IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-843

Filed 05 July 2023

Lincoln County, Nos. 20 JA 22–25

IN THE MATTER OF: C.T., C.T., C.T., C.T.

Appeal by respondents from order entered 14 July 2022 by Judge Micah J. Sanderson in Lincoln County District Court. Heard in the Court of Appeals 16 June 2023.

R. Scott Hudson for petitioner-appellee Lincoln County Department of Social Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith for the guardian ad litem.

Richard Croutharmel for respondent-appellant father.

Freedman Thompson Witt Ceberio & Byrd PLLC, by Christopher M. Watford for respondent-appellant mother.

TYSON, Judge.

Respondents, the parents of C.R'M.T. ("Megan"), C.L.T. ("Colin"), C.R.T. ("Rachel"), and C.W.T. ("Will"), appeal from a permanency planning order that awarded legal guardianship of Megan and Colin to their respective foster parents and awarded legal guardianship of Rachel and Will to respondent-father's aunt and her

husband. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identities of the juveniles). We vacate the order and remand for further proceedings.

I. Background

Lincoln County Department of Social Services ("DSS") has been involved with the family dating back to July 2016 due to concerns of neglect, improper supervision, substance abuse, injurious environment, and domestic violence. DSS became re-involved with the family in November 2019 after receiving a Child Protective Services ("CPS") report asserting: an injurious environment due to the negligent treatment of a child during an altercation between Respondents; substance abuse by respondent-mother; and, domestic violence. At that time, Will was six years old, Rachel was four-and-a-half years old, Colin was one-and-a-half years old, and Respondent-mother was pregnant with Megan.

Between November 2019 and January 2020, DSS placed Respondents on numerous safety plans directed at keeping Respondent-mother from being in Respondent-father's home with the children. Despite the safety plans, DSS repeatedly discovered Respondent-mother in the home with the children while Respondent-father was away. DSS also received reports of Respondent-mother's substance abuse, including assertions that Respondent-mother had been arrested in South Carolina in December 2019 for possession of methamphetamine and cocaine, and of domestic altercations between Respondents in the presence of the children.

In January 2020, Respondent-mother gave birth to Megan. Hospital staff reported Respondent-mother had behaved as if she was under the influence. A blood screen of the umbilical cord was positive for Subutex, Subutex metabolites, amphetamines, and methamphetamines. Respondent-mother admitted she had used methamphetamine and may have taken Adderall during her pregnancy. Though Megan exhibited withdrawal symptoms, which necessitated her admission to the NICU, Respondents minimized her symptoms and refused treatment, exacerbating her symptoms.

Respondent-father became angry and aggressive with hospital staff and DSS because he was not allowed to take Megan home and was banned from the birthing center. Megan was eventually discharged on 18 January 2020 with a directive that Respondents return for a follow-up appointment in forty-eight hours. Respondents attended the follow-up appointment, but they did not continue Megan's treatment thereafter.

DSS scheduled Respondent-mother to attend a substance abuse assessment as part of a January 2020 safety plan. Respondent-mother's assessment revealed unusually high levels for prescribed Buprenorphine and Norbuprenorphine. She was recommended to complete a Substance Abuse Intensive Outpatient Program and eight weeks of follow-up care. Respondent-mother did not complete these recommendations. In late February 2020, DSS again discovered Respondent-mother in Respondent-father's home while he was away, in violation of safety plans.

DSS filed a series of petitions between March 2020 and May 2020 alleging the children were neglected and dependent. DSS first filed petitions alleging Will, Rachel, and Colin were neglected and dependent and obtained nonsecure custody of the children on 2 March 2020. DSS filed additional petitions on 24 March 2022, alleging Will, Rachel, Colin, and Megan were neglected and dependent, but filed a voluntary dismissal of those petitions on 26 March 2022. DSS filed an "amended" petition alleging all four children were neglected and dependent. DSS later filed "second amended" petitions alleging all four children were neglected and dependent on 19 May 2020.

The juvenile petitions were heard together on 23 June 2020. On 15 July 2020, the trial court entered a "Consolidated Order of Adjudication and Disposition" adjudicating all children neglected. Both Respondents were ordered to complete mental health, domestic violence, and substance abuse assessments and follow recommendations; complete parenting classes; and sign releases of information to DSS.

