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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-584

Filed: 17 March 2020

Guilford County, No. 16 JA 53

IN THE MATTER OF: X.A.R.

Appeal by respondent-father from order entered 18 March 2019 by Judge Angela C. Foster in Guilford County District Court. Heard in the Court of Appeals 19 February 2020.

*Mercedes O. Chut for Guilford County Department of Health and Human Services.*

*Dorothy Hairston Mitchell for respondent-father.*

*Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for the guardian ad litem.*

ARROWOOD, Judge.

Respondent-father appeals from the trial court's order granting legal guardianship of his son X.A.R. ("Zavion")<sup>1</sup> to his maternal grandmother. For the following reasons, we affirm.

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<sup>1</sup> A pseudonym is used to protect the juvenile's identity and for ease of reading.

I. Background

Zavion is the biological son of respondent-father. However, Zavion was raised by his biological mother and her boyfriend, whom Zavion mistakenly believed was his father. Zavion's mother and her boyfriend share two other children together, Zavion's younger siblings. On 6 April 2016, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging that Zavion and his siblings (who are not the subject of this appeal) were abused and neglected by their mother and her boyfriend. DHHS subsequently obtained non-secure custody of the children. On 22 September 2016, all three children were adjudicated abused and neglected. Respondent-father, whom DHHS had made several unsuccessful attempts to contact, was not present at the hearing. The children remained placed in the legal and physical custody of DHHS with relative placement with their maternal grandmother ("grandmother"). The trial court ordered a permanent plan of adoption with a concurrent plan of reunification for Zavion.

On 12 November 2016, DHHS filed a petition to terminate parental rights. The petition was heard on 5 and 8 June 2017, whereupon the trial court terminated the parental rights of the children's mother and her boyfriend. The trial court also concluded that while grounds existed to terminate respondent-father's parental rights as well, such termination would not be in Zavion's best interests. In reaching

its conclusion, the trial court made several findings about respondent-father, including the following.

Respondent-father had a very short relationship with Zavion's mother which resulted in Zavion's conception. Shortly before Zavion's first birthday, the mother contacted respondent-father to inform him that he may be Zavion's father. Upon learning of Zavion's existence and his potential paternity of Zavion, respondent-father attempted to establish a relationship and visited with him a few times at his grandmother's house. Following the third visit, however, respondent-father contacted Zavion's grandmother and expressed concerns about the behavior of Zavion's mother and her boyfriend. Zavion's mother then told respondent-father that he was in fact not Zavion's father. Respondent-father believed her at the time and saw no reason to pursue the possibility of his paternity through a DNA test. When DHHS obtained custody of Zavion, respondent-father was again identified as a putative father. On 16 May 2016, Connie Bowman ("Ms. Bowman"), a DHHS employee, called respondent-father to inform him that he may have a child in DHHS custody. Respondent-father denied ever knowing Zavion's mother and that he was Zavion's father, and refused to take a paternity test.

Respondent-father did not contact DHHS or express any interest in being a part of Zavion's life until after the filing of the Petition to Terminate Parental Rights. DHHS attempted to contact respondent-father several times by mail to arrange for a

paternity test, but received no response. In November 2016, Guilford County Child Support Enforcement initiated a child support action against respondent-father for Zavion. On 7 March 2017, respondent-father called Ms. Bowman and agreed to submit to a paternity test. He stated that he had initially believed her earlier attempts to contact him regarding Zavion's paternity were a joke, and he did not take the matter seriously until Guilford County Child Support Enforcement began garnishing his wages for Zavion's child support. The paternity test confirmed respondent-father was Zavion's father, and Ms. Bowman notified him that DHHS had filed a petition to terminate his parental rights to Zavion.

The trial court found respondent-father deliberately chose not to pursue paternity or act in a parental role until 7 March 2017. However, it did not terminate respondent-father's parental rights because it also found that it was in Zavion's best interest to have an opportunity to know and develop a relationship with his father. The trial court thus changed the permanent plan for Zavion to a primary plan of reunification with his father and a concurrent, secondary plan of guardianship with his grandmother. The trial court ordered respondent-father to enter into a case plan with DHHS that should include a requirement that he do the following: (1) participate in a parenting psychological evaluation and follow all recommendations; (2) successfully complete the PATE parenting education program; (3) fully cooperate with a home study of his home by DHHS; (4) provide a budget and proof of all income

to DHHS, including a copy of his federal income tax returns for the past two years; (5) remain current in his child support obligation; and (6) fully cooperate with DHHS and the guardian *ad litem* (“GAL”).

