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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1077

Filed: 16 July 2019

Lee County, Nos. 15 JA 46-47

IN THE MATTER OF: C.M. and C.M.

Appeal by respondent-father from order entered 9 July 2018 by Judge Joy A. Jones in Lee County District Court. Heard in the Court of Appeals 27 June 2019.

*Elizabeth Myrick Boone for petitioner-appellee Lee County Department of Social Services.*

*Robert W. Ewing for respondent-appellant father.*

*Marie H. Mobley for guardian ad litem.*

BERGER, Judge.

Respondent-father appeals from a permanency planning order granting custody of his children C.M. (“Cathy”) and C.M. (“Carol”)<sup>1</sup> to their mother, giving him supervised visitation with the children, and terminating the juvenile court’s jurisdiction. We hold the trial court erred in finding and concluding Respondent-

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<sup>1</sup> The names are pseudonyms to protect the juveniles’ privacy.

father had acted in a manner inconsistent with his constitutionally protected status as a parent. Accordingly, we vacate and remand.

Factual and Procedural Background

The Lee County Department of Social Services (“DSS”) filed petitions on May 5, 2015 alleging the children were abused and neglected juveniles. DSS had received four previous reports that the children were sexually abused by their stepfather, but no abuse was substantiated.

Respondent-father and the mother were involved in contentious custody litigation, where the trial court had ordered there were to be no physical or mental health evaluations of the children pertaining to sexual abuse allegations unless ordered by the court. Despite that order, DSS received a report in April 2015 that Respondent-father took the children to the hospital where they received vaginal exams, because one of them had stated she was touched by their stepfather “in her privates.” Pursuant to the hospital’s referral, Cathy was taken by her paternal grandmother to UNC for a sex-abuse exam. This was Cathy’s fourth such exam in less than two years, and Carol had undergone two prior sex-abuse exams. Upon questioning by a DSS social worker, Respondent-father and his parents acknowledged they were aware of the civil court order prohibiting unauthorized physical or mental health evaluations. Respondent-father stated he would have the children evaluated regardless of the civil order if he thought “they need[ed] it.” Based

on the children's history of unwarranted and excessive medical treatment, DSS alleged the children were emotionally abused, lived in an injurious environment, and did not receive proper care.

DSS obtained non-secure custody of the children and placed them in foster care. The trial court's non-secure custody orders prohibited contact between all members of Respondent-father's family and all members of the mother's family. Respondent-father and the mother were forbidden to have any contact with the children or go within one mile of the children's school. The parties were also prohibited from discussing the juvenile matter with anyone not directly involved in the case.

After psychological evaluations were completed on Respondent-father, the mother, the stepfather, and the paternal grandparents, the trial court entered a visitation order allowing Respondent-father and the mother one hour of supervised visitation with the children each week. The paternal grandparents were permitted to attend one of Respondent-father's visitations each month. The stepfather was not permitted any contact with the children.

On August 26, 2015, DSS filed addendums to the petitions alleging the children also lived in an injurious environment because Respondent-father had a history of drug use, including use in front of the children. DSS also alleged Respondent-father

and his mother had mental health issues that contributed to the emotional abuse and neglect of the children.

The trial court entered a Consent Consolidation Order in September 2015. The court ordered the juvenile cases be consolidated with the ongoing custody case and directed that the juvenile petitions be dismissed upon the entry of an order in the custody case. An order was subsequently entered in the custody case, and DSS voluntarily dismissed the juvenile petitions.

On March 14, 2017, DSS obtained non-secure custody of the children and filed new petitions alleging they were abused and neglected juveniles. DSS reiterated the children's history of sexual abuse examinations and its substantiation of emotional abuse in 2015 due to Respondent-father's subjection of the children to procedures in violation of court orders. DSS also alleged that Respondent-father and his mother violated court orders with regard to the children's therapy and that Respondent-father's mother told Carol to tell her therapist that her stepfather "touched her." A new therapist had become involved with the children in January 2017, and by February 2017, DSS had received a new report alleging sexual abuse of the children by their stepfather. DSS further alleged Respondent-father's mother questioned Cathy in the bathtub and then woke her up in the middle of the night asking about her stepfather touching her. Respondent-father and his mother also allowed a non-

treating professional to interview the children regarding alleged sexual abuse, which impeded DSS's investigation.

The trial court subsequently entered consent adjudicatory orders concluding the children were abused juveniles. DSS voluntarily dismissed the allegations of neglect. In its subsequent dispositional orders, the court continued custody of the children with DSS and their kinship placement with their maternal grandparents. Respondent-father and the mother were granted two hours of supervised visitation with the children every other week, with additional visitation left to the discretion of the children's therapist. The court set the primary permanent plan for the children as reunification with Respondent-father or their mother, and set the secondary plan as guardianship with a relative. Respondent-father, the mother, and other caretakers of the children were ordered to follow all recommendations of the children's therapist. The court further ordered Respondent-father, the mother, the paternal grandparents, and the stepfather to comply with a case plan that required the following:

- a. Individual therapy;
- b. Group/family therapy;
- c. Coparenting education between the mother and [Respondent-father];
- d. Parenting education;
- e. Psychiatric evaluation and follow recommended treatment;
- f. Submit to random drug screens, including hair and oral swabs;
- g. All parties shall sign releases of information for all

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- providers to allow the DSS and GAL to have access to their records;
- h. Continue to abide by the gag order rendered on 08/02/2017;
  - i. All providers shall be given copies of all CFEs, CMEs and psychological reports;
  - j. All therapists shall be allowed to coordinate treatment with all parties as well as sharing information as necessary for treatment. [The children's therapist] is the directing therapist for all of the parties;
  - k. Follow recommendations of the children's current medical providers;
  - l. Cooperate with the DSS and the GAL;
  - m. [Respondent-father] shall make efforts to establish a residence of his own; and
  - n. The stepfather shall participate in reconciliation therapy as directed by [the children's therapist].

The trial court's gag order prohibited the parties from disseminating any information about the juvenile cases to any third party not already involved in the cases or the children's treatment.

The trial court held a custody review and permanency planning hearing in November 2017. In its orders from that hearing, the court continued custody of the children with DSS and placement with their maternal grandparents. A trial placement with the mother and stepfather was authorized, contingent upon a recommendation from the children's therapist. The court maintained the primary and secondary permanent plans for the children as reunification and guardianship and set detailed visitation plans for the parties. The court directed Respondent-

father, the mother, the paternal grandparents, and the stepfather to fulfill similar case plan requirements as set forth in the original dispositional orders.

On December 8, 2017, DSS filed a motion for contempt, alleging the paternal grandparents provided unauthorized parties with information about the juvenile cases in violation of the trial court's gag order. The unauthorized parties, in turn, posted comments and information about the cases on social media and local news websites. DSS asked for the trial court to order the parental grandparents to appear and show cause why they should not be held in contempt of court.

On May 9, 2018, the trial court conducted a combined permanency planning and contempt hearing. In the resulting order, the court found Respondent-father had moved from his parents' home and, as a result, the paternal grandparents were no longer caretakers of the children. The court removed the paternal grandparents from the juvenile case and allowed DSS to voluntarily dismiss its contempt motion. The court found the children had been placed with their mother since November 7, 2017 and were doing well in her care. Further, the court found the mother had complied with her case plan, but Respondent-father had failed to make any progress with major portions of his case plan, including:

- a. Individual therapy;
- b. Group/family therapy;
- c. Parenting education;
- d. Psychiatric evaluation and following all treatment recommendations;
- e. Signing a release of information for [DSS];

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- f. Following recommendations of the children's current medical providers;
- g. Cooperating with [DSS] and the GAL; and
- h. Contacting [DSS] by the 30<sup>th</sup> of each month to update [DSS] on his progress towards his case plan.

The court concluded Respondent-father had “acted in a manner inconsistent with his constitutionally protected rights as a parent and is unfit to have custody of the juveniles.” The mother was awarded sole legal and physical custody of the children, and Respondent-father was granted monthly supervised visitation with the children. The court ordered that a civil custody order be entered in the original custody action between Respondent-father and the mother and terminated its jurisdiction over the juvenile case. The civil custody order was entered that same day. On August 7, 2018, Respondent-father filed timely notice of appeal from the juvenile court order.<sup>2</sup>

Analysis

Respondent first argues that the trial court erred by failing to recite the standard of proof used in finding he acted contrary to his constitutionally protected status as a parent. We agree.

Generally, “[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

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<sup>2</sup> DSS filed a motion with this Court seeking the dismissal of Respondent-father’s appeal, because his notice of appeal did not properly designate the order from which his appeal was taken. This Court denied the motion by order entered November 21, 2018.



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). However, “a trial court’s determination that a parent’s conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.” *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). This standard “applies to custody awards arising out of juvenile petitions filed under Chapter 7B.” *In re E.M.*, 249 N.C. App. 44, 57, 790 S.E.2d 863, 874 (2016) (citation and quotation marks omitted). In such a case, the trial court may state either orally in open court or in its written order that it used the clear and convincing standard of proof in making its findings of fact. *In re M.D.*, 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009). When a trial court fails to so state, we will vacate that portion of the court’s order. *In re E.M.*, 249 N.C. App. at 58, 790 S.E.2d at 874.

Here, the trial court found and concluded that Respondent-father was unfit and acted in a manner inconsistent with his constitutionally protected status as a parent, but did not designate the standard of proof used in making its findings. We therefore vacate the trial court’s findings and conclusion that Respondent-father was unfit and acted in a manner inconsistent with his constitutionally protected status as a parent. Because we vacate the findings and conclusion on this basis, we need not address Respondent’s remaining argument regarding the trial court’s finding and

conclusion that he acted in a manner inconsistent with his constitutionally protected status as a parent.

In addition, Respondent-father has been prejudiced by this erroneous finding. The trial court's best interest determination was supported by this erroneous finding. We therefore vacate the trial court's order as to Respondent-father and remand.

VACATED AND REMANDED.

Judges DILLON and TYSON concur.

Report per Rule 30(e).