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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1240

Filed: 5 July 2017

Cabarrus County, No. 15 JA 19

IN THE MATTER OF: R.R.

Appeal by Respondent-Father from order entered 12 September 2016 by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Court of Appeals 15 June 2017.

*Hartsell & Williams, P.A., by Stephen A. Moore and H. Jay White, for Petitioner-Appellee Cabarrus County Department of Social Services.*

*W. Michael Spivey for Respondent-Appellant Father.*

*Doughton Blancato, PLLC, by William A. Blancato, for Guardian ad Litem.*

McGEE, Chief Judge.

R.R.'s father ("Respondent") appeals from an order ceasing reunification efforts and granting guardianship of his minor child, R.R., to R.R.'s maternal aunt and uncle. R.R.'s mother is not a party to this appeal. We vacate the trial court's order and remand for further proceedings.

I. Background

The Cabarrus County Department of Human Services (“DHS”) received a report on 29 January 2015, alleging that R.R. had been exposed to domestic violence and an injurious environment in both parents’ homes, and had suffered severe injuries at the hands of an unknown perpetrator while under the mother’s care and supervision. DHS filed a juvenile petition on 6 February 2015 alleging that R.R. was abused and neglected. The trial court entered a consent order on 11 June 2015 wherein R.R. was adjudicated abused and neglected and placed in the custody of DHS. The trial court ordered Respondent to: (1) complete psychological, domestic violence, and substance abuse evaluations and follow all recommendations resulting therefrom; (2) maintain suitable housing free from violence in the home; (3) submit to random drug and alcohol screens; (4) visit with R.R.; and (5) maintain contact with his social worker. The order established a permanent plan of reunification with Respondent.

Following a permanency planning hearing, the trial court entered an order on 4 January 2016, establishing a primary plan of reunification and a secondary plan of guardianship. After an 18 April 2016 permanency planning hearing, the trial court entered an order changing the primary plan to guardianship with a secondary plan of reunification. The trial court held another permanency planning hearing on 26 July 2016, following which the trial court entered an order ceasing reunification

efforts between R.R. and Respondent, and awarding guardianship of R.R. to his maternal aunt and uncle on 12 September 2016. Respondent appeals.

## II. Appellate Jurisdiction

Respondent has filed a petition for writ of *certiorari* as an alternate basis for review of this case in recognition of the fact that his notice of appeal, while timely, was not served upon the guardian ad litem (“GAL”) nor upon the guardians of R.R., in violation of N.C.R. App. P. 3.1(a). While R.R.’s guardians and the GAL were not served with Respondent’s 23 September 2016 notice of appeal, those parties were served with the proposed record on appeal in November 2016 and the settled record on appeal in December 2016. Respondent also served all parties with his appellate brief and petition for writ of *certiorari*. Thus, R.R.’s guardians and the GAL have had an opportunity to object to the notice of appeal, but have not done so. Those parties have also suffered no apparent prejudice by not being served with the original notice of appeal.

“[A] defect in a notice of appeal ‘should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake.’” *State v. Springle*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 781 S.E.2d 518, 521 (2016) (quoting *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011)) (second alteration in original). R.R.’s guardians and the GAL were made aware of Respondent’s appeal early in the appellate process, and

neither objected to Respondent's failure to serve the notice of appeal. Accordingly, we find that the defect in Respondent's notice of appeal should not result in the loss of his appeal, and we allow *certiorari* to permit review of the trial court's order.

### III. Analysis

Respondent argues the trial court erred by: (1) delegating its fact-finding duty to DHS by substantially copying a DHS report into its findings of fact; (2) granting guardianship of R.R. to a non-parent without finding that Respondent was unfit or acted inconsistently with his constitutional right to custody of his child; (3) failing to make findings of fact mandated by statute; and (4) failing to verify that the appointed guardians understood the legal consequences of guardianship or had adequate resources to care appropriately for R.R.

#### A. Delegation of Fact-Finding Duty

Respondent first argues that the trial court improperly delegated its fact-finding duty when it entered an order that substantially copied a DHS report. We disagree. In *In re J.W.*, \_\_\_ N.C. App. \_\_\_, 772 S.E.2d 249, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015), this Court clarified that

it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant

whether those findings are taken verbatim from an earlier pleading.

*Id.* at \_\_\_, 772 S.E.2d at 253.

Respondent does not address *J.W.* or attempt to distinguish its holding from the facts of the present case. After reviewing the record of the proceedings, we are confident the trial court used the process of logical reasoning to find the ultimate facts before it and, therefore, it is irrelevant that the findings were taken verbatim from the DHS report. In light of this Court's holding in *J.W.* and Respondent's inability to distinguish this case from *J.W.*, Respondent's contention is without merit.

