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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-89

Filed: 5 November 2019

Davidson County, No. 16 JA 127

IN THE MATTER OF: J.C.R.

Appeal by respondent from order entered 15 October 2018 by Judge Jimmy L. Myers in Davidson County District Court. Heard in the Court of Appeals 4 September 2019.

Assistant Davidson County Attorney Danielle De Angelis for petitioner-appellee Davidson County Department of Social Services.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant mother.

Redding Jones, PLLC, by Ty Kimmell McTier and David G. Redding, for guardian ad litem.

DIETZ, Judge.

Respondent appeals a permanency planning order awarding guardianship of Jane,[1] Respondent's minor daughter, to Jane's half-sister. As explained below, we reject Respondent's challenges to the trial court's findings and conclusions and affirm the court's permanency planning order.

[1] We use a pseudonym to protect the identity of the juvenile.

Facts and Procedural History

Respondent has several children, including her teenage daughter, Jane, and two other, older daughters, Heather and Brittney, who have a different father and are Jane's half-sisters. Jane's father also had a relationship with Brittney, Jane's half-sister, which resulted in two children.

When the Davidson County Department of Social Services became involved with the family, Respondent was living with Jane, Jane's father, Brittney, and Brittney's children. From 2012 through 2016, DSS received multiple reports of substance abuse by Brittney and Jane's father, as well as domestic violence between them. Respondent and the children were present in the home during some of these incidents.

In November 2016, DSS filed a juvenile petition alleging that Jane was neglected and dependent. The trial court granted DSS nonsecure custody. DSS later placed Jane with her other half-sister, Heather. Jane has remained with Heather since her removal from Respondent's custody.

In March 2017, the trial court entered an order adjudicating Jane as dependent. Later that year, the trial court granted Respondent unsupervised visitation with Jane, but also ordered that Jane's father and Brittney "shall not be allowed to live in or spend the night in [Respondent's] residence."

After entry of that order, DSS reported continuing concerns that Respondent was allowing Jane's father and Brittney to live with her. During a home visit in January 2018, a DSS social worker found Jane's father and Brittney hiding in Respondent's pantry closet. In April 2018, the trial court reduced Respondent's visitation to supervised visits once every other week, in part because of the incident involving Jane's father and Brittney hiding in the pantry closet.

Finally, in October 2018, the trial court entered the review and permanency planning order challenged in this appeal. In its order, the trial court did not find it in Jane's best interest to terminate parental rights or change Jane's plan to adoption. But the court found that it was in Jane's best interests to continue with her current placement with Heather and to grant guardianship to Heather and her husband Jason. The court relieved DSS of their duty to make reasonable efforts toward reunification, allowed visitation with Respondent twice a month for two hours, and waived further reviews. Respondent timely appealed.[2]

[2] Respondent petitioned for a writ of certiorari because she failed to timely serve the notice of appeal. The failure to timely serve a notice of appeal is not a jurisdictional defect. *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 102, 693 S.E.2d 684, 689 (2010). Thus, this defect in the notice of appeal should not result in dismissal unless the appellee is prejudiced by the failure to receive service. *State v. Springle*, 244 N.C. App. 760, 763, 781 S.E.2d 518, 521 (2016). No party asserts that the failure to timely serve the notice caused any prejudice. We therefore have appellate jurisdiction and we dismiss the petition for a writ of certiorari as moot.

Analysis

I. Incorporation of outside documents into findings

Respondent first argues that the trial court improperly incorporated outside documents as its findings of fact. Specifically, in the trial court's second finding of fact, the court stated that it "received into evidence" a series of documents including two DSS court reports, a guardian ad litem report, and an affidavit of financial standing. The court then stated "[t]he information contained within said reports and the Affidavit of Financial Standing are incorporated herein by reference as additional findings of fact upon which this order is based."

We agree that the purported incorporation of the contents of these outside documents as part of the court's findings of facts is precluded by our precedent. In a case involving similar facts, we held that a trial court "should not broadly incorporate these written reports from outside sources as its findings of fact." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004).

Nevertheless, the trial court's improper use of these outside documents as fact findings is not reversible error. In reviewing a permanency planning order, "this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case." *In re J.W.*, 241 N.C. App. 44, 48, 772 S.E.2d 249, 253 (2015). Here, in addition to stating that the court

incorporated various documents by reference "as additional findings of fact," the trial court made its own evidentiary findings of fact in the order, and then made the ultimate findings required by the applicable statute, based on its evidentiary findings. Indeed, the order contains fifty-five detailed findings of fact, across seven single-spaced pages of the written order. Respondent does not challenge any of these express findings as unsupported by the record. Accordingly, we will confine our review to the court's express, written findings, and disregard any purported findings that are contained through reference to documents outside the court's order. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

II. Finding regarding constitutional status as parent

Respondent next challenges the trial court's finding that she acted inconsistently with her constitutional status as a parent.

A parent has a constitutionally protected interest in the custody, care, and control of her children. *Price v. Howard,* 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). Thus, before a trial court can award guardianship to a non-parent, it must find that the natural parent is unfit or that her conduct is inconsistent with her constitutionally protected status. *In re C.P.*, __ N.C. App. __, __, 812 S.E.2d 188, 192 (2018).

But, because this parental right is an independent constitutional argument, and not part of the statutory criteria for guardianship, this Court repeatedly has held

that a parent must assert this constitutional argument in the trial court in order to preserve the argument for appellate review. *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011). As we recently reaffirmed in *In re C.P.*, so long as the parent is aware that her child may be removed from her custody and has "been afforded the opportunity to object or raise the issue at the hearing," the failure to assert that the ruling violates the parent's constitutional rights waives the issue and bars any appellate review. __ N.C. App. at __, 812 S.E.2d at 192.

Here, Respondent had ample notice that the trial court might award guardianship of her daughter to Heather and Jason. The existing permanency planning order had a primary plan of termination of parental rights and adoption, with a secondary plan of guardianship with a relative. During the hearing, a DSS social worker testified about why DSS was recommending guardianship with Heather and Jason, and Heather testified about the couple's interest in becoming Jane's guardians. Finally, at closing arguments, DSS argued in favor of ceasing reunification efforts with Jane and appointing Heather and Jason as her guardians.

Nevertheless, Respondent never asserted that removing Jane from her custody and awarding guardianship would violate her constitutional rights as a parent. Accordingly, we are required to follow the controlling rule from *In re C.P.* and its companion cases and hold that Respondent waived this constitutional argument by failing to assert it to the trial court. *Id.*

Conclusion

We affirm the trial court's permanency planning order.

AFFIRMED.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).