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NO. COA14-755
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

IN THE MATTERS OF:

O.K.D.
G.M.D.
I.W.D,
MINOR CHILDREN.

Wilkes County
Nos. 13 JA 62-64

Appeal by respondent from order entered 17 April 2014 by Judge Michael D. Duncan in District Court, Wilkes County. Heard in the Court of Appeals 25 November 2014.

Paul W. Freeman, Jr., for Wilkes County Department of Social Services, petitioner-appellee.

Alston & Bird LLP, by Matthew D. Montaigne, for guardian ad litem.

Robert W. Ewing, for respondent-appellant.

STROUD, Judge.

Respondent-mother appeals from a permanency planning order transferring custody of her children Oscar¹, George, and Irene from the Wilkes County Department of Social Services to their paternal grandparents. For the following reasons, we affirm.

¹ We will use pseudonyms to protect the identity of the minors involved and for ease of reading.

I. Background

On 16 May 2013, the court entered an order with the consent of the parents adjudicating Oscar, George, and Irene as neglected juveniles. The court placed the children in the custody of the Wilkes County Department of Social Services ("DSS") and authorized DSS to continue to allow the children to reside with their paternal grandparents. On 18 March 2014, the court commenced a permanency planning hearing, and on 17 April 2014, filed the permanency planning order.

The court found that the children had been residing with their paternal grandparents since 27 March 2013 and were doing well; all of their needs were met, and they were attending counseling sessions. The court found that the parents disavowed any responsibility for their children's current mental health issues and minimized the effects their dysfunctional behavior, including domestic violence, had upon the children. The parents had only partially complied with their case plans; had not consistently attended visitations with the children, having visited with them on only two occasions since 1 October 2013; failed drug screens in February of 2014; had sporadic telephone contact with the children; and had attended only one school event for the children.

The court concluded:

8. By neglecting their children, failing to make reasonable progress to remedy the conditions which caused the children to be placed into DSS care, and failing to accept responsibility for their actions as set forth above, the parents have acted in contravention of their constitutionally protected parental rights.

The court also concluded that it was in the children's best interests for custody to be granted to their paternal grandparents. The court relieved DSS and the guardian ad litem of any further responsibilities and determined there was no further need for review through the juvenile court process. The court directed the clerk of superior court to treat the court's order as the initiation of a civil action for custody and as an order constituting a custody determination subject to modification pursuant to Chapter 50 of the North Carolina General Statutes. The court further ordered that the parents have supervised visitation with the children at least twice monthly for a duration of at least 90 minutes to two hours. Respondent-mother appeals.²

II. Standard of Review

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support

² Father did not appeal.

the findings and the findings support the conclusions of law.”
In re C.M., ___ N.C. App. ___, ___, 750 S.E.2d 541, 542 (2013)
(citation and quotation marks omitted).

III. Permanent Custody Determination

We first note that respondent does not actually challenge any of the substantive findings of fact or conclusions of law regarding the loss of her constitutionally protected status as a parent or the best interests of the children. Instead, respondent first contends that “the trial court erred in finding and concluding at a permanency planning review hearing where there is no burden of proof that the respondent mother was unfit and her conduct was inconsistent with her constitutionally protected parental status.” (Original in all caps.) Respondent uses her first argument as the basis for sub-arguments which can be summarized as: The trial court should not have granted permanent custody of the children to a non-parent because it required the court to consider whether respondent had acted inconsistently with her constitutionally protected status as a parent. Considering whether respondent had acted inconsistently with her constitutionally protected status as a parent at a permanency planning hearing was improper because (1) it is not the purpose of such a hearing, and (2) it does not require the

court to comply with the standard of proof requiring clear, cogent, and convincing evidence.

A. Trial Court's Authority

The trial court did have authority to grant permanent custody to a third party at a permanency planning hearing. North Carolina General Statute § 7B-906.1(a) provides that the trial court should "review the progress made in finalizing the permanent plan for the juvenile, or if necessary, . . . make a new permanent plan for the juvenile[,]" N.C. Gen. Stat. § 7B-906.1(a) (2013), and subsection (e) goes on to provide that if the court determines that the child's "placement with a parent is unlikely within six months," the court should consider "whether legal guardianship or custody with a relative . . . should be established and, if so, the rights and responsibilities that should remain with the parents" along with "whether the juvenile should remain in the current placement, or be placed in another permanent living arrangement and why." N.C. Gen. Stat. § 7B-906.1(a), (e) (2), (4) (2013). Subsection (n) of North Carolina General Statute § 7B-906.1 further allows the court to "waive" further hearings if it finds a "relative or other suitable person as the juvenile's permanent custodian or guardian of the person." N.C. Gen. Stat. § 7B-906.1(n) (5)

(2013). As such, N.C. Gen. Stat. § 7B-906.1, by its plain language, allows the court to grant permanent custody of a child to a non-parent in certain circumstances. See N.C. Gen. Stat. § 7B-906.1 (2013). This argument is overruled.

