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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-51

Filed: 5 July 2017

Cherokee County, No. 15-JA-62

IN THE MATTER OF: B.T.

Appeal by Respondent-Father from an order entered 18 October 2016 by Judge Monica H. Leslie in Cherokee County District Court. Heard in the Court of Appeals 7 June 2017.

*R. Scott Lindsay for petitioner-appellee Cherokee County Department of Social Services.*

*Michael E. Casterline for respondent-appellant father.*

*Parker, Poe, Adams & Bernstein L.L.P., by Mary Katherine H. Stukes, for guardian ad litem.*

HUNTER, JR., Robert N., Judge.

Respondent appeals from a permanency planning order granting custody of his child, B.T. (“Benny”)<sup>1</sup> to the juvenile’s brother and sister-in-law. On appeal,

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<sup>1</sup> We use this pseudonym to protect the juvenile’s privacy and for ease of reading.

Respondent asserts the juvenile court committed the following errors: (1) failing to make a proper inquiry of Benny's proposed custodians; (2) improperly terminating juvenile court jurisdiction by not creating a new civil order; and (3) failing to state the correct evidentiary standard in the order. We vacate and remand.

### **I. Factual and Procedural Background**

On 14 September 2015, Cherokee County Department of Social Services ("DSS") filed a juvenile petition alleging Benny to be a neglected juvenile.<sup>2</sup> The petition asserted the following narrative.

On 18 May 2015, DSS received<sup>3</sup> a "report of concern" regarding Benny. The report averred:

[Benny] reported that [Rita]<sup>4</sup> and [Mom's boyfriend, Daniel] were fighting this morning. [Daniel] slammed [Rita] up against the wall. She could not get up without feeling like she was going to throw up. [Daniel] was acting crazy and [Benny] said he is drinking when he's acting crazy. He also said they were driving around the back grounds, out in Unaka, in the middle of the night and they only stopped at Graves and then went to [a friend]'s house. He was able to take a shower at [the friend]'s house. He is unable to shower at home because there is no water. He also stated he had no medicine today that it was lost or [Daniel] smashed it when he was acting crazy. [Benny] is afraid of [Daniel]. He has not taken medicine at school since March. Mom stated he was taking it at home. There have been several times that the teacher and the nurse have had to call and ask if Mom had given [Benny] his

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<sup>2</sup> Prior to this report, DSS also received two additional reports alleging Benny to be a neglected juvenile on 8 May 2013 and 8 October 2013.

<sup>3</sup> The record does not indicate who filed the "report of concern."

<sup>4</sup> We use pseudonyms for all parties involved to further protect the identity of the juvenile.

medicine. We have no current working phone number.

DSS investigated the allegations and spoke with Rita and Daniel. They admitted to arguing in front of Benny. They also told DSS their home lacked power and running water.

In early June 2015, Courtney Myers, a social worker with DSS, attempted to contact Rita and Daniel. However, Myers was unable to locate the family “for several days.” Rita and Myers spoke on the phone on 15 June 2015. Rita “was very scattered[,]” and Myers struggled to understand her. Rita told Myers that Benny had been staying with his brother, Charlie.

On 16 June 2015, DSS received the following additional information:

Reporter received a text yesterday from unknown drug dealer house that she was seen there using meth via IV. The child was not with the parent. The child was placed with reporter 2013-2014. The boyfriend was arrested recently for drugs in Murphy. There is no power currently at the home. The child reports getting bottle of water from boyfriend’s parent’s house. The child had been with reporter since 06/12/2015 and has not seen the mother since Friday. The mother reports letting the child stay with reporter as they have no power.

Social workers visited Rita at Daniel’s mother’s home. Rita cried and told social workers she had taken pain killers, Xanax, and “maybe a little meth” since Benny was gone. Throughout June and July 2015, Rita and Daniel failed numerous drug tests. Sometime in June 2015, Benny moved in with Charlie and Kate.

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On 23 July 2015, Myers met Respondent and requested a drug screen. Respondent tested positive for methamphetamine. On 2 August 2015, Respondent called Benny's brother and sister-in-law, Charlie and Kate, and threatened to take Benny from their home. Respondent also threatened physical violence against Charlie and Kate. On 5 August 2015, Respondent tested positive for marijuana.

