NO. COA10-705

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

IN THE MATTER OF: Lenoir County
No. 09 JA 78

P.W.

Appeal by Respondent-Appellant Mother from order entered 19 March 2010 by Judge Elizabeth A. Heath in District Court, Lenoir County. Heard in the Court of Appeals 15 November 2010.

Wooten & Turik, PLLC, by Annette W. Turik, for Petitioner-Appellee Lenoir County Department of Social Services.

Lisa Skinner Lefler for Respondent-Appellant Mother.

Pamela Newell for Guardian ad Litem.

McGEE, Judge.

Respondent-Mother appeals from an order entered 19 March 2010 granting guardianship of her daughter, P.W., to P.W.'s maternal aunt and uncle (the Whitmores). We reverse the trial court's order and remand the case to the trial court.

The Lenoir County Department of Social Services (DSS) filed a juvenile petition on 7 August 2009, alleging that P.W., then eight years old, was a neglected juvenile. The petition was based on a report that DSS had received on 3 February 2009 alleging that P.W. was sexually assaulted by her fourteen-year-old cousin. Prior to this sexual assault, Respondent-Mother, P.W., P.W.'s cousin, and

Respondent-Mother's mother (the grandmother) lived together. According to the petition, after P.W. complained of the sexual assault, Respondent-Mother and the grandmother took P.W. to the emergency room. The hospital's medical report indicated that a physician observed tears in the opening of P.W.'s vagina, which appeared to be enlarged. Respondent-Mother then voluntarily placed P.W. with the Whitmores and DSS offered Respondent-Mother case services. DSS alleged in the petition that: (1) Respondent-Mother had failed to provide safe housing for P.W., (2) Respondent-Mother had continued to live in the same household as P.W.'s cousin, and (3) Respondent-Mother had expressed her desire to return P.W. to her home.

Following a hearing on 1 September 2009, the trial court entered an order on 2 October 2009 adjudicating P.W. neglected, pursuant to N.C. Gen. Stat. § 7B-101(15). The adjudication was based on the consent of Respondent-Mother and the trial court found that she had stipulated to the factual basis for the neglect petition. The trial court thereby found as fact the allegations contained in the petition.

The trial court also entered a separate disposition order on 2 October 2009. In that order, the trial court noted that: (1) the kinship assessment of the Whitmores was favorable, (2) P.W. had a significant relationship with the Whitmores, and (3) since her birth, P.W. had spent a great deal of time in the Whitmores' home. The trial court found that returning P.W. to Respondent-Mother's home would not be in P.W.'s best interest because Respondent-Mother

did not have "a stable living environment for herself and [P.W.] in that [Respondent-Mother] continues to live in the home with the cousin who sexually assaulted [P.W.]" Therefore, the trial court continued P.W.'s placement with the Whitmores and granted Respondent-Mother and the Whitmores joint custody of P.W. The trial court also ordered Respondent-Mother 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.

The trial court conducted its first review hearing on 17 November 2009 and entered an order on 21 December 2009, finding that P.W. was doing well in her placement with the Whitmores. The trial court also found that Respondent-Mother had not been complying with the trial court's previous order in that Respondent-Mother had not obtained her mental health assessment, housing, or employment. Respondent-Mother had enrolled in a GED program, but she was not attending regularly. Therefore, the trial court found that P.W.'s return to Respondent-Mother's home would not be in P.W.'s best interest because Respondent-Mother did not have a stable living environment. The trial court concluded that Respondent-Mother and the Whitmores should retain joint custody of P.W., with placement of P.W. remaining with the Whitmores.

The trial court held a second review hearing on 16 February 2010. In an order entered 19 March 2010, the trial court found that the best interest and welfare of P.W. would be promoted and

served by the legal guardianship of P.W. being given to the Whitmores. The trial court found that Respondent-Mother had completed her mental health evaluation on 27 January 2010, but she had not begun therapy. The trial court further found that Respondent-Mother reported she was taking a GED class online, but she did not provide the trial court with any evidence of regular attendance. Additionally, the trial court found that Respondent-Mother continued to reside in the grandmother's house with P.W.'s cousin. At the time of the hearing, Respondent-Mother claimed she had the use of a house that was provided by the grandmother. However, the house required painting, locks on the windows, and other repairs. Therefore, the trial court concluded that

> the continuation or return of [P.W.] to [Respondent-Mother's] home would not be in [P.W.'s] best interest in that [Respondent-Mother] does not have a stable living environment for herself and [P.W.] in that [Respondent-Mother] continues to live in the home with the cousin who sexually assaulted [P.W.]

The trial court also made findings of fact that P.W. had been in her placement with the Whitmores for more than a year and that the placement had been going well; that P.W. attended school regularly, was doing well academically, and was well-cared for by the Whitmores. Therefore, the trial court determined that it was in the best interest of P.W. to award the Whitmores guardianship of P.W. Furthermore, the trial court verified that the Whitmores understood the legal significance of the guardianship and that they had adequate resources to provide appropriately for P.W. The Whitmores also indicated in open court that they understood the

responsibility of guardianship and they were willing and able to serve as guardians. From this order, Respondent-Mother appeals.

I.

We must first address Respondent-Mother's constitutional challenge to the trial court's award of guardianship to the Whitmores. Respondent-Mother contends that the trial court erred by removing P.W. from Respondent-Mother's "care, custody, and control" without a finding that Respondent-Mother was unfit or acted in a manner inconsistent with her constitutionally protected status as a parent. It is well-established that a parent has a constitutional right to the care, custody, and control of her children. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). 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.

Id. (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).

