IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-219

Filed 19 December 2023

Alexander County, No. 20 JA 42

IN RE:

D.L., Minor Juvenile.

Appeal by Respondent-Appellant Father from Order entered 15 November 2022 by Judge Bryan A. Corbett in Alexander County District Court. Heard in the Court of Appeals 29 November 2023.

Lauren Vaughan for Petitioner-Appellee Alexander County Department of Social Services.

Robinson & Lawing, LLC, by Christopher M. Watford, for Respondent-Appellant Father.

Robert C. Montgomery for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Respondent-Father appeals from an Order captioned "Juvenile Order, Subsequent Permanency Planning Hearing" (the Order), which eliminated

reunification as a permanent plan for his minor son, Doug,[1] and awarded guardianship of Doug to family friends of the paternal grandparents (Family Friends).[2] The Record before us tends to reflect the following:

On 27 October 2020, Alexander County Department of Social Services (DSS) filed a Petition alleging Doug and his three siblings were neglected and dependent juveniles. The same day, DSS requested and was granted nonsecure custody of the children. Prior to requesting custody, DSS personnel questioned both parents to determine whether there was a potential relative or kinship placement for the children. Neither parent was able to identify a suitable placement for the children. Consequently, Doug and his siblings were initially placed in foster care.

Respondent-Father signed a Family Services Case Plan on 23 November 2020. Pursuant to that Plan, Respondent-Father agreed to complete a Comprehensive Clinical Assessment and follow any recommendations, complete random drug screens, and engage and participate in home visits and meetings, among several other items. Although a urine drug screen came back negative on 9 March 2021, Respondent-Father did not submit to the requested hair follicle screen and failed to submit to numerous drug screens DSS requested between November 2020 and 11 May 2021. Respondent-Father also missed at least five visits with Doug between the Dispositional Hearing on 25 February 2021 and the next scheduled hearing date of

[1] A pseudonym chosen by the parties pursuant to N.C.R. App. P. 42(b).

[2] Respondent-Mother is not a party to this appeal.

20 May 2021.

In January 2021, DSS completed a home study of Doug's paternal grandparents for potential placement of Doug's older siblings. At that time, the paternal grandfather had a pending charge of Driving While Impaired from August 2020. During the home study, DSS personnel asked the paternal grandparents about taking all three of Respondent-Father's children; however, they declined to be considered for Doug's placement.[3] The home study was approved for placement of Respondent-Father's older children.

In February 2021, DSS obtained a home study of the Family Friends for placement. Both the mother and Respondent-Father requested they be considered for placement of Doug. The home study was approved for placement of Doug. Both placements of Doug and his siblings were consented to by the parents and approved by the trial court at Disposition on 25 February 2021.

On 28 January 2021, Respondent-Father was arrested for felony Possession of a Schedule II Controlled Substance, Maintaining a Vehicle/Dwelling Place for a Controlled Substance, and Possession of Drug Paraphernalia. On 25 February 2021, the children were adjudicated neglected and dependent. On 14 May 2021, Respondent-Father was arrested and charged with Felony Trafficking in

[3] The paternal grandfather later testified that that he and his wife were willing to assume care for Doug but claimed DSS never contacted them to evaluate them for placement. The Record contains conflicting evidence, namely a DSS report and evidence showing the paternal grandparents had first suggested the Family Friends for placement of Doug.

Methamphetamine and Felony Possession with Intent to Manufacture, Sell, and Deliver. He was convicted on 23 September 2021 and sentenced to 10-17 months of imprisonment. He remained incarcerated throughout the continuation of these proceedings.

On 18 November 2021, the trial court entered a Permanency Planning Order. The Permanency Planning Order established reunification as the primary permanent plan for the children and a secondary permanent plan of guardianship. At further permanency planning hearings on 24 February 2022 and 16 June 2022, these remained the primary and secondary goals, and Doug's placement with the Family Friends continued. At the 16 June permanency hearing, the parents for the first time requested Doug be placed with Respondent-Father's parents. DSS considered placement with the paternal grandparents, but believed continued placement with the Family Friends was in Doug's best interest.

At a permanency planning hearing on 6 October 2022, the trial court awarded guardianship of Doug to the Family Friends. In its written Order entered 15 November 2022, the trial court made Findings of Fact which stated Respondent-Father had not made adequate progress on his case plan in a reasonable period of time to address the issues that brought Doug into DSS custody, he was not actively participating in or cooperating with the plan, he had not remained available to DSS, the Court, and the GAL, and was acting in a manner inconsistent with Doug's health or safety.