On 18 August 2015, Myers learned Respondent was jailed "for a failure to appear and b[e]ing a fugitive of another state." On 19 August 2015, Myers met with Benny and Kate. Benny told Myers he was excited to see his mother and Daniel. Benny liked to visit Respondent, but did not like to stay over there "because dad just stays down at the camper and leaves me all alone in [aunt]'s house." Kate told Myers that Benny's attitude improved during his time with Charlie and Kate. Benny thanked Kate for letting him live with her and Charlie "because he 'didn't have to be hungry.'" He also enjoyed staying there because he did not "have to be scared to sleep in the car."

On 14 January 2016, the juvenile court held an adjudication hearing. In an order entered 30 March 2016, the juvenile court adjudicated Benny as a neglected juvenile. On 31 March 2016, Myers learned Respondent failed to visit Benny in "several" months and did not call Benny. On 4 May 2016, Respondent tested positive for methamphetamine and amphetamine. On 20 May 2016, Respondent told Myers, "Like I said before, just because I have a positive drug screen doesn't mean I have a

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problem. I hang out with people doing meth. That's how it's in my hair." On 31 May 2016, Respondent ran late to a visitation with Benny. Kate contacted Respondent, and he "became verbally abusive[.]" When Respondent arrived at Charlie's and Kate's home, he was "physically aggressive" towards Charlie and Kate.

On 2 June 2016, the juvenile court held a disposition hearing. At the time of the hearing, Respondent's visitation was "sporadic and inconsistent[.]" The juvenile court noted the following changes in Benny's behavior, which correlated to increased visitation with Respondent:

(a) [Benny] attacked students at school by kicking and punching them; (b) [Benny] may no longer ride the school bus due to his aggressive behaviors on the bus; (c) [Benny]'s grades are being affected with his math grade dropping to a 62 when he was making acceptable grades; (d) [Benny] has become uncontrollable during lessons and the teachers are unable to get him engaged; and (e) [Benny] has started lying stating to social worker Myers that "my dad told me to lie to [Charlie] and [Kate] and I wouldn't get in trouble if I didn't rat myself out."

On 27 July 2016, the juvenile court entered a disposition order and kept Benny in the custody of Charlie and Kate. The juvenile court awarded Respondent weekly visitation for two hours.

On 29 August 2016, the juvenile court held a permanency planning hearing. Myers and another potential custodian for Benny, Rose, testified. Respondent, Charlie, and Kate did not testify at the hearing. On 18 October 2016, the juvenile court entered an order and awarded custody of Benny to Charlie and Kate. The

juvenile court also terminated jurisdiction, pursuant to N.C. Gen. Stat. § 7B-201 (2016) “because the juvenile’s custody is being placed with his brother and sister-in-law pursuant to this order.” On 21 October 2016, Respondent filed timely notice of appeal.

## **II. Standard of Review**

“[Appellate] 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. . . . If the trial court’s findings of fact are supported by any competent evidence, they are conclusive on appeal.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted). We review conclusions of law *de novo*. *Id.* at 41, 698 S.E.2d at 530 (citation omitted).

## **III. Analysis**

We review Respondent’s contentions in three parts: (A) verification of the proposed custodians; (B) the juvenile court’s termination of its jurisdiction; and (C) the standard of proof.

### **A. Verification of the Proposed Custodians**

Respondent contends the juvenile court erred by granting custody to Charlie and Kate because the court received insufficient evidence to verify each custodian understood the legal significance of custody and each custodian possessed adequate resources to appropriately care for Benny. We agree.

Under N.C. Gen. Stat. § 7B-906.1(j) (2016):

[i]f the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

*Id.* This statute requires the court to make two verifications: first, the prospective custodian understands the legal significance of the appointment; and second, the prospective custodian has adequate financial resources to care for the juvenile. *Id.*

“We have held that the trial court need not make any specific findings in order to make the verification under these statutory provisions[,] . . . [b]ut the record must contain competent evidence of the guardians’ [or custodian’s] financial resources and their awareness of their legal obligations.” *In re J.H.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 780 S.E.2d 228, 240 (2015) (internal citations and quotation marks omitted). To that end, we recently explained:

It is correct that the trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian’s situation and resources, nor does the law require any specific form of investigation of the potential guardian. *See* N.C. Gen. Stat. §§ 7B-600(c), -906.1(j). But the statute does require the trial court to make a determination that the guardian has “adequate resources” and some evidence of the guardian’s “resources” is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence.

*In re P.A.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 772 S.E.2d 240, 246 (2015) (citation omitted). “The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.” N.C. Gen. Stat. § 7B-906.1(c) (2016). The evidence may include reports and a home study. *In re J.E., B.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007).

