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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-192

No. COA20-771

Filed 4 May 2021

Scotland County, No. 19 JA 107

IN THE MATTER OF: J.P., JR.

Appeal by respondent from orders entered 19 June 2020 by Judge Sophia G. Crawford in Scotland County District Court. Heard in the Court of Appeals 14 April 2021.

*Jones Bullock, PLLC, by Brandi Jones Bullock, for Petitioner-Appellee Scotland County Department of Social Services.*

*Office of the Parent Defender, by Parent Defender Wendy C. