IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-280

No. COA20-508

Filed 15 June 2021

New Hanover County, No. 16 JA 60

IN THE MATTER OF: A.C.

Appeal by Respondent-Father from order entered 13 November 2019 by Judge J. H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 9 March 2021.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

Benjamin J. Kull for respondent-appellant father.

Administrative Office of the Courts, by Guardian Ad Litem Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

MURPHY, Judge.

¶ 1 A parent waives appellate review of a trial court's determination he acted inconsistently with his constitutionally protected parental status when he fails to raise the issue at a permanency planning hearing that involves a guardianship determination and provides an opportunity to present evidence on that issue.

¶ 2 Here, the juvenile's father failed to object, present argument, or otherwise raise the issue of his constitutionally protected parental status at the permanency planning

hearing, and he has waived appellate review of the trial court's determination he acted inconsistently with his constitutionally protected parental rights.

BACKGROUND

¶ 3 In its *Order on Adjudication and Disposition* filed 29 April 2016 ("April 2016 Order"), the trial court adjudicated the juvenile ("Mitch"),[1] born 2012, dependent and neglected as defined by N.C.G.S. §§ 7B-101(9) and (15) based on "the stipulation of the Respondent-Parents, Guardian ad Litem and [New Hanover County Department of Social Services]." N.C.G.S. §§ 7B-101(9), (15) (2019). The April 2016 Order also included findings that Respondent-Mother ("Nicole") had no contact with Mitch for two years, and Mitch had been residing with Respondent-Father ("Ivan") and Ivan's girlfriend. Prior to residing with Ivan and his girlfriend, Mitch had resided with his paternal grandmother for approximately one year. Ivan's girlfriend had been the primary caregiver to Mitch, and she had previously been "convicted of felony child abuse . . . and served eight months in prison." New Hanover County Department of Social Services ("DSS" or "the Department") had been in contact with Ivan and his girlfriend due to multiple "reports . . . concerning domestic violence, substance abuse[,] and parenting concerns[,]" and "[l]aw enforcement . . . responded to domestic violence calls at the home wherein [Ivan] claim[ed] his girlfriend assaulted him."

[1] Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

¶ 4 The April 2016 Order required Ivan to comply with mental health and substance abuse treatment recommendations, submit to random drug screens, take medications as prescribed, successfully complete a parenting class, execute releases for care providers, maintain stable housing and employment, consistently participate in scheduled visits, and complete a couples parenting program. In its *Order on the Permanency Planning Hearing* filed 19 January 2017 ("January 2017 Order"), the trial court ordered "the permanent plan shall be reunification with [Nicole], with a concurrent plan of reunification with [Ivan]."

¶ 5 However, in its *Subsequent Permanency Planning Hearing* Order filed 2 June 2017 ("June 2017 Order"), the trial court found Ivan had not established stable housing, submitted several positive drug tests, failed to consistently engage in mental health or substance abuse treatment, and Nicole had failed to make progress on her case plan. In light of these findings, the trial court changed the permanent plan to adoption with a concurrent plan of reunification with either parent. DSS petitioned the trial court to terminate the parental rights of Nicole and Ivan in June 2017; Nicole voluntarily relinquished her rights, and Ivan's parental rights were involuntarily terminated in the trial court's *Order Terminating Parental Rights* filed 11 October 2017 ("October 2017 Order").

¶ 6 Ivan appealed the judicial termination of his parental rights, and this Court vacated the October 2017 Order due to service deficiencies in an opinion filed on 5

June 2018. *See In re A.J.C.*, 259 N.C. App. 804, 817 S.E.2d 475 (2018). Nicole subsequently revoked her voluntary relinquishments of her parental rights. In the *Subsequent Permanency Planning Hearing* Order filed 15 October 2018 ("October 2018 Order"), the trial court found Ivan was eagerly pursuing reunification with Mitch and had participated in a residential substance abuse treatment program, despite not producing records or signing releases to show his case plan progress. Mitch remained in foster care and had been diagnosed with many mental health conditions. In the October 2018 Order, the trial court changed the permanent plan from adoption to "guardianship with a court approved caretaker with a concurrent plan of reunification."

¶ 7 In its *Subsequent Permanency Planning Hearing* Order filed 30 April 2019 ("April 2019 Order"), the trial court found Ivan had continued to cooperate with DSS, received substance abuse treatment and passed drug tests, maintained safe and appropriate housing, and attained adequate finances. However, the trial court subsequently reviewed a guardian ad litem ("GAL") September 2019 report indicating that Ivan's therapy had not resulted in him modifying his behavior regarding boundaries, consistent action regarding Mitch, and displays of physical affection that made Mitch uncomfortable. The trial court also considered the following corresponding testimony from a counselor, psychologist, DSS employee, and Ivan at the 26 September 2019 permanency planning hearing: Mitch had negative reactions

after visits with Ivan; Ivan tested positive for a prescribed medication only once, suggesting he may not have been taking his prescription medications; there were instances where Ivan did not adequately supervise Mitch during visits; and Ivan was not aware of the medication Mitch was taking despite attending doctor visits, blamed the foster parents and DSS for Mitch's mental health concerns, and did not pay attention to the doctor at a doctor's appointment for Mitch.

¶ 8 During the 26 September 2019 permanency planning hearing, Ivan did not raise the issue of his constitutionally protected status as a parent at any point and did not object to the plethora of testimony concerning guardianship. Ivan also did not object to arguments that he had acted contrary to his constitutionally protected status as a parent, or the trial court's award of guardianship to the foster parents. In closing arguments, Ivan's attorney asked the trial court "to deny the guardianship today[,] . . . [grant] extended visitation to start off at two times a week[,] . . . [and] start family therapy . . . addressing issues related to reunification."