Respondent-father was additionally ordered to complete a parental fitness evaluation and to follow recommendations. Respondent-mother was separately ordered to actively engage in a substance abuse program and to immediately comply with any drug screens requested by DSS. The court allowed Respondent-father to have ninety minutes of weekly visitation with Will, Rachel, and Colin at their

placements and with Megan at DSS. Respondent-mother was granted ninety minutes of weekly supervised visitation with each child at DSS.

The trial court conducted routine permanency planning hearings throughout the case. The court's findings from the hearings generally provide Respondent-mother failed to make substantial progress on her case plan, and Respondent-father, while completing a substantial portion of his case plan, did not complete approved anger management classes, did not demonstrate a change in his behaviors, and did not recognize the impact on the children of Respondent-mother's substance abuse. The court changed the primary plan for the children to adoption following a permanency planning hearing on 6 April 2021. The court changed the primary plan for the children to guardianship at Respondents' request at the next permanency planning hearing on 25 May 2021.

As Respondent-father continued to make progress on his case plan and reported no longer living with Respondent-mother, the court gradually increased his visitation with the children to unsupervised visits in the community following a hearing on 29 June 2021 and to weekend overnight visits following a hearing on 27 July 2021, on the condition Respondent-mother would not be present during visits. Despite a brief period where overnight visits were suspended due to concerns Respondent-mother was living with Respondent-father and was present during the children's visits, Respondent-father's weekend overnight visits with the children continued until 23 March 2022, when DSS filed a motion to suspend visitation

following a threatening phone call between Respondent-father and DSS, in which Respondent-father made "statements constitut[ing] an imminent threat of mass violence towards [DSS] and all other parties involved in this case."

That phone call occurred the day after a 22 March 2022 permanency planning hearing at which concerns were raised Respondent-father was facing eviction and did not have adequate plans for future housing. Respondent-mother had given birth to a baby in October 2021. Respondent-father was suspected to be the putative father, and his paternity of the newborn would refute his assertions they were no longer in a relationship. Upon learning of the newborn, the court ordered paternity testing and ordered if Respondent-father's paternity was established, his visitation with the children would revert to two hours of weekly supervised visitation at DSS.

On 24 March 2022, the trial court suspended Respondent-father's visits until it could fully review the matter. Following a hearing on 29 March 2022, the court found Respondent-father had threatened physical violence out of frustration, but he was remorseful and would follow court orders. The trial court re-instated ninety minutes of weekly supervised visitation at DSS.

A permanency planning hearing was held on 31 May 2022. DSS and the GAL recommended to the court to proceed with guardianship for the children. The trial court entered a permanency planning order on 14 July 2022, which granted legal guardianship of the children, concluding Respondents "have waived their paramount constitutional rights to care, custody[,] and control of the Minor Children because

they have neglected the Minor Children's welfare and are acting inconsistently with their constitutionally protected status[,]" and "[t]hat it is in the best interests of the Minor Children that guardianship be granted[.]" Guardianship of Megan and Colin was granted to their respective foster parents, and guardianship of Rachel and Will was granted to Respondent-father's aunt and her husband. Respondents appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(4) (2021). Challenges to the trial court's subject matter jurisdiction may be raised at any stage of a juvenile proceeding, even for the first time on appeal. *In re M.R.J.*, 378 N.C. 648, 654, 862 S.E.2d 639, 643 (2021). Whether the trial court possesses subject matter jurisdiction is a question of law subject to *de novo* review. *Id.*

III. Issues

Respondents raise the same three arguments on appeal: (1) the trial court lacked subject matter jurisdiction to conduct permanency planning hearings regarding Megan; (2) the trial court failed to identify the correct legal standard applied to the determination that they acted inconsistently with their constitutionally protected status as parents; and (3) the trial court failed to properly verify that the guardians understood the legal significance of the appointment and had adequate resources to care for the children. We address Respondents' arguments together.

IV. Analysis

A. Subject Matter Jurisdiction Over Megan

Respondents challenge the trial court's subject matter jurisdiction in the case regarding Megan. "Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child." *In re A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1, 3–4 (2020) (citation omitted). Orders entered by a trial court acting without subject matter jurisdiction are void *ab initio*. *In re E.B.*, 375 N.C. 310, 317, 847 S.E.2d 666, 672 (2020) (citing *In re T.R.P.*, 360 N.C. at 588, 636 S.E.2d at 789).

