IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1115

Filed: 15 December 2020

Orange County, Nos. 17 JA 36–37

IN THE MATTER OF: A.H. and R.I.J.-H.

Appeal by respondent-parents from orders entered 10 September 2019 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 3 November 2020.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Speaks Law Firm, PC, by Garron T. Michael, Esq., for respondent-appellant father.

J. Thomas Diepenbrock for respondent-appellant mother.

Womble Bond Dickinson US, LLP, by Erin H. Epley and Judy Rabil, for guardian ad litem.

BRYANT, Judge.

Respondent-parents appeal from orders ending reunification as a permanent plan and establishing guardianships for their minor children, A.H. ("Angela") and R.I.J.-H. ("Robert").[1] We vacate the orders and remand for further proceedings.

On 24 May 2017, Orange County Department of Social Services ("DSS") obtained nonsecure custody of the children and filed petitions alleging the children were neglected and dependent juveniles. DSS alleged Robert had cystic fibrosis and pancreatic insufficiency and required consistent medical care and medication. Respondents had failed to provide Robert with adequate medical care and supervision, which resulted in multiple hospitalizations, weight loss, and lack of progress. DSS further alleged respondents had a history of domestic violence, each had accused the other of substance abuse, respondent-father had mental health concerns, and there had been allegations the children had been sexually abused.

After a hearing on 1 September 2017, the trial court entered an order adjudicating the children to be neglected and dependent juveniles. The court continued custody of the children with DSS and granted respondents weekly supervised visitation. Respondents were ordered to have no contact with each other and: (1) complete a parenting education program; (2) participate in a parental competency and psychological evaluation; (3) submit to random drug screens; and (4) participate in individual therapy to include anger management education.

[1] We use the pseudonyms "Angela" and "Robert" throughout this opinion to protect the children's privacy and for ease of reading.

Respondent-mother was also ordered to participate in a psychiatric evaluation, and respondent-father was ordered to participate in a substance abuse assessment and complete the "Partner Abuse Intervention group." They were also ordered to "be on time and attend all medical appointments for the children that they are invited to."

The trial court conducted a custody review hearing on 7 December 2017, and entered an order continuing custody of the children with DSS and continuing respondents' weekly supervised visitation. The court ordered respondents to comply with their case plans and added that respondent-mother was to submit to a substance abuse assessment.

Over the next several months, the trial court conducted four permanency planning hearings. Throughout the case, the court found respondents made some progress toward the goals of their case plans, but their progress was consistently insufficient. The court initially set the children's primary permanent plan as adoption and their secondary permanent plan as reunification. In its order from the second permanency planning hearing, the court changed the primary permanent plan for the children to guardianship and kept the secondary permanent plan of reunification. In its order from the fourth permanency planning hearing (entered 10 September 2019), the trial court granted guardianship of the children to their individual foster parents and eliminated the secondary plan of reunification.[2] The

[2] The children had been placed in separate foster homes due to their differing needs of care.

court granted respondents supervised visitation at Chatham County Family Visitation Services once every other month and ordered respondents to pay the cost of the supervised visits. The court retained jurisdiction over the case, but relieved DSS and the children's guardian *ad litem* of any further responsibility in the matter. The trial court also entered separate orders for each child, appointing their guardians and providing for respondents' supervised visitation. Respondents timely appealed to this Court.

We first address respondents' argument that the trial court erred by failing to make the requisite findings and conclusions of law at the permanency planning hearings in accordance with N.C.G.S. § 7B-906.2(c), which states:

> Unless reunification efforts were previously ceased, at each permanency planning hearing the court shall make a finding about whether the reunification efforts of the county department of social services were reasonable. In every subsequent permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make written findings about the efforts the county department of social services has made toward the primary permanent plan and any secondary permanent plans in effect prior to the hearing. The court shall make a conclusion about whether efforts to finalize the permanent plan were reasonable to timely achieve permanence for the juvenile.

N.C.G.S. § 7B-906.2(c) (2019). Respondents contend the trial court failed to make the required findings and conclusion addressing whether the reunification efforts by DSS were reasonable. We agree that the trial court failed to make the required findings.

It is well established that when entering orders from a permanency planning hearing, "the trial court must, through 'processes of logical reasoning,' based on the evidentiary facts before it, 'find the ultimate facts essential to support the conclusions of law.' " *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (quoting *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003)). The court's findings must be " 'sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.' " *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)). " 'This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.' " *In re D.A.*, 262 N.C. App. 559, 564, 822 S.E.2d 664, 667 (2018) (quoting *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 631 (2010)).

The trial court had not previously ceased reunification efforts and thus was required to make a finding about whether the reunification efforts of DSS were reasonable. The court made numerous findings detailing the efforts provided to respondents by DSS. The court, however, explicitly found that "[p]rior to this hearing, reasonable efforts to achieve the permanent plan of *guardianship* were made by [DSS] . . . ." (emphasis added).

