and is attentive to her needs[.]

¶ 33 In its conclusions of law, the trial court stated, in pertinent part:

> 2. That [Piper] will not receive proper care and supervision should she be returned to the custody of her parents;
>
> 3. The Person County Department of Social Services has made reasonable efforts in dealing with the Respondents in order to make it possible for the return of the minor to the home of the Respondent mother;
>
> . . . .

> 5. That despite the efforts of the Person County Department of Social Services, the conduct of the Respondent parents and other factors mentioned above render a custodial situation with either of the Respondent parents inappropriate for the minor child[.]

¶ 34 Despite all of these findings and conclusions, the trial court does not expressly address the factors laid out by N.C. Gen. Stat. § 7B-906.2, does not address how any of the findings should be weighed in favor or against reunification as provided by N.C. Gen. Stat. § 7B-906.2, and fails to specifically address whether mother "remains available to the court, the department, and the guardian ad litem for the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3).

¶ 35 In summary, "[t]he trial court failed to make statutorily required findings of fact related to whether the parents demonstrated the degree of failure towards reunification necessary to support ceasing reunification efforts." *See In re A.W.*, ¶ 44. Accordingly, I would remand on the issue of reunification to remedy these errors.

¶ 36 In conclusion, because I believe that the record below is sufficient for the trial court to perform its duty, I would remand for the court to apply the proper standards and determine the issues without taking additional evidence.