¶ 9 In its final remarks and oral order at the 26 September 2019 permanency planning hearing, the trial court did not specifically mention Ivan's constitutionally protected status as a parent, but specifically granted guardianship to the foster parents. The trial court's final remarks and oral order came immediately after DSS's closing argument, where DSS repeatedly argued Ivan had acted inconsistently with his constitutionally protected right as a parent and guardianship was appropriate.

¶ 10 In its *Juvenile Order* filed 9 October 2019, the trial court granted guardianship to the foster parents. In its *Subsequent Permanency Planning Hearing* Order filed 13 November 2019 ("November 2019 Order"), the trial court determined Nicole and Ivan had "acted inconsistently with their constitutional rights to parent" and that "it is in [Mitch's] best interest and welfare for guardianship to be granted to [the foster parents]." The trial court made the findings of fact in the November 2019 Order "by sufficient and competent evidence."

¶ 11 Ivan appeals the November 2019 Order and argues (1) the trial court applied the incorrect evidentiary standard in its conclusion that he acted inconsistently with his constitutional right to parent Mitch; (2) even if the trial court applied the correct evidentiary standard in reaching that conclusion, the findings do not support the conclusion; and (3) the findings do not support the trial court's "conclusion that reunification efforts clearly would be unsuccessful or inconsistent with [Mitch's] health or safety."

¶ 12 The GAL and DSS argue Ivan waived appellate review of the trial court's finding that he had acted inconsistently with his constitutionally protected status as a parent because he did not object on that basis, raise the issue before the trial court, or present any evidence regarding his constitutionally protected parental status. Further, the GAL admits "the [November 2019 Order] mistakenly states that the trial court applied a 'sufficient and competent' standard to the evidence in making its

findings of fact rather than the required 'clear and convincing' standard," but DSS and the GAL portray the mistake as harmless.

¶ 13 In his reply brief, Ivan does not contest that he failed to object or raise the issue regarding his constitutionally protected parental status during the 26 September 2019 permanency planning hearing. Instead, he argues appellate review of the trial court's conclusion he acted inconsistently with his constitutionally protected status cannot be waived, because *Owenby v. Young* does not allow application of a best interest test "[u]ntil, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status." *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003).

ANALYSIS

¶ 14 "The standard of review for alleged violations of constitutional rights is *de novo*." *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017) (citing *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. rev. denied*, 363 N.C. 857, 694 S.E.2d 766 (2010)).

¶ 15 When guardianship is at issue in a permanency planning hearing, a parent must "raise[] the issue that guardianship would be an inappropriate disposition on a constitutional basis" to preserve the constitutional issue for appellate review. *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018); *see also In re T.P.*, 217 N.C.

App. 181, 186, 718 S.E.2d 716, 719 (2011); *In re R.P.*, 252 N.C. App. 301, 304-05, 798 S.E.2d 428, 430-31 (2017). Under *In re T.P.*, *In re R.P.*, and *In re C.P.*, a parent waives appellate review of a trial court's finding of unfitness or inconsistent action with that parent's constitutionally protected parental status when (1) the parent had the ability to produce evidence concerning guardianship at a permanency planning hearing, (2) the parent had the opportunity to raise an objection, raise the issue, or otherwise argue against guardianship on constitutional grounds at a permanency planning review hearing, and (3) the parent does not raise the objection, issue, or argument on constitutional grounds at the hearing. *See In re T.P.*, 217 N.C. App. at 186, 718 S.E.2d at 719; *In re R.P.*, 252 N.C. App. at 305, 798 S.E.2d at 431; *In re C.P.*, 258 N.C. App. at 246, 812 S.E.2d at 192.

¶ 16 After a thorough review of the transcript, we find the 26 September 2019 permanency planning hearing included a plethora of testimonial and documentary evidence and argument regarding both guardianship and whether placement with the foster parents would negatively affect Mitch and should be modified. Unlike the respondent's lack of opportunity in *In re R.P.*, Ivan had opportunity to object on constitutional grounds, or present evidence or argument regarding his constitutionally protected status as a parent throughout the hearing, and did not. *See In re R.P.*, 252 N.C. App. at 305, 798 S.E.2d at 431 (holding no waiver occurred when "the trial court did not hold a proper hearing [because evidence and argument

concerning guardianship was not permitted, and thus the] respondent was not offered the opportunity to raise an objection on constitutional grounds").

¶ 17 For example, Ivan did not object on constitutional grounds during presentation of evidence via the DSS recommendation that the foster parents should receive guardianship of Mitch, documentary evidence recommending the same regarding guardianship, closing argument that guardianship should go to the foster parents, or during closing arguments when DSS extensively argued Ivan had acted inconsistently with his constitutionally protected parental status. Although the trial court did not specifically state at the 26 September 2019 permanency planning hearing that Ivan had acted inconsistently with his constitutionally protected parental status or mention best interests, the trial court made the guardianship determination immediately after closing argument that Ivan had acted inconsistently with his constitutionally protected parental status. Ivan clearly had the opportunity to object or raise this constitutional issue at the 26 September 2019 permanency planning hearing, and did not. According to *In re T.P.*, *In re R.P.*, and *In re C.P.*, Ivan waived appellate review of the trial court's conclusion he acted inconsistently with his constitutionally protected parental status.

CONCLUSION

¶ 18 Ivan's attorney did not object, present argument, or otherwise raise the issue of Ivan's constitutionally protected parental status at the permanency planning

hearing. Accordingly, Ivan waived appellate review of the trial court's determination he acted inconsistently with his constitutionally protected parental rights.

AFFIRMED.

Judges TYSON and GORE concur.

Report per Rule 30(e).