DSS and the guardian *ad litem* argue the trial court's findings regarding the reasonable efforts to achieve the primary permanent plan of guardianship also show DSS made reasonable efforts to achieve the secondary permanent plan of

reunifications. *See In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language."). DSS further suggests the trial court's limitation of its findings to only the primary permanent plan of guardianship is merely a "scriber's flaw [that] does not require reversal[.]"

A "scriber's flaw" or clerical error "is '[a]n error resulting from a minor mistake or inadvertence, [especially] in writing or copying something on the record, and not from judicial reasoning or determination.' " *In re D.B.*, 214 N.C. App. 489, 497, 714 S.E.2d 522, 527 (2011) (quoting *State v. Lark*, 198 N.C. App. 82, 95, 678 S.E.2d 693, 702 (2009)).

Here, there is nothing in the record to show the trial court made a clerical error when it found DSS provided reasonable efforts to achieve the permanent plan of guardianship rather than reunification. The court rendered no oral findings at the conclusion of the hearing and made a similar finding that DSS had made reasonable efforts to achieve the plan of guardianship in the preceding permanency planning order. Thus, we cannot tell from the record whether the trial court meant "reunification" or "reunification and guardianship," when its finding states only "guardianship." The court's finding of reasonableness is limited to the primary permanent plan of guardianship and does not address the statute's specific concern as to whether the reunification efforts by DSS were reasonable. The court's order is

entirely silent as to whether DSS made reasonable efforts toward achieving the secondary permanent plan of reunification; therefore, we hold the court failed to make the findings of fact mandated by N.C.G.S. § 7B-906.2(c).

Although we can infer that the trial court intended to make the requisite finding, given its ultimate award of guardianship of the children to their foster parents and the court's findings of reasonable efforts that would not directly apply to guardianship (*e.g.*, "DSS has held Child and Family Team Meetings and PPATs separately with each parent, with the grandparents also able to attend, to help develop their respective Out of Home Family Services Agreements."), doing so would impermissibly place this Court in the role of a fact-finder. *See In re F.G.J.*, 200 N.C. App. 681, 693, 684 S.E.2d 745, 754 (2009) ("It is the role of the trial court and not this Court to make findings of fact regarding the evidence." (citation omitted)). Accordingly, we must vacate the permanency planning and guardianship orders and remand for the trial court to make adequate findings of fact addressing the mandates of N.C.G.S. § 7B-906.2(c). *See generally In re D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018). Because we must vacate the trial court's orders on this basis, we need not address respondents' arguments that the court also erred in making proper conclusions of law pursuant to N.C.G.S. § 7B-906.2(c).

We do, however, address respondents' arguments that the trial court erred in concluding they had the ability to pay the costs associated with their supervised

visitation. They contend the trial court's findings are insufficient to support its conclusion, because there is no finding as to the actual costs of supervised visitation or their ability to pay those costs. We agree.

When a trial court orders a parent to bear the costs of supervised visitation, the court must make sufficient findings of fact as to whether the parent is able to pay the costs associated with visitation for this Court to conduct meaningful appellate review. *See generally In re J.C.*, 368 N.C. 89, 89, 772 S.E.2d 465, 465 (2015); *see also In re Y.I.*, 262 N.C. App. 575, 581–82, 822 S.E.2d 501, 505–06 (2018) (vacating the trial court's visitation plan where it did not make findings regarding the costs of supervised visitation, who would bear responsibility for the costs, or the parent's ability to pay).

Here, the trial court concluded respondents "have the ability to defray costs associated with supervised visitation." The findings of the court in support of this conclusion include:

> 58. Respondent mother is in a relationship and has an infant with [S.B. ("Mr. Brown")]. . . He is unemployed and on probation.
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> 59. Respondent mother relies on [Mr. Brown's] family for assistance. She resides on their property and does not have a rental agreement. . . .
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> . . . .
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> 61. Respondent mother is meeting the needs of her new child with [Mr. Brown].

> 62. Respondent mother is employed full-time as a manager at Domino's Pizza. . . .
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> . . . .
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> 69. In January 2019, Respondent father established independent housing from the paternal grandparents. It is a one-bedroom apartment with a month to month [sic] lease. In the event he cannot make lease obligations, there is a likelihood he would return to their home or be provided with their financial assistance.
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> 70. Respondent father has had inconsistent employment. He was recently employed at IHOP from January to March 2019, and reports working at Food Lion.

Respondents do not challenge the evidentiary support for these findings, and therefore, they are binding on appeal. *In re Y.I.*, 262 N.C. App. at 579, 822 S.E.2d at 504.

The trial court's findings generally establish that respondents are employed and have additional family resources, but do not show how much, if anything, they could pay toward the unknown costs of supervised visitation at Family Visitation Services in Chatham County. The foster care social worker for the children testified that he "believed" the cost for supervised visitation at Family Visitation Services in Chatham County was $25. However, the social worker's belief does not affirmatively establish the actual costs that respondents would be required to "defray," and the trial court made no findings as to those costs. Accordingly, if the trial court again orders respondents to pay the costs of supervised visitation, the court shall make

findings of fact regarding the costs of supervised visitation and respondents' ability to pay those costs. *Cf. id.* at 582, 822 S.E.2d at 506.

VACATED AND REMANDED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).