IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-50

No. COA20-247

Filed 2 March 2021

Edgecombe County, Nos. 18 JA 51, 52

IN RE: N.T., A.T.

Appeal by respondent-mother from order entered 20 November 2019 by Judge Anthony W. Brown in District Court, Edgecombe County. Heard in the Court of Appeals 17 November 2020.

Best, Lawrence Law, P.A., by Trevoria L. Jackson, Natarlin R. Best, and Henry Clay Turner, for petitioner-appellee.

Parent Defender Wendy C. Sotolongo and Assistant Parent Defender J. Lee Gilliam, for respondent-appellant-mother.

Parker Poe Adams & Bernstein, LLP, by Sloan L. E. Carpenter and Kelsey Monk, for Guardian ad Litem.

STROUD, Chief Judge.

¶ 1 Respondent-mother appeals a permanency planning order granting full physical and legal custody of her children to a relative. Because the trial court failed to make findings of fact regarding respondent-mother's unfitness as a parent or acting inconsistently with her constitutionally protected status as a parent, we vacate and remand for entry of a new order including appropriate findings of fact and conclusions of law.

I. Background

¶ 2 On 9 January 2018, Edgecombe County Department of Social Services ("DSS") filed a juvenile petition alleging that Natalie and Amy,[1] ages three and four at the time of the petition, were neglected and dependent juveniles. The district court found both children exhibit major medical issues: Amy is nonverbal, nonmobile, and has hydrocephaly; Natalie has microcephaly and respondent-mother has failed to have her evaluated. Respondent-mother leaves the children "with random boyfriends" and home alone. Respondent-mother also "does not understand the importance of obtaining services for the children's special needs."

¶ 3 The children were placed in DSS nonsecure custody. After a hearing on 24 April 2018, on or about 4 September 2018, the children were adjudicated neglected and ordered to remain in the custody of DSS. Since 9 January 2018, the date of the juvenile petition, the district court has entered many orders continuing the girls' custody with DSS who eventually placed the girls with their maternal step-grandfather. The only order on appeal is the permanency planning order from 20 November 2019, in which "[p]resently the minor children are in the joint legal custody of the Maternal Step-Grandfather, . . ., and the Mother[.]" The order provided both children had "made excellent developmental progress." The district court noted the

[1] Pseudonyms are used.

prior adjudication of neglect from the hearing held on 24 April 2018 and found that respondent-mother was employed and maintaining a two-bedroom apartment. The district court also noted that although the children were in joint custody between their step-grandfather and respondent-mother, they had primarily been with their step-grandfather since 29 January 2019, and he was "providing more than primary care" where both children "have thrived and developed."

¶ 4 As to respondent-mother the district court found:

> 9. On several occasions, the Mother . . . failed to exercise visits with the children and had several excuses including having something else to do or being out of town for her birthday.
>
> 10. The Mother . . . has expressed that she is embarrassed by the behavior of the minor children on more than one occasion and for that reason does not take them out with her.
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> 11. On one occasion, the Mother participated in only an abbreviated visit because she did not feel like going into a hot kitchen to make dinner for the minor children. The mother claimed someone was bringing her a plate of food, but she did not have any food for the children to eat.

The district court then found DSS had exercised reasonable efforts regarding respondent-mother including, "In Home Services, Intensive In Home Services, CPS Referrals, APEX/CFT Meetings, Petition Review, Petition filed, Court Hearings, and Supervised visitations."

¶ 5 The district court ultimately concluded it was in the best interest of the children "that full legal and physical custody be granted" to their step-grandfather. The district court then decreed the children's step-grandfather was to have full custody and noted the primary plan as "Custody with a Relative." The district court ordered mother to continue with her mental health treatment, psychological evaluation process, and parenting education; maintain stable housing and income, and to have at least two hours of unsupervised visitation each week. Further review of the matter was suspended. Respondent-mother appeals.

II. Permanency Planning Order

¶ 6 Respondent-mother first contends that "the permanent custody order must be vacated." Respondent-mother argues that the order granted full legal and physical custody of the children to a non-parent without first making the required findings "regarding [respondent-mother's] constitutionally protected parental status." (Original in all caps.) In particular, respondent-mother contends the trial court failed to find she was unfit or had acted inconsistently with her constitutionally protected status as a parent.

A. Standard of Review

> 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. Findings supported by competent evidence, as well as any uncontested findings,

> are binding on appeal. The trial court's conclusions of law are reviewed *de novo*.