Following the termination of parental rights hearing, respondent-father worked to comply with the trial court’s order. On 21 June 2017, DHHS offered respondent-father a case plan. Respondent-father signed the case plan on 9 April 2018. The case plan placed additional requirements on respondent-father to: (1) maintain suitable housing for himself and his children; (2) cooperate with all announced and unannounced visitors; (3) provide DHHS with a copy of his lease; (4) attend scheduled visits with Zavion as ordered by the court; and (5) maintain biweekly contact with DHHS. The trial court periodically held permanency planning review hearings, during which it made findings that respondent-father had complied with some, but not all, components of his case plan, and he did not seem to understand and prioritize Zavion’s needs.

Respondent-father was slowly introduced to and permitted to have supervised visits with Zavion, based on recommendations from Zavion’s therapists. Zavion’s therapists reported that he was fragile and vulnerable due to his traumatic experiences with his mother and her boyfriend, whom he was afraid of. Thus, any relationship with respondent-father needed to progress in a manner which honored Zavion’s needs. Though he was open to developing a relationship with his father,

Zavion repeatedly expressed a desire to continue to live with his grandmother and siblings rather than with his father. Zavion also experienced increased anxiety and stress at the possibility of having to live with his father.

On 15 November 2018, the trial court held a final permanency planning hearing. After reviewing the evidence, the trial court found that respondent-father was substantially in compliance with his case plan. However, the trial court also found that it was in Zavion's best interest that his grandmother be granted guardianship of him. The trial court thereby adopted a permanent plan of guardianship of Zavion by his grandmother. It also ordered that Zavion continue therapy and that supervised visits with respondent-father occur at a minimum of one hour per week. Unsupervised visits were to be allowed upon the recommendation of Zavion's therapist. The trial court further relieved DHHS of custody and no additional hearing dates were set. Respondent-father timely gave notice of appeal.

## II. Discussion

Respondent-father raises three arguments on appeal: (1) the trial court erred in concluding that making guardianship the sole permanent plan and awarding guardianship to Zavion's grandmother was in Zavion's best interests because the findings of fact did not support that conclusion; (2) the trial court abused its discretion by making guardianship the sole permanent plan and ending reunification efforts without making the statutorily required findings of fact; and (3) the trial court erred

in concluding that respondent-father acted in a manner inconsistent with his constitutionally-protected right as a parent. We disagree.

“This Court’s 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.” *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citing *In re Eckard*, 148 N.C. App. 541, 544, 559 S.E.2d 233, 235 (2002)). We review a trial court’s conclusions of law *de novo*. *Id.* (quoting *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006)). A court’s non-compliance with a statutory mandate is reversible error. *In re D.A.*, 169 N.C. App. 245, 247-48, 609 S.E.2d 471, 472 (2005) (citing *In re Alexander*, 158 N.C. App. 522, 581 S.E.2d 466 (2003)). It is in the trial court’s discretion as to which placement plan will serve the best interests of the child. *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004) (citing N.C. Gen. Stat. § 7B-901 (2003)).

1. Guardianship as Sole Permanent Plan

Respondent-father first assigns as error the trial court’s conclusions of law 5 and 7, in which the trial court stated it was in Zavion’s best interest that his permanent placement plan remain guardianship and that guardianship be awarded to his grandmother. Respondent-father contends these conclusions are not supported by competent evidence. He argues that, in awarding guardianship to Zavion’s

grandmother, the trial court effectively ceased reunification efforts and was thus required to make specific findings in accordance with N.C. Gen. Stat. § 7B-906.2(b).

N.C. Gen. Stat. § 7B-906.2(b) provides, in pertinent part, as follows:

At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court 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) (2019). In its finding of fact 37, the trial court found that “[a]s of this hearing, efforts to reunify the juvenile with [respondent-father] would be unsuccessful or inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.” Respondent-father argues this finding was not supported by competent evidence. In support of his argument, he points to his compliance with his case plan, his cooperation with Zavion’s grandmother, and the recommendation of Zavion’s therapist that respondent-father and Zavion continue to work towards developing a healthy relationship. However, while these things may be true, the relevant standard is whether there is competent evidence to support the trial court’s finding; that there may be evidence in the record to support a contrary finding has no bearing on the



matter. *In re C.I.M.*, 214 N.C. App. 342, 345, 715 S.E.2d 247, 250 (2011) (citations omitted).

Here, there is ample evidence in the record to support the trial court's finding. DHHS, the GAL, Zavion's therapist, and Zavion himself all testified to the increased anxiety Zavion experienced at the prospect of having to live with respondent-father. These feelings of anxiety, in addition to having a negative impact on Zavion's mental health, also significantly affected his performance in school. In addition, Zavion's therapist noted that he continued to suffer from PTSD due to the trauma he suffered while living with his mother and her boyfriend, who Zavion grew up believing was his father. In light of this trauma, Zavion's therapist concluded that building a relationship between Zavion and respondent-father should not be rushed and would take time, including up to and over a year. Zavion also consistently expressed his desire to live with and be adopted by his grandmother, who Zavion has a close relationship with and who already adopted Zavion's other siblings. Given these facts, there is competent evidence to support the trial court's finding that reunification "would be unsuccessful or inconsistent with [Zavion's] health, safety, and need for a safe, permanent home within a reasonable period of time."