This Court has stated that, "to 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 or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citing *Price*, 346 N.C. at 79, 484 S.E.2d at 534). In *B.G.*, our Court reversed and remanded the trial court's order granting guardianship to a juvenile's aunt and uncle, because the trial court did not find that the juvenile's father acted inconsistently with his constitutionally protected rights. *Id.* In the present case, the trial court made no finding that Respondent-Mother was unfit or acted inconsistently with her constitutionally protected status. Although Respondent-Mother raised the constitutional challenge to the trial court during her closing statement, the trial court gave no indication, either at the hearing or in its order, that it considered and determined the constitutional issue raised by Respondent-Mother. Instead, the trial court conducted a best interest of the child analysis without making the necessary finding of whether Respondent-Mother was either unfit or otherwise behaved inconsistently with her constitutional rights as a parent. While the evidence may support such a finding, as DSS suggests, the trial court must nevertheless decide the issue before applying a best interest analysis. *See id.*

DSS further argues that the adjudication of neglect and

Respondent-Mother's stipulation to that finding, in a prior consent order, are sufficient to demonstrate that Respondent-Mother acted inconsistently with her constitutionally protected status as a parent. We disagree. We recognize that the existence of grounds for termination of parental rights under N.C. Gen. Stat. § 7B-1111 (2009) may be sufficient to demonstrate that a parent has "forfeited his or her constitutionally protected status." *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 267 (2003) (describing termination of parental rights under N.C. Gen. Stat. § 7B-1111 as one of two methods a trial court may use to find that a natural parent has forfeited his or her constitutionally protected status). However, none of the findings of fact in the trial court's juvenile disposition order filed 19 March 2010 addresses the prior adjudication of neglect. Without proper findings in the 19 March 2010 order, the trial court's past adjudication of neglect alone was not sufficient to support the application of the best interest test in removing P.W. from the "care, custody and control" of Respondent-Mother. Accordingly, we reverse the trial court's order and remand for reconsideration. *See also David*, 359 N.C. at 307, 608 S.E.2d at 754 (discussing the application of the *Petersen* presumption to a custody dispute and remanding for the trial court to make proper findings of fact "supported by clear and convincing evidence") (citations omitted); *see also In re A.C.V.*, ___ N.C. App. ___, 692 S.E.2d 158 (2010).

II.

Respondent-Mother also argues that: (1) the trial court erred

by failing to make sufficient findings of fact required by N.C. Gen. Stat. § 7B-907; (2) the trial court abused its discretion when it gave the Whitmores guardianship of P.W.; and (3) the trial court committed reversible error in its order regarding visitation with P.W. The first two arguments are related to the trial court's dispositional determination as to whether guardianship was in P.W.'s best interest. As the trial court failed to address the constitutional issue discussed above, which is a precursor to any best interest determination by the trial court, we do not address Respondent-Mother's arguments regarding the trial court's decision to appoint the Whitmores as guardians for P.W.

However, we do address Respondent-Mother's contention that the trial court committed reversible error in its order regarding visitation of Respondent-Mother with P.W. N.C. Gen. Stat. § 7B-905(c) provides, in pertinent part, that:

> Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety.

N.C. Gen. Stat. § 7B-905(c) (2009). "The trial court maintains the responsibility to ensure that an appropriate visitation plan is established within the dispositional order." *In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 651 (2005). In connection with this responsibility, we have held that, "[a]t the review hearing, the court must consider and make relevant findings of fact regarding an appropriate visitation plan." *Id.* (citing N.C. Gen. Stat. §

7B-906(c)(6)).

"This Court repeatedly has held that both the awarding of custody of a child and the award of visitation rights constitute the exercise of a judicial function." *In re T.T. & A.T.*, 182 N.C. App. 145, 149, 641 S.E.2d 344, 346 (2007) (citations omitted). "'To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.'" *Id.* (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). Therefore, the trial court may not grant the guardian of a juvenile discretion regarding visitation with the juvenile's parent. *See E.C.*, 174 N.C. App. at 522, 621 S.E.2d at 652.

This Court has further held that the trial court must provide a "minimum outline of visitation," as follows:

> An appropriate visitation plan must provide for a minimum outline of visitation, such as the time, place, and conditions under which visitation may be exercised. The trial court may also in its order, however, grant some "good faith" discretion to the person in whose custody the child is placed to suspend visitation if such visitation is detrimental to the child.

E.C., 174 N.C. App. at 523, 621 S.E.2d at 652 (citations omitted).

In the present case, the trial court granted Respondent-Mother weekly visitation with P.W., as follows:

> That [Respondent-Mother] shall be allowed supervised visitation at least weekly as can be arranged between the parties. The visitation may take place at any location as long as [P.W.'s cousin] is not present, but [the Whitmores] must be present at all times

> during the visitation. The [] grandmother [] may visit with [P.W.] as well.

Thus, the trial court did place appropriate conditions on visitation, in that the trial court ensured that P.W.'s cousin would not be present. The trial court also provided that Respondent-Mother receive visitation at least weekly. However, the trial court failed to specify the time and length of the weekly visits, and the trial court delegated responsibility for the location of the visits to the Whitmores. As a result, the trial court erred by failing to establish a specific visitation plan in accordance with N.C. Gen. Stat. § 7B-905(c). *See id.*

We note that, although the trial court's vague visitation order was likely a product of the amicable relations between Respondent-Mother and the Whitmores, who are related, and where visitation had been going well during the pendency of the case, the situation could certainly change. Without specific direction from the trial court setting the time and length of the weekly visits, as well as the location, the trial court's order lacks a "minimum outline" for visitation and Respondent-Mother's visitation rights are not adequately safeguarded, as required by N.C.G.S. § 7B-905(c). *See id.* Therefore, we reverse the visitation portion of the trial court's order and remand for further consideration. On remand, the trial court must first address the constitutional issue raised by Respondent-Mother, and the trial court must then also enter an appropriate visitation plan.

Reversed and remanded.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).