Matter of D.A., 262 N.C. App. 559, 563, 822 S.E.2d 664, 667 (2018) (citations and quotation marks omitted). Further,

> [t]he U.S. Constitution's Due Process Clause protects a parent's paramount constitutional right to custody and control of his or her children. This protection ensures that the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status. 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.
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> The Due Process Clause further requires that 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. The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters. Our inquiry as a reviewing court is whether the evidence presented is such that a fact-finder applying that evidentiary standard could reasonably find the fact in question.

In re A.C., 247 N.C. App. 528, 533, 786 S.E.2d 728, 733–34 (2016) (citations, quotation marks, ellipses, brackets, and footnote omitted).

B. Parent's Paramount Constitutional Right

¶ 7 As to a parent's constitutionally protected parental status, it is well-established that before the trial court may grant custody of a child to a non-parent, the court must first find the parent is unfit or has acted inconsistently with her rights as a parent:

> Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child. So long as a parent has this paramount interest in the custody of his or her children, the parent's interest prevails in any custody dispute with a nonparent, regardless of the best interests of the child. However, a parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status. . . . . Once a parent cedes his or her protected status, custody issues must be resolved based on the best interests of the child.
>
> There is no bright line beyond which a parent's conduct amounts to action inconsistent with the parent's constitutionally protected paramount status. Our Supreme Court has emphasized the fact-sensitive nature of the inquiry, as well as the need to examine each parent's circumstances on a case-by-case basis. The court must consider both the legal parent's conduct and his or her intentions *vis-à-vis* the child.

Id. at 536, 786 S.E.2d at 735 (citations, quotation marks, brackets, and heading omitted). "[T]his Court has enunciated the fundamental principle that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and

control of their children must prevail." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citation and quotation marks omitted).

¶ 8 In the case of *In re P.A.*, this Court noted the need for findings of fact regarding the parent's paramount constitutional right even when there has been a prior adjudication of neglect:

> On remand, we also note that the trial court should more clearly address whether respondent is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court again consider granting custody or guardianship to a nonparent. As directed by this Court in *In re B.G.*:
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> > To 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.
> >
> > Here, the trial court concluded that it was in the best interest of Beth to remain with the Edwardses *but failed to issue findings to support the application of the best interest analysis—namely that Respondent acted inconsistently with his custodial rights. Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact*. Rather, our review is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. Accordingly, we must reverse the order awarding custody to the minor child's non-parent relative and remand for reconsideration in light of this opinion.

In re P.A., 241 N.C. App. 53, 55–67, 772 S.E.2d 240, 242-49 (2015) (emphasis added) (citation and brackets omitted).

¶ 9 Here too, "[a]lthough there may be evidence in the record to support a finding that Respondent acted inconsistently with h[er] custodial rights, it is not the duty of this Court to issue findings of fact" even given a prior adjudication of neglect. *Id.* at 67, 772 S.E.2d at 249. In addition, in this case, before the order on appeal, respondent-mother and the step-grandfather were granted *joint* legal custody of the children.

¶ 10 Indeed, in February of 2019 the trial court granted joint legal custody to respondent-mother and the step-grandfather. The order on appeal order fails to make sufficient findings to explain why respondent-mother was previously fit to share joint legal custody of the children but lost these custodial rights. The findings indicate some improvements since the prior orders in respondent-mother's ability to care for the children, such as her employment and maintaining her own apartment. There is also evidence in the record respondent-mother failed to improve her care of the children, despite improvements in her employment and housing. For example, the guardian ad litem report of 1 October 2019 stated,

> Joint custody did not work! [Respondent-mother] again did not hold up her end of the bargain. She failed to take full advantage of the time she was able to spend with the girls. She often called [step-grandfather] to pick them up early,

> had some excuse as to why she could visit, did not attend school functions and meetings for the girls, did not attend medical appointments for the girls, nor did she follow up with anyone about their very serious medical conditions.

But this Court cannot make findings of fact based upon this evidence; only the trial court may do so. *See id.*

¶ 11 DSS and the guardian ad litem urge this Court to consider that the prior adjudication of neglect heard on 24 April 2018 and filed 12 September 2018 -- wherein the trial court found respondent-mother had neglected her children with "major medical and developmental issues" by her "failure to provide proper care or supervision" creating "major safety concerns" as the children's health requires "special attention[,]" her numerous moves, and her continuing "inappropriate supervision arrangements" for the children such as "random boyfriends" and "leaving them home alone" -- is enough to demonstrate respondent-mother acted inconsistently with her parental rights.