Based on its Findings, the trial court made its Conclusions of Law, which included that guardianship was the best permanent plan for the juvenile. The trial court subsequently ordered the Family Friends be appointed as Doug's guardians under N.C. Gen. Stat. §§ 7B-600 and 7B-906.1 and set out conditions for Respondent-Father's visitation as follows:

> If recommended by the juvenile's therapist, [Respondent-Father] shall have a minimum of two (2) hours per month visitation with the juvenile in a therapeutic setting. Thereafter, if/once the therapist recommends traditional visits (i.e., not therapeutic setting), [Respondent-Father] shall have a minimum of six (6) hours per month[.]

Respondent-Father filed written notice of appeal on 15 December 2022.

Appellate Jurisdiction

This Court has jurisdiction to hear this case pursuant to N.C. Gen. Stat. § 7B-1001(5) as it arises from an Order eliminating reunification as a permanent plan.

Issues

The issues presented are whether: (I) the trial court erred by finding the Family Friends understood the legal significance of guardianship; (II) the trial court erred by denying Respondent-Father's request Doug be placed with the paternal grandparents; (III) the trial court erred by ceasing reunification efforts with Respondent-Father; (IV) the trial court erred by conditioning Respondent-Father's visitation on a therapist's determination.

Analysis

Our "review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law." *In re J.V. & M.V.*, 198 N.C. App. 108, 112, 679 S.E.2d 843, 845 (2009) (alteration in original) (citation and quotation marks omitted).

"When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show that it considered the best interest of the child." *In re Chasse*, 116 N.C. App. 52, 62, 446 S.E.2d 855, 861 (1994) (citation omitted). "Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citation omitted). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 273 N.C. App. 427, 429, 848 S.E.2d 749, 751 (2020) (citation and quotation marks omitted).

I. Appointment of the Family Friends as Legal Guardians

Respondent-Father contends the trial court improperly concluded the Family Friends should be appointed as Doug's legal guardians because it failed to verify they understood the legal significance of guardianship, as required by N.C. Gen. Stat. § 7B-600. Respondent-Father specifically challenges Finding of Fact 26, which states,

in pertinent part, "The proposed guardians understand the legal significance of the placement[.]"

Under N.C. Gen. Stat. § 7B-600(c), before placing a child in a guardianship, the trial court must verify that the person or persons receiving guardianship "understand[s] the legal significance of the appointment[.]" N.C. Gen. Stat. § 7B-600(c) (2021). Although the trial court need not make specific findings of fact on this point, there must be competent evidence in the record to support verification. *In re J.M.*, 271 N.C. App. 186, 195, 843 S.E.2d 668, 675 (2020). "It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (citation omitted). This Court has held that competent, reliable evidence may include testimony from others, including testimony of a social worker or a home study or other court report. *See, e.g.*, *In re B.H.*, 278 N.C. App. 183, 190-91, 861 S.E.2d 895, 901 (2021); *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73, *disc. rev. denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). A prospective guardian is not required to testify to demonstrate understanding of the legal significance of guardianship. *In re S.B.*, 268 N.C. App. 78, 88, 834 S.E.2d 683, 690 (2019).

Finding 26 is supported by competent evidence. First, DSS social worker Myles McLain testified that he had spoken with the Family Friends about guardianship:

> McLain: We felt with the placement being a kinship provider with familiar bonds as well as the progress on the Respondent Mother's part with her case plan it was in, it was in [Doug's] best interest to remain with the guardship at this time.
>
> Q: And, and at that time that those recommendations were being formulated and made did you discuss it with the placement in terms of the placements being amenable to a guardianship entering as to [Doug]?
>
> McLain: That's correct.

Additionally, during McLain's testimony, he identified a home study for the Family Friends conducted in 2021. In the home study, the Family Friends stated "[t]hey want [Doug] to be somewhere stable," and "they are willing to meet the needs for him as long as needed." Further, the Family Friends reported "they are able to provide a safe and stable home for [Doug]," and the home study concluded the Family Friends "appear[ed] eager and willing to support [Doug] and his wellbeing."

Both the testimony of the social worker in this case and the home study support the trial court's Finding that the Family Friends understood the legal significance of guardianship. Therefore, we affirm the trial court's Finding.