B. Standard of Proof

Respondent's argument regarding a standard of proof is quite confusing, especially because she interchangeably uses the phrases "burden of proof" and "standard of proof." To clarify, "[b]urden of proof means the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." *Banks v. Shepard*, 230 N.C. 86, 90, 52 S.E.2d 215, 218 (1949) (citation and quotation marks omitted). "Standard of proof" means "[t]he degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence.'" *Black's Law Dictionary* 1535 (9th ed. 2009). Respondent seems to be contending that the trial court failed to use clear, cogent, and convincing evidence, the proper standard of proof for determining if she acted inconsistently with her constitutionally protected status as a parent, because the trial court considered this issue at a permanency planning hearing,

where "[t]he purpose" of a permanency planning hearing is only to determine the "best interests for a child."

Regardless of the title or name given to a hearing, the standard of proof depends upon the issue to be decided. As discussed in the first portion of this opinion, regarding the trial court's authority, the trial court may decide to grant custody to a third party at a permanency planning hearing in the appropriate circumstances. The title of the hearing alone does not define the standard of proof. Although this was a permanency planning hearing, and the trial court must, and did, consider the best interests of the children when appropriate, the trial court did use clear and convincing proof as his standard when he considered respondent's constitutionally protected status as a parent. In the order, in Finding of Fact 27, the court specifically stated that it was using "clear and convincing evidence" in compliance with North Carolina General Statute § 7B-906.1(n). See N.C. Gen. Stat. § 7B-906.1(n). There is no indication in the order that the trial court used any lesser standard of proof. This argument is overruled.

IV. Termination of Jurisdiction

Respondent next contends the court erred by terminating its jurisdiction when six months had not passed since the court

entered a permanent plan determining that the children should be awarded to the paternal grandparents. The governing statute is North Carolina General Statute § 7B-911, which permits the court to terminate its jurisdiction and instruct the clerk to treat its order as the initiation of a civil custody action under Chapter 50 of the General Statutes if the court finds in its order that

[a]t least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, *though this finding is not required if the court is awarding custody to a parent or person with whom the child was living when the juvenile petition was filed.*

N.C. Gen. Stat. § 7B-911 (2013) (emphasis added).

Respondent contends the children were living with her at the time the petitions were filed and argues that the petitions themselves note that the children's father refused to place the children outside of the home and the affidavits as to the status of the children noted they were living with their parents. However, other evidence in the record indicates that the children were residing with their paternal grandparents as of 27 March 2013. Furthermore, the court had already determined in a prior review order that the children began living with their

grandparents on 27 March 2013. While it appears that the transition from the children's home with their parents to their grandparents happened very close in time with the filing of the petitions, the record clearly demonstrates that the petitions were not actually *filed* until 28 March 2013. As the evidence supports that the children were living with their grandparents as of 27 March 2013, the court was not required to find that at least six months had passed since the determination of a permanent plan to award custody to the grandparents. See *id.* This argument is overruled.

V. Visitation Plan

Respondent lastly contends the court erred by failing to adopt an appropriate visitation plan which established a specific time, day or place for the visitation. Respondent also argues the visitation order is inappropriate because it delegates establishment of a visitation schedule to the paternal grandparents.

Visitation is reviewed for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). North Carolina General Statute § 7B-905.1(c) provides,

[i]f 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(c) (2013). Here, the court ordered that the parents

shall have a minimum of twice monthly supervised visitation with the children. Each visit is to be for a minimum of one and a half to two hours (1 ½ to 2) hours in length. The visits are to be supervised by the custodians named herein, or one of them, staff of the Child Abuse Prevention Team (Our House), or such other person and/or organization approved by the custodians. The custodians shall have the authority to extend the frequency and length of visitation, in their discretion.

This order complies with the requirements of North Carolina General Statute § 7B-905.1 and does not provide the parental grandparents with unfettered discretion as respondent claims. See *id.* As such, this argument is overruled.

VI. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).