Respondents argue the record does not contain a verified juvenile petition initiating Megan's case and the trial court lacked subject matter jurisdiction. Respondents contend all proceedings and orders concerning Megan are void *ab initio* and must be vacated.

Respondents argue *In re E.B.*, 268 N.C. App. 23, 834 S.E.2d 169 (2019), *rev'd on other grounds*, 375 N.C. 310, 847 S.E.2d 666 (2020), is controlling on the jurisdictional issue. In that case, a father petitioned this Court for a writ of *certiorari* to review the validity of six permanency planning orders as part of his appeal from an order terminating his parental rights. *Id.* at 25, 834 S.E.2d at 172. The father argued "the trial court erred in basing the termination of his parental rights on his failure to comply with the terms of [the permanency planning] orders" since "those orders were entered without subject matter jurisdiction or authority because there

was no pending juvenile action for abuse, neglect, or dependency filed under the Juvenile Code at the time the [o]rders were entered." *Id.* (quotation marks omitted).

This Court granted the writ of *certiorari* and agreed with the father, holding that "because no abuse, neglect, or dependency action was commenced in the instant case by the filing of a proper petition, the trial court was without subject-matter jurisdiction to enter its six [p]ermanency [p]lanning [o]rders[,]" and the permanency planning orders were void. *Id.* at 27, 834 S.E.2d at 173.

The instant case is distinguishable from *In re E.B.*, in which "[n]o juvenile petition was ever filed in the case[,]" much less "a proper juvenile petition consistent with the requirements of N.C. Gen. Stat. §§ 7B-402(a) and 403(a)[.]" *Id.* at 24–26, 834 S.E.2d at 171–72. The record does include a juvenile summons returned on 4 March 2020, evidencing service on Respondent-mother of a neglect and dependency petition and a nonsecure custody order concerning Megan on 3 March 2022, indicating there may have been a petition filed for Megan at the same time as the other children. Respondents contend the petitions labeled as "amended" petitions are insufficient to confer jurisdiction without a prior pleading to amend and relate back to. We cannot presume a petition exists and base our analysis on the record before the Court.

Although the record does not contain a petition for Megan filed at the time DSS filed petitions concerning the other children on 2 March 2020, DSS filed what it labeled as "amended" petitions alleging Megan was neglected and dependent on 26

March 2020 and 19 May 2020. Those petitions, which contained the information and allegations of fact required by N.C. Gen. Stat. § 7B-402(a) and were verified as required by N.C. Gen. Stat. § 7B-403(a), were sufficient to initiate a juvenile proceeding and invoke the trial court's jurisdiction over Megan. Respondents admit the 26 March 2020 and 19 May 2020 petitions are "technically sufficient."

The "amended" petition for Megan filed by DSS on 26 March 2020 standing alone contained the necessary information, verification, and sufficient factual allegations to invoke the trial court's jurisdiction as of the filing of the petition. The trial court had subject matter jurisdiction over all stages of Megan's juvenile case after the filing of the amended petition. *In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792. Respondents' subject matter jurisdiction argument concerning Megan is overruled.

B. Constitutionally-Protected Status of Parents

Respondents next argue the trial court erred by failing to identify the evidentiary standard it applied in determining whether they had acted inconsistently with their constitutionally-protected status as parents.

"A parent has a[ ] [paramount] interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution." *In re N.Z.B.*, 278 N.C. App. 445, 449, 863 S.E.2d 232, 236 (2021) (quoting *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010)). A parent's constitutionally protected paramount interest in their children may be diminished or lost only "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 [their] constitutionally protected status." *In re D.A.*, 258 N.C. App. 247, 250, 811 S.E.2d 729, 731–32 (2018) (quoting *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011)).