II. Continued Placement with Non-Relatives

Respondent-Father argues the trial court erred by continuing Doug's placement with the Family Friends after Respondent-Father and mother requested he be placed with his paternal grandparents.

Under N.C. Gen. Stat. § 7B-903(a1), when a child must be removed from their home, the court must first consider "whether a relative of the juvenile is willing and

able to provide proper care and supervision of the juvenile in a safe home." N.C. Gen. Stat. § 7B-903(a1) (2021). If the trial court determines there is such a relative, it must place the juvenile with that relative "unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.* Additionally, the trial court must "consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence." *Id.*

Immediately when DSS obtained custody of Doug, DSS considered and evaluated placement of Doug and his siblings with the parental grandparent and completed a full home study in January 2021. Although the home study was approved for "the children," the paternal grandparents declined to consider placement of Doug with them at that time. At the disposition hearing on 25 February 2021, in an order Respondent-Father consented to, the trial court made the following Finding:

> The Court has considered whether a relative of the juveniles are [sic] willing and able to provide proper care and supervision of the juveniles in a safe home. . . . Placement of [Doug] with Foster Care [the Family Friends] and [Doug's siblings] with the maternal [sic] grandparents is consistent with the juvenile's best interest.

The trial court specifically approved placement of Doug's siblings with the paternal grandparents and of Doug with the Family Friends. On 5 March 2021, Doug was placed with the Family Friends. In June 2022, after Doug had been with the Family Friends for over fourteen months, Respondent-Father and mother inquired about moving Doug to place him with the paternal grandparents. Based on Doug's bonds

with the Family Friends, his progress in their home, and the paternal grandfather's pending criminal charges, DSS did not recommend moving Doug to the paternal grandparents' home.

In the Order, entered following the permanency planning hearing on 6 October 2022, the trial court made the following relevant Findings of Fact:

> 7. [DSS] did reach out to the paternal grandparents. . . as a possible placement option for the juvenile.
>
> . . . .
>
> 20. Information regarding the placement(s) the juvenile has had is contained in the social worker's report, the GAL's report, and the prior court orders. The Court has considered whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why. Specifically, the Court finds that the juvenile should remain in the current placement because the juvenile is receiving appropriate care and the placement provider is willing and able to provide permanency for the juvenile.
>
> . . . .
>
> 27. The Court finds by clear, cogent, and convincing evidence that: (a) the juvenile has resided with [the Family Friends] for a period of at least one year; (b) the placement is stable, and continuation of the placement is in the juvenile's best interest[.]

Based on these Findings, the trial court concluded: "The best permanent plan for the juvenile is Guardianship pursuant to N.C.G.S. § 7B-600(b)," and ordered the Family Friends be awarded guardianship of Doug.

The Record demonstrates the trial court considered placement of Doug with his paternal grandparents both at the initial disposition and the permanency

planning hearings. The trial court could not place Doug with the paternal grandparents at the initial disposition because they declined to take him. At the permanency planning hearing in October 2022, the trial court specifically found that continued placement with the Family Friends was in Doug's best interest. Based on the Record before us, the trial court considered relative placement with the paternal grandparents as required by N.C. Gen. Stat. § 7B-903(a)(1), and adequately explained such placement was not in Doug's best interest. Consequently, the trial court did not err in its consideration of placements for Doug.

III. Cessation of Reunification Efforts

Respondent-Father next contends the trial court erred by ceasing reunification efforts with Doug because the trial court either failed to make statutorily required findings, or its Findings were not supported by competent evidence.

Appellate review of a trial court's permanency planning review order "is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law." *In re A.P.W.*, 378 N.C. 405, 410, 861 S.E.2d 819, 825 (2021) (alteration in original) (citation and quotation marks omitted). The trial court's findings of fact are conclusive on appeal if supported by competent evidence. *Id.*

Pursuant to N.C. Gen. Stat. § 7B-906.2(b), "[r]eunification shall be a primary or secondary plan unless. . . the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's

health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2021). To make that determination, the trial court is required to make written findings "which shall demonstrate the degree of success or failure toward reunification," including:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan[;]
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile[;]
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile[;]
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d)(1)-(4) (2021). Thus, when ceasing reunification efforts and eliminating reunification as a permanent plan, the trial court must make findings under both N.C. Gen. Stat. § 7B-906.2(b) and (d). *See In re L.E.W.*, 375 N.C. 124, 129-33, 846 S.E.2d 460, 465-67 (2020).

a. Finding Under N.C. Gen. Stat. § 7B-906.2(b)

Respondent-Father contends the trial court failed to make a finding "reunification efforts clearly would be unsuccessful" or would be inconsistent with Doug's health or safety. Here, the trial court made the following Finding of Fact:

> 8. Based on the [Respondent-Father's] lack of sufficient, timely progress in addressing the issues that caused the juvenile to enter the purview of the court and foster care, *further efforts to reunite the juvenile with the [Respondent-Father] clearly would be unsuccessful and inconsistent with the juvenile's health or safety* and thus, should cease.

Thus, the Record clearly rebuts Respondent-Father's contention the trial court did not make the required findings under N.C. Gen. Stat. § 7B-906.2(b).

b. Findings of Fact

Respondent-Father also challenges Findings of Fact 12 through 15, arguing they are not supported by the evidence. Those Findings read:

> 12. The Respondent Father is not making adequate progress within a reasonable period of time under the plan.
>
> 13. The Respondent Father is not actively participating in or cooperating with the plan, DSS, and the GAL for the juvenile.
>
> 14. The Respondent Father has not remained available to the Court, DSS, and the GAL for the juvenile.
>
> 15. The Respondent Parents are acting in a manner inconsistent with the health or safety of the juvenile.

First, Respondent-Father argues Finding 12 is not supported by evidence because the trial court did not indicate what it believed constituted "adequate progress" or what it believed to be "reasonable time," and because the evidence showed he could not make progress due to his incarceration. Here, the Record shows Respondent-Father made little progress on his case plan even prior to his incarceration.

This case is similar to the facts of *In re A.P.W.*, in which our Supreme Court affirmed an order eliminating reunification efforts where the juvenile had been in DSS custody for over twenty months, respondent-father "continued to engage in

activities resulting in his incarceration and conviction, repeatedly refused to submit to drug screens, and had made no meaningful effort to engage with his case plan[.]" 378 N.C. at 419, 861 S.E.2d at 831. Here, the trial court received written reports from both DSS and the Guardian ad litem, and it heard testimony from several witnesses. The DSS court report indicates Respondent-Father entered into a case plan on 23 November 2020 in which he agreed to: complete a Comprehensive Clinical Assessment and comply with its recommendations; sign necessary releases of information; submit to random drug screens; demonstrate effective parenting skills; participate in community referrals and resources; attend medical appointments for Doug; provide proof of income; and maintain employment.

The DSS report also contained a summary of Respondent-Father's criminal history, which shows he was arrested twice on felony drug charges while Doug was in foster care. The report also stated Respondent-Father was incarcerated on 14 May 2021 and has remained incarcerated since then. It lists at least six drug screens with which Respondent-Father failed to comply prior to his incarceration. The Record further contains prior DSS reports indicating Respondent-Father did not visit Doug at all after 20 December 2022, nearly five months prior to his incarceration. Additionally, the trial court took "judicial notice of the prior orders entered" in this case and "incorporate[d] the same herein by reference."

At the time of the Order, Doug had been in DSS custody for over two years. While Doug was in foster care, Respondent-Father continued to engage in activities

resulting in his incarceration and conviction, failed to submit to drug screens as required in his case plan, and stopped visiting Doug nearly five months prior to his incarceration. This evidence, in conjunction with our precedents, supports the trial court's Finding 12. Further, Respondent-Father's arguments on this Finding and others largely center on his contention he was precluded from making adequate progress under the plan due to his incarceration. In the context of termination of parental rights actions, our Courts have consistently held a parent's incarceration is a circumstance the trial court should consider in evaluating a parent's progress. *In re C.W.*, 182 N.C. App. 214, 226, 641 S.E.2d 725, 733 (2007). However, "incarceration, standing alone, is neither a sword nor a shield[.]" *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005). Respondent-Father's incarceration, standing alone, cannot shield him from a finding he had not made adequate progress in a reasonable period of time, particularly when the Record contains ample evidence he did little to make progress on his case plan in the months prior to his incarceration. Thus, Finding 12 is supported by competent evidence.

