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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-877

Filed: 17 April 2018

Cumberland County, Nos. 14 JA 235, 236

IN THE MATTER OF: I.A. & E.L.

Appeal by respondent-mother from orders entered 25 April 2017 by Judge Tiffany M. Whitfield in Cumberland County District Court. Heard in the Court of Appeals 20 February 2018.

Elizabeth Kennedy-Gurnee, for petitioner-appellee Cumberland County Department of Social Services.

Mark L. Hayes, for respondent-mother.

Parker, Poe, Adams & Bernstein, L.L.P., by R. Bruce Thompson II, for guardian ad litem.

CALABRIA, Judge.

Where the trial court's order was unclear as to whether it did or did not cease reunification efforts, that portion of its order is vacated and remanded for clarification. Where the trial court applied the correct standard of proof in its

findings, and mother does not challenge the substance of those findings, the trial court did not err in determining that mother had acted inconsistently with her constitutionally-protected rights as a parent, and did not err in awarding custody to the maternal grandmother. We affirm in part and remand in part.

I. Factual and Procedural Background

On 6 June 2014, the Cumberland County Department of Social Services ("DSS") filed a petition alleging that I.A., age 7, and E.L., age 11, (collectively, "the children") were neglected and dependent juveniles.[1] The petition named S.A. ("mother") as the mother of both children, along with two named individuals and one John Doe as putative fathers. The petition alleged the following facts:

On 7 April 2014, E.L. attempted to strangle himself with a belt but was stopped by mother. On 8 April 2014, mother contacted E.L.'s school staff, seeking treatment for E.L. When the phone number she was given did not produce results, mother ceased her attempts at seeking treatment. On 9 April 2014, E.L. attempted to cut himself with a pair of scissors while at school. When asked, he explained that he tried to cut himself "because his mother leaves him and his sister alone at night." School staff attempted to contact mother but could not; instead, they contacted the maternal grandmother, who took E.L. to the hospital. On that same day, DSS received a Child Protective Services referral concerning the safety of the children. On

[1] Abbreviations are used for the privacy of the children and for the convenience of reading.

10 April 2014, mother allowed the children to be placed with the maternal grandmother until she could provide "proper care and supervision and a safe and stable environment for the children."

At the time of the filing of the petition, mother had not made any appointments for E.L.'s treatment, nor authorized the maternal grandmother to make educational or medical decisions. The children stated that mother repeatedly left them at home alone, and that they were reluctant to live with her for fear of being left alone. The petition alleged that mother provides "nutritional assistance" to the maternal grandmother for the children, but no financial support and that mother "sporadically visits with the children." The petition also alleged that one of the putative fathers was currently in prison for second-degree murder, to be released in 2036, that he had not legally acknowledged paternity, and that he did not provide financial support for his child; that another of the putative fathers had just been released from prison and had an extensive criminal record, and that he had also not acknowledged paternity nor provided support.

The petition alleged that the children were neglected, in that they lacked proper supervision, they were not provided necessary medical or remedial care, and that they lived in an environment injurious to their welfare; and dependent, in that mother had failed to seek treatment for E.L., had failed to provide documentation that would allow the maternal grandmother to seek treatment, frequently left them

alone, and visited sporadically; and in that no putative father had legally acknowledged paternity or provided support for the children. The petition alleged that DSS had made reasonable efforts to prevent placement, by completing a Kinship Care Placement with the maternal grandmother, encouraging mother to visit the children, conducting multiple meetings and telephone calls with mother to advise her of the steps necessary to return the children to her care, and encouraging mother to pursue mental health treatment for E.L.

On 6 June 2014, the trial court entered an order for nonsecure custody, finding that the children were "exposed to a substantial risk of physical injury or sexual abuse because the parent . . . has created conditions likely to cause injury or abuse or has failed to provide . . . adequate supervision or protection." The trial court found that DSS had made efforts to prevent placement, ordered the children to be placed in nonsecure DSS custody, and authorized DSS to arrange for and consent to any medical, remedial, or similar needs of the children.

On 21 April 2016, the trial court entered its adjudication and disposition order. In its adjudicatory findings, the trial court noted that the parties stipulated to a number of the allegations, some as modified, in the dependency section of the petition, and that those allegations supported an adjudication that the children were dependent. DSS then voluntarily dismissed the allegations of neglect. Based on the stipulated allegations, the trial court found that the children "are dependent

inasmuch as the Respondents were unable to provide proper care, control and supervision of the juveniles due to a failure to obtain necessary medical care issues at the time of the filing of the petition."

In the dispositional portion of its order, the trial court found that the children were placed with the maternal grandmother; that mother had a job and recently moved into an apartment; that mother's visits with the children were inconsistent; that one of the putative fathers remained in prison; that the other putative father was living with the paternal grandmother, and was in contact with I.A.; and that I.A. was determined not to need therapeutic services, but E.L. was found to have Attention Deficit Hyperactivity Disorder. The trial court noted that the guardian *ad litem* recommended legal and physical custody of the juveniles to be awarded to the maternal grandmother, with whom the juveniles had been living for two years at that point. The trial court also found that return of the juveniles to the custody of their parents would be "contrary to their welfare and best interests[,]" as the conditions which led to their removal had not been alleviated. Lastly, the trial court found that DSS was making reasonable efforts to alleviate the continued out-of-home placement of the children, and encouraged those efforts to continue. The trial court therefore concluded that it was in the children's best interests that physical and legal custody remain with DSS, pending a further hearing.

On 25 April 2017, the trial court entered an order addressing judicial review, initial permanency planning, and closure of juvenile files. The court found that the children remained in the custody of DSS and the care of the maternal grandmother; that DSS, the guardian *ad litem*, and the children desired that the children be placed in the custody of the maternal grandmother; that the children were in school and their medical and therapeutic needs were being addressed; that the children and mother were engaged in family therapy; that mother was living with her lover, and a DSS background check on the lover returned favorable results, but that mother's living arrangement was "not independent or stable enough to consider returning the juveniles to the home[;]" and that mother has been employed continuously and has provided "uniforms and items" for the children. The trial court further noted that mother "requests this case remain open if custody of the juveniles is not being returned to her on today's date, or in the alternative to have joint custody with the Maternal Grandmother."

The trial court found that "continuation of the juveniles in the home of the Maternal Grandmother is in the best interests of the juveniles." The trial court further found that the maternal grandmother understood the legal significance and accepted the responsibilities of being the children's custodian; that DSS and the guardian *ad litem* recommended primary placement with the maternal grandmother and a secondary plan of reunification with mother; and that returning the juveniles

to their parents would be contrary to their welfare and best interests. The trial court also found that the failure of the parents to address the issues which gave rise to the children's removal from the home constituted actions "inconsistent with their constitutionally protected status as parents."

The trial court therefore concluded that the primary placement plan should be custody with the maternal grandmother, with a secondary permanent plan of reunification with mother, that DSS should close the juvenile files in these cases, that the maternal grandmother should be made a party to the proceedings, and that DSS, the guardian *ad litem*, and the attorneys should be withdrawn and relieved of further duties. The trial court awarded legal and physical custody of the children to the maternal grandmother, granting supervised visitation with mother.

From the trial court's 25 April 2017 order on judicial review, initial permanency planning, and juvenile file closure, mother appeals.

II. Reunification

In her first and second arguments, mother contends that the trial court erred in failing to make findings as to whether efforts to reunite the children with her would be unsuccessful or inconsistent with their health or safety, and in relieving DSS of its duties absent such a finding. We agree in part and disagree in part.

A. 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). "Issues of statutory construction are questions of law, reviewed *de novo* on appeal. Under a *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Coakley*, 238 N.C. App. 480, 492, 767 S.E.2d 418, 426 (2014) (citation and quotation marks omitted).

B. Analysis

With respect to reunification between the children and their parents, the trial court found in its order:

> 31. That the return of the juveniles to the custody of the Respondents would be contrary to the welfare and best interests of the juveniles at this time, inasmuch as the conditions which led to the removal of the juveniles have not been alleviated.
>
> 32. That with regard to the juveniles, the failure of the Respondents to address issues which gave rise to the removal of the juveniles from the home within a timely manner and in a reasonable manner, constituted a waiver of their constitutional right of paramount custody with regard to their children. The Respondents have abdicated their responsibilities as parents and acted inconsistent with their constitutionally protected status as parents.
>
> . . .

> 39. That the Respondent Parents are not fit or proper persons for the care, custody and control of the juveniles. That return of the juveniles to the custody of the Respondent Parents would be contrary to the health, safety, welfare, and best interest of the juveniles inasmuch as the juveniles remain in need of more adequate care and supervision than can be provided by the Respondent Parents at this time.

Based upon these findings, the trial court concluded:

> 4. That return of the juveniles to the custody of the Respondents would be contrary to the health, safety, welfare and best interests of the juveniles at this time.
>
> 5. That the Respondent Mother, [mother], is not a fit or proper person for the care, custody and control of the juveniles at this time. That visitation is in the juveniles' best interests at this time and should occur as set forth herein below.

Nonetheless, on appeal, mother contends that the trial court failed to consider whether efforts towards reunification "clearly would be unsuccessful or inconsistent with the juvenile's health or safety[.]" Specifically, she notes that while these findings concern custody, they do not in fact address reunification.

Mother correctly argues that failure to make statutorily-mandated findings constitutes reversible error. *In re J.L.H.*, 224 N.C. App. 52, 60, 741 S.E.2d 333, 338 (2012) (vacating and remanding an order terminating parental rights where the trial court failed to make mandated findings). N.C. Gen. Stat. § 7B-906.1 provides that, at each permanency planning hearing, the court must hear evidence and enter

findings about multiple factors, including, *inter alia*, "[w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3) (2015). Our statutes also provide that reunification "shall remain a primary or secondary plan unless the court made findings under G.S. 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). This Court has consistently held that where reunification remains part of the permanent plan, the trial court is not required to make findings consistent with N.C. Gen. Stat. § 7B-906.2(b). *See In re C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429 (2017)[2] (holding that where "the court did not eliminate reunification as a permanent plan for the children, the court was not required to make the findings mandated by Section 7B-906.2(b), and it did not err in failing to do so").

In the instant case, the trial court expressly maintained that reunification was the secondary plan. Mother was granted detailed visitation rights. Mother retains the ability to raise concerns in the trial court, notwithstanding the closure of the juvenile file.

[2] Although *C.S.L.B.* was originally filed as an unpublished opinion, this Court subsequently granted a motion to publish it.

Mother concedes some of this logic in her brief. However, she contends that, notwithstanding the trial court's language maintaining the secondary plan of reunification, the trial court's conduct in relieving DSS of its duties in this case had the effect of ceasing reunification efforts. Mother relies upon this Court's decision in *In re T.W.*, in which this Court held:

> Thus, if reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C. Gen. Stat. § 7B-906.2(b). *Cf.* N.C. Gen. Stat. § 7B-1001(a)(5) (2015) (providing a right of appeal from an order "eliminating reunification as a permanent plan" pursuant to "G.S. 7B-906.2(b)"). Only when reunification is eliminated from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child. *See* N.C. Gen. Stat. § 7B-906.2(c).

In re T.W., ___ N.C. App. ___, ___, 796 S.E.2d 792, 795-96 (2016).

DSS concedes, in its brief, that DSS may only be relieved of its duties when reunification is eliminated from the permanent plan. DSS acknowledges that, ordinarily, the cessation of reunification efforts requires findings, as mother contends. However, DSS notes the existence of a more recent piece of legislation, which it alleges creates a change in procedure.

In 2016, N.C. Gen. Stat. § 7B-906.2 was amended to add the following new section: "Concurrent planning shall continue until a permanent plan has been achieved." N.C. Gen. Stat. § 7B-906.2(a1) (2016). DSS contends that this language

operates to automatically terminate a concurrent plan – that is, a secondary plan of reunification – upon the completion of the permanent plan. DSS further argues that, in the instant case, the permanent plan of custody with a family member was achieved when the maternal grandmother was awarded custody of the children, and that therefore efforts towards reunification, the secondary plan, could automatically cease, without any findings required.

We are not prepared to adopt DSS' interpretation of N.C. Gen. Stat. § 7B-906.2(a1). Even assuming *arguendo* that the statute causes a secondary plan of reunification to automatically terminate, nowhere does that section provide that this means of cessation of reunification efforts does not require the same findings as any other cessation of reunification efforts.

We further note that *In re C.S.L.B.*, on which DSS relies, addressed this point directly, holding that, "by leaving reunification as a secondary permanent plan for the children, Respondent-mother continued to have the right to have OCDSS provide reasonable efforts toward reunifying the children with her, and the right to have the court evaluate those efforts." *C.S.L.B.*, ___ N.C. App. ___, 803 S.E.2d 429. We therefore held that the trial court erred in waiving further hearings and releasing DSS from its duties, and vacated that portion of the order. *Id.*

Once more, we find the reasoning in *C.S.L.B.* persuasive. If the trial court does not cease reunification efforts, the role of DSS in the matter remains unfinished, and

the trial court erred in releasing DSS from its duties and ordering it to close the juvenile file.

This conclusion leaves us with a conundrum. DSS correctly argues that, pursuant to N.C. Gen. Stat. § 7B-906.2(a1), the secondary plan becomes obsolete once the permanent plan is achieved. And in the instant case, the trial court held that the permanent plan would be custody with the maternal grandmother, which it immediately ordered. The trial court held that the permanent plan was thus achieved. By that logic, reunification should have ceased, and DSS should have been released from its duties. Yet, as we have noted, the trial court also expressly ordered that reunification should remain the secondary plan, and declined to order a cessation of reunification efforts or enter findings that would support a cessation of those efforts. The order contains multiple provisions which purport to encourage reunification efforts.

The order is thus internally inconsistent. Either the trial court ordered that reunification remain the secondary plan, in which case supporting findings were not necessary but DSS could not be released from its duties, or the trial court held that the permanent plan was achieved, in which case reunification efforts could be ceased but the mandatory statutory findings to support cessation were necessary and not made by the court. Which outcome the trial court intended remains unclear to this Court. As such, we vacate this portion of the order, and remand this matter to the

trial court for entry of a more precise order. On remand, the trial court shall either find that the permanent plan has not been achieved, and maintain the concurrent plan of custody with the secondary plan of reunification, or find that the permanent plan has been achieved, and enter the necessary findings to support a cessation of reunification efforts. *See In re D.A.*, ___ N.C. App. ___, ___ S.E.2d ___ (COA17-819) (2018).

III. Non-Parent Custody

In her third argument, mother contends that the trial court erred in awarding custody to a non-parent, namely the maternal grandmother. We disagree.

A. Standard of Review

> "[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." *David N. v. Jason N.,* 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B. *See generally In re B.G.,* 197 N.C. App. 570, 571-74, 677 S.E.2d 549, 551-52 (2009) (applying the constitutional analysis in a juvenile petition case).

In re D.M., 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011).

B. Analysis

Mother contends that the trial court's order, in awarding custody to the maternal grandmother, infringed upon her constitutionally protected interest in

parenting the children. She argues, therefore, that the trial court was required to enter findings to support this award, and that those findings must have been supported by "clear and convincing evidence." Mother concedes that the trial court's order finds that "Respondents have abdicated their responsibilities as parents and acted inconsistent with their constitutionally protected status as parents[,]" but contends that this statement was not supported by "clear and convincing evidence," nor was any other finding which might support it supported by "clear and convincing evidence."

Mother is correct that, in the context of an adjudication of abuse, neglect, and dependency, the findings must be "proven by clear and convincing evidence," and the trial court must state as such. N.C. Gen. Stat § 7B-807(a) (2015). Because these proceedings and permanency planning proceedings fall within the same chapter of the General Statutes, we may read them together to construe legislative intent. *See In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000) (reading provisions of abuse, neglect, and dependency statutes alongside termination of parental rights statutes "to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding").

However, this Court has held that prefatory language stating this standard of proof is sufficient to satisfy the statutory mandate in subsequent holdings by the trial court. *In re A.S.*, 190 N.C. App. 679, 688, 661 S.E.2d 313, 319 (2008) (holding that

the language "FROM THE FOREGOING, THE COURT CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE" was sufficient to establish the standard of proof employed), *aff'd per curiam,* 363 N.C. 254, 675 S.E.2d 361 (2009); *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (holding that the language "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE" was sufficient to meet the requirement of N.C. Gen. Stat. § 7B-807).

In the instant case, the order from which mother appeals contained the following prefatory language:

> THIS MATTER COMING ON TO BE HEARD AND BEING HEARD, the Court, after reviewing the evidence, record, testimony and arguments presented, makes the following findings *by clear, cogent and convincing evidence*[.]

(Emphasis added.) Pursuant to the precedent outlined above, we hold that this prefatory statement of the standard of proof used by the trial court was sufficient to establish that all subsequent findings were found "by clear, cogent, and convincing evidence[.]"

Nor does mother actually challenge any of the findings in the order at issue. She merely contends that the findings in the prior adjudicatory order, from which she did not appeal, did not support the finding in the order at issue that she "acted inconsistent with [her] constitutionally protected status as [a] parent[.]" She does not challenge the other findings in the instant order, nor the evidentiary basis behind

them. She merely alleges that this one finding did not apply the proper standard of proof, an argument we hold is without merit.

Given that mother has failed to successfully challenge this finding, and has declined to challenge any other findings in the instant order, the trial court's findings are binding on appeal. We hold that mother has not met her burden on appeal, and that the trial court did not err in awarding custody to the maternal grandmother.

IV. Waiver of Further Review

In her fourth argument, mother contends that the trial court erred in waiving further review without first making appropriate findings. As discussed in Section II-B, *supra*, this Court cannot determine whether the waiver of further review was appropriate without first determining whether reunification efforts were ceased. We therefore vacate and remand this matter for entry of a clearer, more precise order, consistent with the requirements in the statute.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges DILLON and TYSON concur.

Report per Rule 30(e).