¶ 12 While a prior adjudication of neglect has in some cases been part of the basis for determining that a parent has acted inconsistently with their constitutionally protected right, this is simply not one of them.[2] There is no indication that the trial

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[2] While respondent-mother did not raise this issue we also note that if the trial court were to use the prior adjudication of neglect as a basis for terminating respondent-mother's parental rights, it must consider the likelihood of neglect in the future for the children. *See generally In re M.A.W.*, 370 N.C. 149, 153–54, 804 S.E.2d 513, 517 (2017) ("Furthermore, in the present

court used the prior adjudication order as part of any analysis of whether respondent-mother was unfit or had acted inconsistently with her constitutionally protected status as a parent or whether the trial court considered respondent-mother's rights as a parent before making its determination based on the best interests of the children. *See generally id.* at 67, 772 S.E.2d at 249. In fact, even after the prior adjudication of neglect, the trial court had granted joint legal custody of the children to respondent-mother. While we agree with DSS and the guardian ad litem there are no magic words necessary in considering a parent's constitutional parental status, findings that respondent-mother cut a visit short, missed visits, or feels embarrassment will not on their own suffice to meet that standard. "[T]he trial court should more clearly address whether respondent is unfit as a parent or if her conduct

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case the trial court made an independent determination that neglect sufficient to justify termination of respondent's parental rights existed at the time of the termination hearing and that a likelihood of repetition of neglect also existed. *Cf. id.* at 716, 319 S.E.2d at 232–33 (reversing a trial court's order terminating the respondent's parental rights when the trial court failed to make an independent determination of whether neglect authorizing termination of the respondent's parental rights still existed at the time of the termination hearing). '[A] prior adjudication of neglect standing alone' likely will be insufficient 'to support a termination of parental rights' in cases in which 'the parents have been deprived of custody for any significant period before the termination proceeding.' *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (*citing In re Barron*, 268 Minn. 48, 53, 127 N.W.2d 702, 706 (1964)). We also are mindful that '[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent.' *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252." (alterations in original)).

has been inconsistent with her constitutionally protected status as a parent, should the trial court again consider granting custody or guardianship to a nonparent." *Id.*

C. Other Issues on Appeal

¶ 13 Though we are vacating and remanding the order on appeal, we briefly address respondent-mother's other issues on appeal to aid the trial court with review.

1. Custodial Financial Resources and Understanding of Custody

¶ 14 Respondent-mother contends the district court failed to make findings "regarding the custodian's financial resources and understanding of the legal significance of custody." North Carolina General Statute § 7B-906.1(j) provides,

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile. The fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

N.C. Gen. Stat. § 7B-906.1(j) (2019). While the children had "stable placement" with their step-grandfather for more than six consecutive months, the trial court failed to address the custodian's understanding of the legal significance of custody. *Id.* Since respondent-mother had been granted joint legal custody under the prior orders, the

trial court should address the custodian's understanding of this change in the custodial situation as well.

2. Reunification

¶ 15 Respondent-mother also notes that "[r]eunification is the default goal in juvenile cases[,]" and the trial court did not sufficiently consider her progress or DSS's "reasonable" efforts to reunify. The district court did address some of the requirements for reunification as to both respondent-mother's and DSS's efforts; we will not determine if they were sufficient as vacating the order and remand is already necessary. Yet, we emphasize North Carolina General Statute § 7B-906.2 addresses reunification and the specific requirements for findings. *See generally* N.C. Gen. Stat. § 7B-906.2 (2019) (noting before ceasing reunification efforts the district court must consider factors such as "[w]hether the parent is making adequate progress" and "actively participating" with the DSS plan). Further, the trial court must consider whether DSS's efforts were reasonable. *See* N.C. Gen. Stat. § 7B-906.2 (2019).

3. Review Hearings

¶ 16 Last, respondent-mother contends "[t]he trial court did not make proper findings before waiving future review hearings." We agree as the district court failed to address all the factors required by North Carolina General Statute § 7B-906.1(n) before terminating future review such as ensuring respondent-mother was aware

"the matter may be brought before the court for review at any time by the filing of a motion for review[.]" *Id.*

III. Conclusion

¶ 17 Because the trial court failed to make findings of fact regarding respondent-mother's unfitness as a parent or acting inconsistently with her constitutionally protected status as a parent, we vacate and remand for entry of a new order including appropriate findings of fact and conclusions of law. In its discretion, the trial court may receive additional evidence or argument on remand.

¶ 18 VACATED and REMANDED.

Judges TYSON and HAMPSON concur.

Report per Rule 30(e).