Second, Respondent-Father challenges Finding 13 that he was "not actively participating in or cooperating with the plan, DSS, and GAL for the juvenile." Again, the Record shows Respondent-Father failed to cooperate with his case plan even prior to his incarceration by refusing to submit to drug screens, missing visits with Doug, and continuing to engage in behavior resulting in his incarceration and conviction. Moreover, in light of the unchallenged Finding of Fact DSS made reasonable

reunification efforts, evidence in the Record showing Respondent-Father has not attempted to participate or cooperate with his case plan is sufficient. "Any unchallenged findings are deemed supported by competent evidence and are binding on appeal." *In re Z.G.J.*, 378 N.C. 500, 508-09, 862 S.E.2d 180, 187 (2021) (internal citation and quotation marks omitted). Thus, Finding 13 is supported by competent evidence.

Third, Respondent-Father challenges Finding 14 that he "has not remained available to the Court, DSS, and the GAL for the juvenile." Respondent-Father relies on a portion of the DSS report that states, "Does the Bio-Father remain available to the Department? Yes." This statement was among the evidence presented to the trial court, which is responsible for considering and weighing the credibility of all the evidence before it to make its own findings. *See In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (stating in the context of a challenge to trial court's factual finding juveniles were neglected, "it is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (citation omitted)). The trial court is not bound to agree with a statement merely because it appears in a DSS report. *See In re A.U.D.*, 373 N.C. 3, 11, 832 S.E.2d 698, 703 (2019) (holding the trial court was not bound by a guardian ad litem's recommendation). The trial court also considered evidence that Respondent-Father had been incarcerated for fifteen

months and his history of contact with DSS and the GAL. Thus, Finding 14 is supported by competent evidence.

Finally, Respondent-Father challenges Finding 15 that he "was acting in a manner inconsistent with the health and safety of the juvenile." The Record contains evidence Respondent-Father continued engaging in drug-related and criminal activities, leading to his incarceration. Respondent-Father had made little progress on his case plan prior to his incarceration. Respondent-Father cannot use his incarceration as a shield, and other evidence in the Record supports the trial court's Finding that he was acting in a manner inconsistent with Doug's health and safety. *In re P.L.P.*, 173 N.C. App. at 10, 618 S.E.2d at 247. Accordingly, Finding 15 is supported by competent evidence. Thus, there is competent evidence to support each of the trial court's challenged Findings of Fact. Therefore, the trial court did not err in ceasing reunification efforts with Respondent-Father. Consequently, we affirm this portion of the Order.

IV. Visitation Condition

Finally, Respondent-Father contends, and DSS concedes, the trial court erred in conditioning his visitation with Doug on a therapist's recommendation.

Under N.C. Gen. Stat. § 7B-905.1(c), "[i]f the juvenile is placed or continued in the custody of 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." N.C. Gen. Stat. § 7B-905.1(c) (2021). In this

case, the trial court's Order set out the following parameters on visitation:

> If recommended by the juvenile's therapist, Respondent Parents shall have a minimum of two (2) hours per month visitation with the juvenile in a therapeutic setting. Thereafter if/once the therapist recommends traditional visits (i.e., not therapeutic setting), Respondent Parents shall have a minimum of six (6) hours per month supervised by [the Family Friends] or a supervisor approved by the guardians.

This Court has held a determination of visitation is a judicial function that cannot be delegated by the trial court. *In re J.D.R.*, 239 N.C. App. 63, 75-76, 768 S.E.2d 172, 179-80 (2015). In *In re J.D.R.*, this Court held a visitation order granting significant discretion to the father to determine the degree and extent of the mother's visitation impermissibly delegated a judicial function. *Id.* Here, the trial court's Order leaves the decision to grant visitation up to a therapist rather than the trial court.

Although the Order sets out minimum length and frequency requirements, as in *In re J.D.R.*, the Order impermissibly delegates the determination of whether to grant visitation solely to the juvenile's therapist. Consequently, we vacate and remand this matter to the trial court to expressly determine whether to grant visitation to Respondent-Father: specifically, whether (a) Respondent-Father has or has not forfeited his visitation rights; and (b) it is or is not in the best interests of Doug to have visitation with Respondent-Father at the present time pending recommendations from the juvenile's therapist upon further judicial review. *See In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971) ("[A] parent's right of visitation with his or her child is a natural and legal right and that when

awarding custody of a child to another, the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child."); *see also* N.C. Gen. Stat. § 7B-905.1(d) (2021) (providing for motions for review when trial court waives further review hearings but retains jurisdiction).

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order granting guardianship to the Family Friends and eliminating reunification as a permanent plan. However, we vacate the trial court's Order with respect to visitation and remand to the trial court for further determinations as set forth above.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).