**B. Lack of Findings of Fact Regarding Respondent's Fitness**

Respondent next contends the trial court erred by granting guardianship of R.R. to a third party without finding that Respondent was unfit or acted inconsistently with his constitutional right to custody of R.R. We agree.

Our Supreme Court "has recognized the paramount right of parents to the custody, care, and control of their children." *David N. v. Jason N.*, 359 N.C. 303, 305, 608 S.E.2d 751, 752-53 (2005) (citation omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children 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 his or her constitutionally protected status." *Id.* at 307, 608 S.E.2d at 753. "[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is

unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 667 S.E.2d 549, 552 (2009) (citation omitted). The trial court is required to make such a finding even when it transfers custody from DHS to a nonparent. *See, e.g., In re P.A.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 772 S.E.2d 240, 243-249 (2015) (instructing the trial court on remand to make findings regarding whether the respondent had lost her constitutionally protected right to control over her child after the trial court had initially failed to do so when transferring custody from DHS to a nonparent).

Here, Respondent asserted his constitutional right to custody at the permanency planning hearing. Respondent's trial counsel argued that the court must find Respondent to be unfit as a parent prior to determining the best interest of the child. The trial court erroneously responded that it need only determine that a parent was unfit in a termination of parental rights proceeding, not in a permanency planning hearing. The trial court's order contains no finding that Respondent was unfit as a parent or had acted inconsistent with his constitutionally protected status as a parent. The court's failure to make such a finding prior to determining that legal guardianship in a third party was in R.R.'s best interests constitutes reversible error. *In re B.G.*, 197 N.C. App. at 574-75, 667 S.E.2d at 552-53.

C. Mandatory Statutory Findings

Respondent further contends the trial court failed to make certain findings mandated by statute. Specifically, Respondent points to N.C. Gen. Stat. § 7B-906.2(b), which provides that reunification with the parent “shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or 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) (2015). DHS and the GAL concede that the trial court was required to make such a finding in its order but failed to do so, and we agree. The permanency planning order ceased reunification efforts with Respondent, yet the trial court did not include any finding that reunification efforts clearly would be unsuccessful or inconsistent with R.R.’s health or safety as required by the statute.

Respondent also points to N.C. Gen. Stat. § 7B-906.1(e)(1) and argues that the trial court failed to make a finding regarding whether R.R. could be returned to Respondent within six months. We agree. At any permanency planning hearing where the juvenile is not placed with a parent, “the court must determine whether it is possible for the juvenile to return home . . . within the next six months[.]” The court must explain why, and if the juvenile will not be returning home within six months, there are other required findings [under N.C. Gen. Stat. § 7B-906.1(e)].” *In re Everett*, 161 N.C. App. 475, 480, 588 S.E.2d 579, 583 (2003) (citations and internal quotation marks omitted). While the trial court found that Respondent’s “progress is

insufficient that [R.R.] could safely return to” his care, and that “[R.R.’s] return to his own home would be contrary to the juvenile’s health, safety, well-being, and best interest,” the trial court failed to address whether those circumstances were likely to change within the next six months such that R.R. could be placed with Respondent. On remand, if the court again decides against returning R.R. to Respondent’s home and continuing reunification efforts, the trial court should make findings as required by N.C. Gen. Stat. §§ 7B-906.2(b) and 7B-906.1(e)(1).

D. Absence of Required Verification Regarding Appointed Guardians

Finally, Respondent contends the trial court erred when it failed to verify that the appointed guardians understood the legal consequences of guardianship or had adequate resources to care appropriately for R.R. DHS and the GAL acknowledge that the trial court erred in failing to make such a finding, and we agree.

When the trial court appoints an individual guardian for a child, the court must verify that the person appointed understands the legal significance of the appointment and will have adequate resources to care appropriately for the child. N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j) (2015). In our review of the transcript, the trial court made no such inquiry of the guardians. Furthermore, while the trial court made some findings regarding R.R.’s placement with the guardians, those findings do not speak to the issue of whether the proposed guardians understood the legal significance of guardianship or had adequate financial resources to provide for R.R.



The trial court erred in appointing guardians without conducting the required inquiry, and must do so on remand should the court again award guardianship.

IV. Conclusion

For the reasons stated, the trial court erred in ordering the cessation of reunification efforts between R.R. and Respondent, and further erred in awarding guardianship of R.R. to R.R.'s maternal aunt and uncle. The trial court's 12 September 2016 permanency planning order is vacated, and this case is remanded for further proceedings.

VACATED AND REMANDED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).