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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-830

Filed 19 September 2023

Wilkes County, No. 20 JA 145

IN THE MATTER OF:

S.A.B.S.

Appeal by Respondent-Father from order entered 13 July 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 28 August 2023.

*Erika Leigh Hamby for the Petitioner-Appellee, Wilkes County Department of Social Services.*

*J. Mitchell Armbruster for the Guardian ad Litem.*

*Sean P. Vitrano for the Respondent-Appellant Father.*

STADING, Judge.

Respondent-Father (“Father”) appeals the trial court’s permanency planning order granting guardianship for his minor child Sunny<sup>1</sup> and waiving further hearings on the matter, except by motion.<sup>2</sup> For the reasons discussed below, we vacate and remand for further proceedings.

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<sup>1</sup> Sunny is a pseudonym to protect the identity of the minor child. See N.C. R. App. P. 42.

<sup>2</sup> Respondent-Mother (“Mother”) does not appeal the trial court order.

**I. Background**

On 4 November 2020, the Wilkes County Department of Social Services (“DSS”) filed a juvenile petition, alleging that the recently born child was a neglected and dependent juvenile. At the time the petition was filed, Sunny had not yet been discharged from the hospital following birth. The petition alleged that she had not received proper care, supervision, or discipline from her parents; she lived in an environment injurious to her welfare; and that her parents failed to provide for her care or supervision and lacked an appropriate alternative childcare arrangement. The trial court entered an order granting nonsecure custody of Sunny to DSS and placed her in a licensed foster home.

The trial court held a pre-adjudication hearing on the matter on 9 November 2020, where it assigned a guardian *ad litem* to Sunny and Rule 17 guardians *ad litem* to both parents. On 16 November 2020, the trial court held a hearing and determined that grounds existed for continued nonsecure custody of Sunny, that DSS made reasonable efforts to eliminate the need for her placement, and that remaining in DSS custody pending a further hearing would serve her best interests.

On 26 April and 24 May 2021, the trial court held adjudication hearings and entered a written order on 16 May 2022. Contained in the trial court’s order was the determination that placement with Sunny’s parents was contrary to her health, safety, and well-being. The trial court concluded that Sunny was a dependent juvenile and her placement with the foster parents was appropriate. As a result, the

trial court ordered that DSS continue reasonable efforts toward reunification with a parent and decreed that while legal and physical custody would remain with DSS, the parents were permitted supervised visitation at least once a week.

On 12 July 2021, the trial court conducted a disposition hearing and rendered an order. In its order, the trial court found that the parents visited Sunny and partially complied with their case plan, but they had not completed parenting classes or complied with treatment and medication recommendations. In due course, the trial court ordered that custody of Sunny remain with her foster parents, that DSS continue reunification efforts, and that the parents' visitation remained unchanged.

The trial court held a permanency planning hearing on 25 October 2021, in which all parties were represented by counsel. On the day of the hearing, the trial court entered a temporary order to address visitation pending the entry of a formal order. However, as of 7 July 2022, the trial court had not yet entered a formal, written permanency planning order. Hence, Father filed a motion to review the permanency planning order, requesting that the order be reduced to writing and entered.

The trial court entered the written permanency planning order on 13 July 2022. In doing so, the trial court found that Sunny had resided with her foster parents since 4 November 2020 and was doing well in the home. Further, the trial court found that "at this time the parents have indicated their consent of the award of guardianship [to the foster parents], but would contest the termination of their parental rights." Based on the parents' consent and the length of time that Sunny

had been with her foster parents, the trial court decided that guardianship should be granted to the foster parents and, pursuant to N.C. Gen. Stat. § 7B-906.1(n), “neither the minor child’s best interests nor the rights of any party require that review hearings be held every six months; however, all parties are aware the matter may be brought before this Court for review at any time by the filing of a motion.”

The trial court concluded that it was in Sunny’s best interests for her to be placed with the foster parents and “[t]hat the parents presented to the Court by and through their attorneys that they were in agreement and consented” to the guardianship placement. It also concluded that “neither the minor child’s best interests nor the rights of any party require that review hearings be held every six months[.]” On 26 July 2022, Father entered notice of appeal.

### **I. Jurisdiction**

This Court has jurisdiction in the present matter pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2021).

### **II. Analysis**

The sole issue on appeal is whether the trial court erred in waiving further hearings pursuant to N.C. Gen. Stat. § 7B-906.1(n). “This Court’s review of a permanency planning review order is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.” *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) (internal quotation marks and citation omitted). “The trial court’s findings of fact are

conclusive on appeal if supported by any competent evidence.” *In re C.H.*, 381 N.C. 745, 751, 874 S.E.2d 537, 543–44 (2022) (internal quotation marks and citation omitted). “Unchallenged findings are deemed to be supported by the evidence and are binding on appeal.” *In re S.C.L.R.*, 378 N.C. 484, 487, 861 S.E.2d 834, 838 (2021) (citation omitted).

Under North Carolina law governing permanency planning hearings, “[r]eview or permanency planning hearings shall be held at least every six months. . . .” N.C. Gen. Stat. § 7B-906.1(a) (2021). However, an exception exists as follows:

[T]he court may waive the holding of hearings required by this section . . . if the 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 interest.
- (3) Neither the juvenile’s best interests nor the right 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) (emphasis added).