"The trial court must clearly address whether [a] parent is unfit or if their conduct has been inconsistent with their constitutionally protected status as a parent, where the trial court considers granting custody or guardianship to a nonparent." *In re N.Z.B.,* 278 N.C. App. at 450, 863 S.E.2d at 236. "A determination that a parent has forfeited this status must be based on clear and convincing evidence." *Id.* (citation omitted); *see also In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017) (providing that findings that support a determination that a parent has acted inconsistently with their constitutionally protected status "are required to be supported by clear and convincing evidence"). "Clear and convincing evidence is an intermediate standard of proof, greater than the preponderance of the evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases." *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019) (internal citations and quotation marks omitted).

" '[T]he trial court must be clear that it is applying the "clear, cogent, and convincing" standard' when it determines a parent has acted inconsistently with their paramount right to parent their children." *In re N.Z.B.*, 278 N.C. App. at 450, 863 S.E.2d at 236 (quoting *Moriggia v. Castelo*, 256 N.C. App. 34, 43, 805 S.E.2d 378, 383

(2017) (alteration in original)). Our Supreme Court and this Court have consistently overturned orders where the trial court fails to indicate its findings and determination that a parent lost their constitutionally protected status was based on clear and convincing evidence and have remanded those cases for application of the appropriate evidentiary standard. *See David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005); *Bennett v. Hawks*, 170 N.C. App. 426, 429, 613 S.E.2d 40, 42 (2005); *In re J.L.*, 264 N.C. App. at 419–20, 826 S.E.2d at 266–67; *In re N.Z.B.*, 278 N.C. App. at 450–51, 863 S.E.2d at 237.

Before reaching the merits of this issue, we address DSS' and the GAL's contention that Respondents' challenge to the trial court's determination they acted inconsistently with their constitutionally-protected status was not preserved for review because no objection was made when the trial court rendered the determination in open court. "[A] parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court." *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497–98 (2022). "However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing." *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (citation omitted); *see also In re J.N.*, 381 N.C. at 135, 871 S.E.2d at 499 (Earls, J., concurring) ("[A] parent must actually have an opportunity to make the argument in the court below.").

Our courts have correctly concluded a party cannot object at a hearing to findings and conclusions in an order not yet entered. *See In re B.R.W.*, 278 N.C. App. 382, 397–99, 863 S.E.2d 202, 214–16 (2021) (overruling contentions that a mother had waived challenges to determinations that she was unfit and had acted in a manner inconsistent with her constitutionally protected status as a parent made in a permanency planning order entered months after the hearing that concluded), *aff'd*, 381 N.C. 61, 871 S.E.2d 764 (2022).

In the case of *In re B.R.W.*, this Court explained:

> a trial court's findings of fact are not evidence, and a parent may not "object" to a trial court's rendition of an order or findings of fact, even if these are announced in open court at the conclusion of a hearing. If a party has presented evidence and arguments in support of [their] position at trial, has requested that the trial court make a ruling in [their] favor, and has obtained a ruling from the trial court, [they] ha[ve] complied with the requirements of Rule 10 and [they] may challenge that issue on appeal. An appeal is the procedure for "objecting" to the trial court's findings of fact and conclusions of law.

278 N.C. App. at 399, 863 S.E.2d at 215.

In this case, Respondent-father presented evidence tending to show he had: made substantial progress on his case plan; opposed imposing guardianship for the children and argued for reunification; and, asserted his constitutional right to the care, custody, and control of his children. The transcript of the permanency planning hearing shows Respondent-father's raising his constitutional rights as a parent reminded the trial court it needed to include a finding Respondents had acted

inconsistently with their constitutionally-protected status.

Upon review of the record, we hold the instant challenge to the trial court's determination that respondents acted inconsistently with their constitutionally-protected status is preserved "by [Respondent-father's] evidence, arguments, and opposition to guardianship at the trial." *Id.* at 399, 863 S.E.2d at 216; *see also In re J.N.*, 381 N.C. at 136, 871 S.E.2d at 499 (Earls, J., concurring) (explaining "there are no 'magic words' such as 'constitutionally-protected status as a parent' that must be uttered by counsel, nor is the parent's counsel required to object to certain evidence or specific findings of fact to preserve the constitutional issue. DSS may present evidence that a parent is unfit or otherwise has acted inconsistently with their constitutionally-protected status. Unless the parent presents no evidence and makes no arguments, the parent has raised the constitutional issue by responding to DSS's arguments.") (citing *In re B.R.W.*, 278 N.C. App. 382, 863 S.E.2d 202)).