Respondent argues no evidence supports the juvenile court’s verification. DSS “believes” the juvenile court addressed custodian verification, but “because the recording of the hearing was garbled at this point, the answer cannot be determined[.]” Thus, DSS concedes this Court should vacate and/or remand the permanency planning order. The guardian *ad litem* argues the record contains sufficient evidence for custodian verification and directs this Court to *In re K.L.*, No. COA15-349, 2015 WL 4898180 (unpublished) (N.C. Ct. App. Aug. 18, 2015).

First, in regard to the legal significance of custody, Myers testified as follows:

Q. And let me ask you where the child -- there's been temporary custody, I think, awarded by the Court.

A. Uh-huh.

Q. And [Kate] and [Charlie], do they have the (inaudible)? Do they care --

A. Yes.

Q. -- for this child?



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A. They do.

Q. And are they (inaudible) being granted custody?

A. Yes.

Q. And have they had any difficulty with that since he has came back (inaudible)?

A. No.

Q. Is there any reservation in your mind about [Benny] being placed with his brother and his sister-in-law in a permanent placement?

A. No.

In its order, the court incorporated by reference the 29 August 2016 Juvenile Court Social Summary and the Guardian *ad litem* Report. However, the Guardian *ad litem* Report is not included in the record, and the Juvenile Court Social Summary has no evidence showing Charlie and Kate understood the legal significance of custody.

We conclude the record contains insufficient evidence to verify Charlie and Kate understood the legal significance of custody. Neither Charlie nor Kate testified at the permanency planning hearing, and neither DSS nor the guardian *ad litem* reported to the court that Charlie and Kate were aware of the legal significance of custody. *See J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240 (holding the court lacked evidence to conclude the guardians understood the legal significance of guardianship when neither proposed guardian testified at the hearing and no one reported to the

court the proposed guardians were aware of the legal significance); *In re L.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 767 S.E.2d 430, 433 (2014) (holding the court lacked evidence to conclude a guardian understood the legal significance of guardianship when the guardian did not testify at the hearing and did not sign a guardianship form).<sup>5</sup>

Next, we turn to whether the juvenile court received sufficient evidence to conclude Charlie and Kate possessed adequate resources. At the hearing, Myers testified regarding the following: (1) Benny lived with Charlie and Kate for almost fifteen months; (2) Charlie and Kate were both employed; (3) Benny had his own room at Charlie's and Kate's home; and (4) Benny's current placement with Charlie and Kate served Benny's needs.

Based on *J.H.* and its progeny, we conclude this evidence is insufficient to support the finding that Charlie and Kate possessed adequate resources to care for Benny. Meager testimony, without more detail, of employment is insufficient to support the type of verification contemplated by the statute and our case law. *J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240; *P.A.*, \_\_\_ N.C. App. at \_\_\_, 772 S.E.2d at 245-48. Moreover, although Charlie and Kate cared for Benny for fifteen months, Benny

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<sup>5</sup> The guardian *ad litem* directs our Court to *In re K.L.*, No. COA15-349, 2015 WL 4898180 (unpublished) (N.C. Ct. App. Aug. 18, 2015). At the outset, we note *In re K.L.* is an unpublished decision and is not binding authority on our Court. Secondly, we note this Court only reviewed whether the guardian had adequate resources to care appropriately for the juvenile in *In re K.L.* 2015 WL 4898180, at \*5-\*6. The appellant in that case did not appeal the order regarding the proposed guardian's understanding of the legal significance of guardianship. 2015 WL 4898180, at \*5. Thus, *In re K.L.* does not demand a different result.

had his own room, and the current placement “serv[ed Benny]’s needs”, these facts are insufficient under N.C. Gen. Stat. § 7B-906.1 *See J.H.*, \_\_\_ N.C. App. at \_\_\_, 780 S.E.2d at 240 (holding that a successful ten-month placement with the juvenile’s proposed guardians and reports that the juvenile had no financial or material needs in the guardians’ custody was insufficient evidence to show the proposed guardians possessed adequate resources); *P.A.*, \_\_\_ N.C. App. at \_\_\_, 772 S.E.2d at 247-48 (holding evidence that the juvenile had his own room and social worker’s testimony that the guardian had been able to provide for all the juvenile’s needs was insufficient evidence to show the proposed guardian possessed adequate resources).

In sum, the court received insufficient evidence to conclude DSS’s proposed custodians, Charlie and Kate, understood the legal significance of custody and possessed adequate resources. Accordingly, we vacate the court’s determination that legal custody of Benny should be granted to Charlie and Kate and remand for further proceedings.

