IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-76

No. COA20-296

Filed 16 March 2021

Forsyth County, Nos. 18 J 056 & 057

IN THE MATTER OF: J.N. & L.N.

Appeal by Respondent from order entered 8 January 2020 by Judge Lisa V. Menefee in Forsyth County District Court. Heard in the Court of Appeals 24 February 2021.

Assistant County Attorney Theresa A. Boucher for Forsyth County Department of Social Services.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, for guardian ad litem.

Benjamin J. Kull for Respondent-Appellant Father.

DILLON, Judge.

¶ 1 Respondent, the father of the juveniles J.N. ("Jimmy") and L.N. ("Lola")[1] appeals from the trial court's permanency planning order. After careful review, we vacate in part and remand the permanency planning order for additional findings.

I. Background

[1] A pseudonym is used to protect the identity of the juveniles and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

¶ 2 On 10 April 2018, the Forsyth County Department of Social Services ("DSS") filed petitions alleging Jimmy to be an abused and neglected child and Lola to be a neglected child. That day, the trial court granted nonsecure custody to DSS.

¶ 3 Eleven months later, in March 2019, the trial court adjudicated Jimmy to be an abused and neglected child and Lola to be a neglected child. In January 2020, after a permanency planning hearing, the trial court entered a permanency planning order (the "Permanency Planning Order") granting guardianship to the juveniles' maternal grandparents ("Grandparents"). Respondent appeals.

II. Standard of Review

¶ 4 We review trial court decisions concerning whether a parent has acted inconsistently with their constitutionally protected status *de novo*. *In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728, 735 (2016). In general, "[a]ppellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re S.J.M.*, 184 N.C. App. 42, 47, 645 S.E.2d 798, 801 (2007).

III. Analysis

¶ 5 Respondent makes two arguments on appeal. We address each in turn.

A. Constitutionally Required Findings

¶ 6 Respondent argues that the trial court erred in awarding guardianship to Grandparents without first finding either that (1) he was an unfit parent or (2) he

had acted inconsistently with his constitutional right to parent. DSS and the Guardian ad Litem ("GAL") counsel argue that Respondent failed to preserve this issue for our review by failing to raise it at trial. We agree that because Respondent failed to raise this issue at trial, he has waived it for appellate review.

¶ 7 Normally, "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). However, "a parent's right to findings regarding [his] constitutionally protected status is waived if the parent does not raise the issue before the trial court." *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430-31 (2017). But there is no waiver where the parent "was not afforded the opportunity to raise an objection at the permanency planning review hearing." *Id.* at 305, 798 S.E.2d at 431. For example, where the trial judge does not allow argument at the hearing, the parent was not afforded the opportunity to raise the issue. *See In re I.K.*, 260 N.C. App. 547, 550, 818 S.E.2d 359, 362 (2018).

¶ 8 Here, the trial judge afforded all parties an opportunity for final arguments at the conclusion of the permanency planning hearing. It was clear to Respondent at that point in the hearing that DSS was seeking guardianship for the juveniles, as Respondent's closing argument consisted of reasons for reunification and against

permanent guardianship. However, Respondent did not raise his constitutional parental rights argument at that time.

¶ 9 Because Respondent was afforded an opportunity to raise his constitutional argument at trial and failed to do so, we conclude that he has waived this argument for our review.

B. Statutorily Required Findings

¶ 10 Respondent also argues that the trial court erred by failing to make all of the statutorily required findings under N.C. Gen. Stat. § 7B-906.1(n) (2020) before ceasing further reviews. We agree.

¶ 11 N.C. Gen. Stat. § 7B-906.1(n) provides:

> (n) Notwithstanding other provisions of this Article, the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following:
>
> > (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
> >
> > (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
> >
> > (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.

> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.
>
> The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review. However, if a guardian of the person has been appointed for the juvenile and the court has also made findings in accordance with subsection (n) of this section that guardianship is the permanent plan for the juvenile, the court shall proceed in accordance with G.S. 7B-600(b).

¶ 12 Respondent concedes that the first requirement of this statute is met by Finding of Fact 8, which states, "Since April 10, 2018, [Jimmy] and [Lola] have resided with [their] maternal grandparents[.]" We conclude that the second requirement is met by Finding of Fact 31 and Conclusion of Law 2, which read:

> 31. [Jimmy] and [Lola] are thriving in the home of maternal grandmother[.] [Grandparents] are meeting all of the children [sic] needs.
>
> 2. It is in the best interest of [Jimmy] and [Lola] that legal guardianship be granted to [Grandparents].

The fifth statutory requirement is satisfied by Finding of Fact 8 and Order 1. In combination, the finding and order identifies the juveniles' maternal grandparents by name and awards them permanent legal guardianship.

¶ 13 But the trial court's order does not satisfy subparts (3) and (4) of the statute,

requiring findings that neither the best interests of the juveniles nor the rights of any party require a review hearing every six months, and that all parties are aware that any party or the court can file a motion for a review hearing at any time.

¶ 14 We conclude that the appropriate action is to vacate and remand the trial court's order so that the trial court may make additional findings to satisfy the remaining requirements of N.C. Gen. Stat. § 7B-906.1(n).

IV. Conclusion

¶ 15 We conclude that Respondent's constitutional argument was waived for appellate review. However, we vacate and remand the trial court's permanency planning order for the limited purpose of making additional findings in order to comply with the requirements of N.C. Gen. Stat. § 7B-906.1(n)(3) and (4). The findings should be based on the evidence already presented to the trial court at the permanency planning hearing.

VACATED AND REMANDED.

Judges INMAN and JACKSON concur.

Report per Rule 30(e).