We agree with Respondents the trial court failed to clearly indicate, in either the order nor in open court, that its determination Respondents acted inconsistently with their constitutionally-protected status as parents was based on clear and convincing evidence.

The trial court announced a finding in open court that Respondent-father "abrogated his constitutionally protected status as a parent" and concluded in the order the Respondents "waived their paramount constitutional rights to care, custody[,] and control of the Minor Children because they have neglected the Minor

Children's welfare and are acting inconsistently with their constitutionally protected status[.]"

On neither occasion did the court specify the determinations were based on clear and convincing evidence. The trial court also failed to specify its findings of fact in support of the conclusion were based on clear, cogent, and convincing evidence. Out of the trial court's thirty-six findings, only finding seven mentions clear and convincing evidence. DSS and the GAL contend the trial court's reference to clear and convincing evidence in finding seven was sufficient to indicate the remainder of the findings were also based on clear and convincing evidence, with the GAL adding that the trial court's failure to indicate findings 8 through 36 were based on clear and convincing evidence was merely scrivener's error.

Finding seven begins, "the following testimony was proven by clear and convincing evidence[.]" The remainder of the finding consists of virtual *verbatim* recitations of testimony from witnesses testifying at the permanency planning hearing. It is unclear what the trial court means by "testimony was proven by clear and convincing evidence[,]" but finding seven merely recites testimony. The court's reference to "clear and convincing evidence" appears to be limited to finding seven. Finding seven is not a proper finding of fact, since mere "[r]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge." *In re N.D.A.*, 373 N.C. 71, 75, 833 S.E.2d 768, 772 (2019) (emphasis omitted) (citation omitted), *abrogated in part on other grounds by In re G.C.*, ___N.C.____, 884 S.E.2d 658 (2023).

The GAL also directs this Court to the trial court's statements during its oral recitation of findings in open court that there was a "mountain of evidence" and it was "beyond any doubt" that Respondent-father was still in a relationship with Respondent-mother, which the GAL asserts corresponds to finding fourteen—"[t]hat based upon the totality of the evidence in this matter, it is evident that the Respondent Father and Mother are still in a relationship." The GAL contends these statements, particularly the mention of "beyond any doubt," indicates the court applied a standard at least as strict as clear and convincing evidence. *See In re J.L.*, 264 N.C. App. at 419, 826 S.E.2d at 266 (explaining the clear and convincing standard is an intermediate standard of proof). Although the court stated "beyond any doubt" in open court, it made finding fourteen only based on the "totality of the evidence," not based on evidence beyond any doubt or even clear and convincing evidence.

The trial court's reference to various standards for a single finding of fact does not show the court applied the correct clear and convincing standard to other findings or in its determination that Respondents had acted inconsistently with their constitutionally-protected status.

Where the trial court's only mention of clear and convincing evidence was made in reference to recitations of testimony, which did not constitute a proper finding of fact and the only other references to evidentiary standards in the order and in open court were to incorrect standards, it is not clear to this Court that the trial court determined Respondents individually or together were unfit or had acted

inconsistently with their constitutionally-protected status by clear and convincing evidence. "[W]e vacate the order of the trial court and remand this matter for the application of the clear and convincing standard[.]" *In re N.Z.B.*, 278 N.C. App. at 451, 863 S.E.2d at 237.

C. Verification of Guardians

Respondents additionally argue the trial court failed to properly verify the guardians understood the legal significance of the appointment and found they had the adequate resources to care for the children, as is required by N.C. Gen. Stat. § 7B-600(c) (2021). We need not address this argument because we are vacating the trial court's order. The trial court must ensure proper verification of guardians as is required by N.C. Gen. Stat. § 7B-600(c) (2021).

IV. Conclusion

Because the trial court failed to indicate it had applied the mandated clear and convincing evidence standard on DSS and the State to determine whether Respondents were unfit or had acted inconsistently with their constitutionally-protected status as parents, we vacate the trial court's order awarding legal guardianship of the children and remand this matter for application of the clear, cogent, and convincing standard of proof. *It is so ordered.*

VACATED AND REMANDED.

Judge FLOOD and Judge RIGGS concur.

Report per Rule 30(e).