Here, Father argues that the criteria to waive further permanency planning hearings under N.C. Gen. Stat. § 7B-906.1(n)(1) were not met. It is clear from the record that Sunny was eleven months old at the time of the permanency planning hearing, so she had not “resided in the placement for a period of at least one year.” N.C. Gen. Stat. § 7B-906.1(a)(1). However, she did reside with her foster parents for six consecutive months. Therefore, we must consider whether the trial court entered a valid “consent order pursuant to G.S. 7B-801(b1).” “A consent [order] is the agreement of the parties, their decree, entered upon the record with the sanction of the court[.]” *In re R.L.G.*, 260 N.C. App. 70, 73, 816 S.E.2d 914, 917 (2018) (internal quotation marks and citation omitted). Moreover, the text of N.C. Gen. Stat. § 7B-801(b1) provides several requirements:

Nothing in this Subchapter precludes the court in an abuse, neglect, or dependency proceeding from entering a consent adjudication order, review order, or permanency planning order when each of the following apply:

- (1) All parties are present or represented by counsel, who is present and authorized to consent.
- (2) The juvenile is represented by counsel.
- (3) The court makes sufficient findings of fact.

N.C. Gen. Stat. § 7B-801(b1) (2021).

Father argues that the trial court was not authorized to waive further hearings except pursuant to a valid consent order in accordance with N.C. Gen. Stat. § 7B-

801(b1). He advances several reasons underlying his position. First, he contends that the order itself was not styled as a consent order and does not bear the signature of the parties or their attorneys. Additionally, Father maintains that the order is not a valid consent order since it was not entered within thirty days following completion of the hearing, as required by N.C. Gen. Stat. § 7B-906.1(h), but much later and only in response to his motion to review the order. Moreover, he asserts that the waiver was not informed and voluntary. Our analysis begins with a review of the validity of the consent order as required by N.C. Gen. Stat. § 7B-801(b1).

The record on appeal shows that the parties attended a review and permanency planning hearing on 25 October 2021. At that hearing, DSS, Mother, and Father were all represented by counsel, and an attorney advocate for the juvenile's guardian *ad litem* was also present. The trial court's order from the hearing contained the following relevant finding of fact and ensuing conclusion of law: "[p]ursuant to N.C.G.S. § 7B-906.1(n), neither the child's best interests nor the rights of any party require that review hearings be held every six months . . . however, all parties are aware the matter may be brought before this Court for review at any time by the filing of a motion." Therefore, the order decreed that "[a]ll parties consent to waiver of further hearings in this matter, but are aware that any party may file a motion to review at any time." The trial court's decree appears to be based on the following exchange at the hearing:

[FATHER'S COUNSEL]: Would you consent to the waiver

of any future hearing?

THE COURT: Would you so consent, [Mother's counsel]?

[MOTHER'S COUNSEL]: Yes, sir.

....

THE COURT: The parents have waived further hearings.

...

Our Court has previously addressed the sufficiency of consent orders authorized in N.C. Gen. Stat. § 7B-801(b1). We find our decision in *In re K.P.*, 249 N.C. App. 620, 790 S.E.2d 744 (2016), to be particularly instructive with respect to consent orders entered in this context. In *In re K.P.*, the respondent-mother challenged the validity of a consent adjudication order. *Id.* at 622, 790 S.E.2d at 747. In that case, the trial court's order did not contain findings of fact "stating that the parties had stipulated to adjudicative facts or had consented to the children being adjudicated as neglected and dependent." *Id.* at 626, 790 S.E.2d at 749. Furthermore, there was not "any evidence that a consent order had been drafted for the parties' agreement." *Id.* Thus, this Court noted, the record did not contain "evidence that the parties had reached a consent agreement or that respondent had consented to her children being adjudicated as neglected and dependent." *Id.*

Also, by comparison, as examined in *In re K.P.*, the facts of our decision in *In re J.N.S.*, 207 N.C. App. 670, 704 S.E.2d 511 (2010) are informative. *In re K.P.*, 249 N.C. App. at 627, 790 S.E.2d at 749. In that matter, the respondent-mother argued that the trial court erred by not directly inquiring as to whether she assented to the



consent adjudication order. *In re J.N.S.*, 207 N.C. App. at 677, 704 S.E.2d at 516. In affirming the adjudication order, our Court noted that the respondent-mother's attorney consented on the record and "drafted a proposed consent order which became most of the actual consent adjudication order." *Id.* at 678, 704 S.E.2d at 517.

In the matter before us, we are presented with facts situated somewhere in between those confronted by our Court in *In re K.P.* and *In re J.N.S.* Here, the colloquy regarding consent of waiving future hearings between the trial court judge, Father's counsel, and Mother's counsel, clearly shows that Mother's attorney agrees to the waiver. However, the question posed by Father's attorney merely provides an inference that his client is doing the same. Thus, these facts distinguish this matter from the acquiescence by the respondent-mother to her attorney's consent in *In re J.N.S.* *Id.* at 678, 704 S.E.2d at 517. Additionally, the transcript of the hearing does not show that there was any draft of a proposed consent order available at the hearing in October 2021 and there were no findings of fact proposed for a consent order. N.C. Gen. Stat. § 7B-801(b1)(3) requires that "[t]he court makes sufficient findings of fact" in a consent order entered under this statute. Furthermore, findings of fact were not announced in open court to which the parents could consent; instead, the written order was not entered until Father requested the trial court to enter a formal order nearly a year later. More importantly, the challenged order in this case does not contain any findings of fact addressing Father's consent to dispensing of further review hearings otherwise required by statute. Therefore, the analysis of *In re K.P.*

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is controlling and the record does not demonstrate that Father consented to waiving further hearings under N.C. Gen. Stat. § 7B-906.1(a).

**III. Conclusion**

For the reasons herein, we vacate the trial court's permanency planning order and remand the matter for further proceedings consistent with this opinion. On remand, in light of the statutory requirements for review, the trial court shall hold an additional evidentiary hearing unless the parties agree to enter a consent order in accordance with N.C. Gen. Stat. § 7B-801(b1). *See* N.C. Gen. Stat. § 7B-906.1; *see also In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 802 (2020).

VACATED AND REMANDED.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).