Respondent-father additionally challenges the trial court's finding of fact 39 as being inconsistent with the evidence presented. Specifically, the trial court found that

It is not possible for the juvenile to be returned to the home of any parent within the next six months as the [respondent-]father has only recently begun to build and develop a relationship with the juvenile, building a relationship with each other will take a significant amount of time, and the juvenile does not want to live with the [respondent-]father at all.

Respondent-father appears to rely on Zavion's therapist's prognosis that "this is a process and it cannot be rushed and it may take six months, or may take a year, the barometer for moving forward is based on symptomatology" in support of his argument. However, this evidence in fact supports the trial court's finding. In addition, for the same reasons we found there is competent evidence to support the trial court's finding of fact 37, we also find there is competent evidence to support this finding as well.

To the extent respondent-father asks this Court to reweigh the evidence, we decline to do so. It is well established that in a bench trial, the trial court is the trier of fact, and a reviewing court may not reweigh evidence and substitute its judgment for that of the factfinder. *In re Patron*, 250 N.C. App. 375, 384, 792 S.E.2d 853, 860 (2016) (citations omitted). We further note that while both Zavion's therapist and the trial court concluded it is in Zavion's best interest that he develop a healthy relationship with respondent-father, this does not equate to reunification. Indeed, the trial court specifically ordered that therapy and supervised visitation continue with this goal in mind. In addition, respondent-father's desire to be more involved in

his son's life, demonstrated through his efforts to comply with his case plan and cooperate with Zavion's grandmother, is a positive development in this case. However, while respondent-father's progress is relevant, the ultimate inquiry is whether reunification would be successful or consistent with Zavion's welfare and needs, and the trial court found that it would not be. Accordingly, we reject respondent-father's argument.

Respondent-father further contends the trial court's finding of fact 27 is inconsistent with its conclusions of law 5 and 7. In its finding of fact 27, the trial court found that "[a]s of this hearing, the permanent plan for the juvenile in this matter is guardianship with a relative and a secondary concurrent plan of reunification, and such plan remains in the juvenile's best interest." It later concluded in conclusions of law 5 and 7 that it was in Zavion's best interest "that the permanent plan remain guardianship" and that "guardianship be awarded to the maternal grandmother[.]" Despite respondent-father's assertions to the contrary, a review of the trial court's permanency planning review order reveals that its finding is not inconsistent with its conclusions of law.

It is clear from the trial court's order that it is not completely ceasing reunification efforts, but rather elected not to proceed with reunification *at that time*. In addition to conclusions of law 5 and 7, the trial court made other conclusions as well, including, in pertinent part, the following:

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2. It is contrary to the best interests of the juvenile to return to the care and custody of any parent *at this time*.

. . . .

4. The juvenile requires more adequate care and supervision than any parent can provide *at this time*.

. . . .

10. It is in the best interest of the juvenile that visitation between [respondent-father] and the juvenile occur in a therapeutic setting a minimum of once per week for a minimum of one (1) hour per week to occur at a day, time, and location as agreed and recommended by the juvenile's therapist, for so long as he remains in therapy, and thereafter a minimum of one (1) hour per week as agreed between the maternal grandmother, . . . , and [respondent-father].

(emphasis added).

The trial court's findings of fact support its conclusions of law. Though in its finding of fact 27 the trial court initially states that a permanent plan of guardianship and a secondary plan of reunification remains in the juvenile's best interest, it went on to find that barriers exist to achieving reunification. In finding of fact 28, the trial court found that such barriers include:

- The [respondent-]father needs to understand that building a relationship with the juvenile needs to occur slowly (and as recommended by the therapist);
- The [respondent-]father needs to demonstrate to [DHHS] that he has the means to financially provide for himself, the four children who are already in the home, and the juvenile, [Zavion] (if he were to be placed with the father);

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- The [respondent-]father needs to demonstrate to [DHHS] that he will put the needs of the juvenile first; and
- The juvenile continues to express a desire to live with maternal grandmother and to not be made to live with [respondent-father].

In addition, the trial court also found that, while respondent-father was currently in substantial compliance with his case plan, he had not made adequate progress with that plan within a reasonable period of time. Based on its prior findings, the trial court ultimately found that “[a]s of this hearing, the juvenile, [Zavion], is unable to be returned to the home of any biological parent, therefore, legal guardianship or custody with a relative or other suitable person is appropriate and should be pursued at this time.” (emphasis added). Thus, the trial court’s findings as a whole support its conclusions of law, and we therefore reject respondent-father’s argument.