## **B. Termination of Juvenile Court Jurisdiction**

Respondent next argues the court erred in terminating the juvenile court’s jurisdiction. Specifically, Respondent contends the juvenile court failed to create a civil action order, as required by N.C. Gen. Stat. § 7B-911 (2016). We agree.

Under N.C. Gen. Stat. § 7B-911:

- (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or

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not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.

(b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.

If the order is filed in an existing civil action and the person to whom the court is awarding custody is not a party to that action, the court shall order that the person be joined as a party and that the caption of the case be changed accordingly. The order shall resolve any pending claim for custody and shall constitute a modification of any custody order previously entered in the action.

...

(c) When entering an order under this section, the court shall satisfy the following:

(1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7.

(2) Make the following findings:

- a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.
- b. At least six months have passed since the court made a determination that the

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juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

*Id.*

Respondent argues the court wholly failed to comply with N.C. Gen. Stat. § 7B-911. DSS concedes the issue. The guardian *ad litem*'s response is three-fold: (1) Respondent failed to preserve this issue for appellate review; (2) "there is competent evidence in the record to support findings required for both a 7B and Chapter 50 custody order"; and (3) any alleged error is non-prejudicial.

In its order, the court stated, "The Court is hereby relieved of jurisdiction with regard to [Benny] and the above-captioned juvenile proceeding pursuant to G.S. § 7B-201 because the juvenile's custody is being placed with his brother and sister-in-law pursuant to this order."<sup>6</sup>

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<sup>6</sup> N.C. Gen. Stat. § 7B-201 states:

(a) When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.

(b) When the court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case, including any juvenile court order relating to the custody, placement, or guardianship of the juvenile. The legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed, unless applicable law or a valid court order in another civil action provides otherwise. Termination of the court's jurisdiction in an abuse, neglect, or dependency proceeding, however, shall not affect any of the

First, we note appellate review of this issue is proper. Although the guardian *ad litem* alleges Respondent should have objected to errors in the order at the hearing, Respondent was unable to complain of errors in an *order* at the *hearing* preceding the order. Next, the guardian *ad litem* argues “there is competent evidence in the record to support findings required for both a 7B and Chapter 50 custody order.” Yet, no order in the record complies with N.C. Gen. Stat. § 7B-911. The guardian *ad litem* also alleges this error is non-prejudicial and a “technical error” which does not warrant our Court vacating and remanding this part of the order. However, our case law directs us to vacate and remand for an order compliant with N.C. Gen. Stat. § 7B-911. *In re J.K.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2017) (2017 WL 1381603) (finding prejudicial error and remanding the order when the court failed to comply with N.C. Gen. Stat. § 7B-911).

### **C. Standard of Proof**

Lastly, Respondent contends the juvenile court committed reversible error by failing to state the standard of proof in its order. We agree.

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following:

- (1) A civil custody order entered pursuant to G.S. 7B-911.
- (2) An order terminating parental rights.
- (3) A pending action to terminate parental rights, unless the court orders otherwise.
- (4) Any proceeding in which the juvenile is alleged to be or has been adjudicated undisciplined or delinquent.
- (5) The court’s jurisdiction in relation to any new abuse, neglect, or dependency petition that is filed.

*Id.*

“Because the decision to remove a child from a natural parent’s custody ‘must not be lightly undertaken[,] . . . [the] determination that a parent’s conduct is inconsistent with . . . her constitutionally protected status must be supported by clear and convincing evidence.’” *In re E.M.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 790 S.E.2d 863, 874 (2016) (quoting *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001)) (alterations in original). “‘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.” *Id.* at \_\_\_, 790 S.E.2d at 874 (citation omitted).

If the court’s order fails to indicate it applied the clear and convincing standard, “we must vacate this portion of the [ ] order and remand for entry of a new finding of fact that makes clear the standard of proof applied by the district court in determining whether [his] actions have been inconsistent with [his] constitutionally-protected status as [the juvenile]’s parent.” *Id.* at \_\_\_, 790 S.E.2d at 874 (citation omitted).

Here, the court’s order fails to state it applied the clear and convincing standard. Additionally, the court did not state this standard in open court. Because the juvenile court failed to indicate it used the clear and convincing standard, we are compelled to vacate the portion of the order pertaining to Respondent’s forfeiture of

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his constitutionally-protected status due to unfitness and remand for further proceedings.

**IV. Conclusion**

For the reasons stated above, we vacate and remand.

VACATED AND REMANDED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).