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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-639

Filed: 2 January 2018

Orange County, No. 15 JA 63

IN THE MATTER OF: C.P.

Appeal by respondent-mother from order entered 21 March 2017 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 14 December 2017.

Holcomb and Stephenson, LLP, by Angenette Stephenson, for Orange County Department of Social Services, petitioner-appellee.

K&L Gates LLP, by Leah D'Aurora Richardson, for guardian ad litem.

W. Michael Spivey, for respondent-appellant mother.

BERGER, Judge.

Respondent-mother appeals from an order that adjudicated the juvenile, C.P. ("Carl"),[1] as a neglected and dependent juvenile, and awarded permanent guardianship to the juvenile's half-brother ("Chris"). On appeal, Respondent-mother makes several arguments, which we address in turn.

[1] Carl is a stipulated pseudonym for ease of reading and to protect the juvenile's identity pursuant to N.C.R. App. P. 3.1(b).

On July 14, 2015, the Orange County Department of Social Services ("OCDSS") filed a juvenile petition alleging that thirteen-year-old Carl was a neglected and dependent juvenile. A hearing was held on August 6, 2015 and an order was entered on August 27, 2015 in which the trial court (1) adjudicated Carl and his older sister[2] as neglected and dependent, and (2) awarded custody of Carl and his sister to their adult half-brother. Respondent-mother appealed.

On October 4, 2016, this Court reversed and remanded the case for a new hearing because the order did not result from a proper adjudicatory hearing or valid consent by Respondent-mother. *In re K.P., C.P.*, ___ N.C. App. ___, ___, 790 S.E.2d 744, 749 (2016). On remand, the trial court held an "adjudication/disposition and permanency planning hearing" on March 2, 2017. The trial court (1) adjudicated Carl as dependent and neglected, and (2) awarded guardianship of Carl to his adult half-brother in an order dated March 21, 2017. Respondent-mother filed notice of appeal.

Respondent-mother concedes that she failed to serve a copy of her written notice of appeal on the guardian for the juvenile. *See* N.C.R. App. P. 3.1(a). Although Respondent-mother failed to comply with Rule 3.1(a) of the North Carolina Rules of Appellate Procedure, this Court has the discretionary authority "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1). Therefore, we

[2] Carl's sister has reached the age of majority and is not a party to this appeal.

grant Respondent-mother's petition for writ of certiorari and address the merits of this case.

Respondent-mother first contends that the court erred by adjudicating Carl as a dependent juvenile. The Juvenile Code defines a dependent juvenile as one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Respondent-mother argues that all of the evidence and findings show that Carl was always in the care of a suitable relative, and thus he could not be adjudicated as dependent. OCDSS concedes that this adjudication was error because at the time of the adjudication, Carl was living with his brother, who was a responsible adult. Because he had an appropriate alternative child care arrangement, Carl was not a dependent juvenile, and the adjudication must be reversed.

Respondent-mother next contends that the court lacked authority to cease reunification efforts at the initial dispositional hearing. Specifically, she argues the court improperly heard the adjudication, initial disposition, and permanency planning hearings on the same day. Associated therewith, Respondent-mother also

asserts that the trial court was required to order reunification as a concurrent plan pursuant to N.C. Gen. Stat. § 7B-906.2.

The "dispositional hearing shall take place immediately following the adjudicatory hearing." N.C. Gen. Stat. § 7B-901(a) (2015). The trial court is required to "conduct a review hearing within 90 days from the date of the [initial] dispositional hearing." N.C. Gen. Stat. § 7B-906.1(a) (2015). Within one year from "the initial order removing custody, there shall be a review hearing designated as a permanency planning hearing." *Id.* The General Assembly has not proscribed conducting adjudications, dispositional, and permanency planning hearings on the same day, and the trial court did not err in hearing these matters.

However, Respondent-mother correctly asserts, and the guardian *ad litem* concedes, that the trial court erred in failing to order reunification as a concurrent plan during the initial permanency planning hearing. "At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b) (2015). The trial court "shall inform the parent, guardian, or custodian that failure or refusal to cooperate with the [initial] plan may result in an order of the court in a *subsequent* permanency planning hearing that reunification efforts may cease." N.C. Gen. Stat. § 7B-906.1(g) (2015) (emphasis added). While a permanency planning hearing may be held on the same day as the adjudication and disposition, a trial court may not

cease reunification efforts at the initial permanency planning hearing. Thus, even though the trial court found that Respondent-mother "presents a risk to the health and safety of the juvenile" and that "[r]eunification efforts . . . would be futile," the plain language of Section 7B-906.1(g) compels us to find that the trial court erred in failing to include reunification as a concurrent permanent plan.

Respondent-mother next contends that the court erred by ordering a permanent plan of guardianship with a relative without making a finding mandated by N.C. Gen. Stat. § 7B-906.1(e)(1) (2015); namely, "[w]hether it is possible for the juvenile to be placed with a parent within the next six months, and if not, why such placement [with the parent] is not in the juvenile's best interests." *Id.* The guardian *ad litem* and OCDSS concede that the order does not contain the mandated finding. Although the trial court addressed Respondent-mother's faults as a mother and the fractured relationship she had with Carl, the court erred in not finding the key issues of whether it is possible for the child to be returned to her within six months, and if not possible, why placement of the child with Respondent-mother is not in the child's best interest.

Respondent-mother next contends that the court erred by awarding guardianship of Carl to a non-parent without finding that Respondent-mother was an unfit parent or had acted inconsistently with her constitutionally protected

parental status. Respondent-mother concedes that she did not raise this issue in the trial court but argues she did not have the opportunity.

"[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 . . . her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). This finding should be made when the court is considering whether to award guardianship to a non-parent. *In re P.A.,* 241 N.C. App. 53, 66-67, 772 S.E.2d 240, 249 (2015). To preserve the issue for appellate review, the parent must raise it in the court below. *In re T.P.,* 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (citation omitted). However, for waiver to occur the parent must have been afforded the opportunity to object or raise the issue at the hearing. *In re R.P.*, ___ N.C. App. ___, ___, 798 S.E.2d 428, 431 (2017). Here, although counsel had ample notice that guardianship with Chris was being recommended, Respondent-mother never argued to the court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis. We conclude Respondent-mother waived appellate review of this issue.

Accordingly, we reverse the adjudication that Carl is a dependent juvenile, and vacate the order for failing to order reunification as a concurrent permanent plan and failing to make required findings regarding guardianship with Chris. Because we

reverse and remand, we need not address the issue of visitation, but we note that the trial court made appropriate findings pursuant to N.C. Gen. Stat. § 7B-905.1. We remand for findings consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges ELMORE and ARROWOOD concur.

Report per Rule 30(e).