2. No Abuse of Discretion

Respondent-father next contends the trial court abused its discretion by making guardianship the sole permanent plan and effectively ending reunification efforts without making all of the statutorily required findings of fact. We disagree.

Pursuant to N.C. Gen. Stat. § 7B-906.2(d), a court conducting a permanency planning hearing under subsection (b) of that statute must make written findings concerning each of the following:

- (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

- (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
- (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
- (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2019). A trial court's decision to cease reunification must contain written findings addressing each of these factors, or it will be vacated. *In re D.A.*, 258 N.C. App. 247, 254, 811 S.E.2d 729, 734 (2018).

Respondent-father concedes the trial court made written findings concerning the first two factors, and argues only that the trial court failed to make specific written findings as to the remaining two. In addition, respondent-father contends the findings made by the trial court favor the continuation of reunification efforts and do not support the trial court's decision to make guardianship the sole permanent plan.

Respondent-father's arguments fail for several reasons. First, the trial court did make all statutorily required written findings, which are best summed up in finding of fact 30 as follows:

[Respondent-father] did not enter into a service agreement with [DHHS] until April 9, 2018, approximately two years after the juvenile came into custody with [DHHS]. . . . Since entering into his service agreement with [DHHS] in April of 2018, [respondent-father] has begun to comply with some of the components of his service

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agreement. However, [respondent-father] has not maintained bi-weekly contact with [DHHS] as ordered. In addition, [respondent-father] has been very vocal in his frustration at how long this process has taken, etc., which causes [DHHS] some concern on whether [respondent-father] will be able to put the juvenile's needs first and/or do what is in the best interest of the juvenile. [Respondent-father] is currently in substantial compliance with the components of his service agreement, but he had not been making adequate progress with the components of that agreement within a reasonable period of time.

As respondent-father acknowledges, the trial court's finding that "[respondent-father] is currently in substantial compliance with the components of his service agreement" but that he had failed to do so "within a reasonable period of time" addresses the first three factors. The third factor is further addressed in the trial court's finding that "[respondent-father] has not maintained bi-weekly contact with [DHHS] as ordered." Finally, the fourth factor is addressed in the trial court's finding that there is some concern as to whether respondent-father will be able to act in Zavion's best interests. In regards to this last point, the trial court made several other findings that Zavion experienced increased anxiety and stress at the prospect of having to live with respondent-father. Despite the adverse effects on Zavion's mental health, however, respondent-father continued to push for a faster relationship building process and for reunification with Zavion when Zavion clearly was not ready. Though the trial court may not have employed the precise statutory language in making its findings, it is enough that the findings address the statute's concerns, and

they need not quote its exact language. *In re L.M.T.*, 367 N.C. 165, 167-68, 752 S.E.2d 453, 455 (2013). We therefore hold the trial court made all statutorily required findings and its findings supported its decision to award guardianship to Zavion's grandmother.

3. Determination that Respondent-Father Acted Inconsistent with his Constitutionally-Protected Status as a Parent

Respondent-father lastly contends the trial court erred in concluding he acted in a manner inconsistent with his constitutionally protected status as a parent. We disagree.

A parent has the constitutionally protected right to the care, custody, and control of their child. *Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994). This right is not absolute, however, and may be infringed upon a showing that the parent is unfit, has neglected the welfare of their child, or their conduct is otherwise inconsistent with their constitutionally protected status as a parent. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997). "Findings in support of the conclusion that a parent acted inconsistently with the parent's constitutionally protected status are required to be supported by clear and convincing evidence." *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017).

Here, the trial court found that "[i]nitially, [respondent-father] denied knowing the mother . . . and denied being the biological father of the juvenile. In addition,



[respondent-father] refused to submit to paternity testing to determine if he was in fact the biological father of the juvenile until March 2017 (approximately a year after the juvenile came into custody).” Following the establishment of paternity, respondent-father did take steps to develop a relationship and become involved in Zavion’s life. However, the trial court found that respondent-father significantly delayed entering into a service agreement with DHHS, failed to comply and make adequate progress with his case plan within a reasonable time, failed to understand and put Zavion’s needs first, and failed to comply with some components of his case plan. These findings are supported by clear and convincing evidence, and are unchallenged and therefore binding on appeal. *In re C.B.*, 180 N.C. App. 221, 223, 636 S.E.2d 336, 337 (2006) (citing *In re J.A.A.*, 175 N.C. App. 66, 68, 623 S.E.2d 45, 46 (2005)). We therefore hold the trial court did not err in concluding respondent-father acted in a manner inconsistent with his constitutionally protected status as a parent.

### III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).