NO. COA12-333
NORTH CAROLINA COURT OF APPEALS

Filed: 4 September 2012

IN THE MATTER OF:
L.M.

Stanly County
No. 07 JA 30

Appeal by Respondent from order entered 2 December 2011 by Judge Amanda L. Wilson in Stanly County District Court. Heard in the Court of Appeals 20 August 2012.

Mark T. Lowder for Petitioner Stanly County Department of Social Services.

Deana K. Fleming for Guardian ad Litem.

Leslie Rawls for Respondent-father.

BEASLEY, Judge.

Respondent appeals the trial court's order placing his son, L.M.,[1] in guardianship with foster parents and contends the trial court erred by concluding that Respondent acted inconsistently

[1] To protect the privacy of the juvenile, his initials are used in this opinion.

with his constitutionally-protected status as a parent. We affirm.

On 19 April 2007, the Stanly County Department of Social Services (DSS) filed a juvenile petition alleging then-nine-month-old L.M., who was living with his mother, was a neglected juvenile due to extremely unsanitary conditions in the home and lack of proper care. DSS was granted non-secure custody the same day. On 6 December 2007, the trial court adjudicated the juvenile dependent and ordered custody to remain with DSS. A plan for reunification with the mother was established.

On 22 October 2009, after multiple review and planning hearings, the trial court relieved DSS of reunification efforts. On 19 February 2010, DSS filed a petition to terminate both parents' rights to the juvenile, and alleged that Respondent failed to make reasonable progress and willful abandonment. Termination hearings were held from August 2010 through April 2011. Before the hearings were completed, the juvenile's mother relinquished her rights to the child.[2] Thereafter, on 8 July 2011, the trial court determined that DSS failed to meet its burden of proof against Respondent and dismissed the petition.

[2] L.M.'s mother is not a party in this appeal.

After a review hearing held on 14 April 2011, the trial court held that the permanent plan was adoption, and that visitation with Respondent was not in the best interests of the juvenile. At the next hearing held on 12 May 2011, the trial court changed the permanent plan to guardianship with the foster family, with a concurrent plan of adoption. No changes were made at the 6 October 2011 hearing.

On 3 November 2011, the trial court held a permanency planning review hearing at which the trial court found that Respondent "has acted in a manner inconsistent with his constitutionally-protected status" and that "[h]e is not fit to have care, custody and control of the child[.]" The trial court then concluded that it was in the best interests of the child to grant guardianship of the juvenile to his foster parents. Respondent timely appealed.

Respondent argues the trial court erred by determining that he had acted inconsistently with his constitutionally protected status as a parent, where the finding is not supported by the evidence and the record.

A parent's right to the custody, care, and control of his or her child is constitutionally-protected and may not be removed without due process of law. *Petersen v. Rogers*, 337

N.C. 397, 400, 445 S.E.2d 901, 903 (1994). The right is not absolute, however, and may be waived if the parent neglects the welfare and interest of the child. *In re Hughes*, 254 N.C. 434, 436-37, 119 S.E.2d 189, 191 (1961). "[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). "[A] determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence." *Id.*

Here, the trial court made several relevant findings of fact that support its conclusion that Respondent acted inconsistently with his constitutionally protected rights. The trial court found that Respondent **never** had contact with the minor child. The trial court also found that the minor child could never be placed with Respondent because Respondent had sexually abused L.M.'s sibling and had never sought sex offender treatment. Further, this sexual abuse was substantiated. Respondent failed to attend several court hearings and ceased

contact with DSS. Respondent never requested visitation with the minor child.

The findings of fact are not contested by Respondent, and they are therefore deemed supported by competent evidence and are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Respondent does, however, contest the legal conclusions that he "has acted in a manner inconsistent with his constitutionally-protected status" and that "[h]e is not fit to have care, custody and control of the child[.]"[3]

Respondent argues the trial court's conclusion is not supported by the record. He asserts that in January 2007, he signed a safety assessment plan in which he agreed to have no contact with L.M.'s mother or her children until the investigation into the sexual abuse allegations was complete. He states that the record is not clear as to whether he received notice of the substantiation of those allegations. He also contends that he was never offered any services or treatment options from DSS and that he was treated as "a virtual non-party." He argues that his compliance with an order to have no

[3] The trial court listed these conclusions of law in its finding of facts. However, when a finding of fact should properly be labeled a conclusion of law, we treat it as such. *Carpenter v. Brooks*, 139 N.C. 745, 752, 534 S.E.2d 641, 646 (2000).

contact should not be used against him to find that he acted inconsistently with his right to parent his child. We are not persuaded by these contentions.

We find no evidence in the record that Respondent was ordered by the trial court not to have any contact with L.M. To the contrary, the first orders issued by the trial court after the child was removed from the home in 2007 state that "it is in the best interests of the Juvenile that his parents have the ability to exercise supervised visitation with him[.]" Although the record reflects that the child's mother exercised her right to visitation, there is no indication that Respondent sought visitation or even inquired into his son's well-being or status outside of court. Prior to one review hearing, DSS prepared a report stating that Respondent attended a permanency planning meeting on 19 February 2008 and expressed his wish that L.M. not be returned to the mother's home. There is no indication that Respondent sought visitation or further involvement with the child at that time. By Respondent's own testimony at the November 2011 hearing, he never asked for information regarding the child including pictures or other reports.

We conclude that the trial court's conclusion that Respondent acted inconsistently with his constitutionally-

protected status as a parent is supported by clear and convincing evidence. *See David N. v. Jason N.*, 359 N.C. at 307, 608 S.E.2d at 753. Therefore, this argument has no merit.

Respondent also argues the trial court erred in its decision to give guardianship to the foster parents pursuant to the best interest of the child standard. However, Respondent's contention relies on his first argument that the trial court's conclusion that he acted inconsistently with his constitutionally protected status was not supported by the evidence or findings of fact. Since we have upheld the trial court's determination on that issue, we conclude the trial court did not err in determining the best interests of the child would be met by granting guardianship to the child's foster parents. Accordingly, we affirm the order of the trial court.

Affirmed.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).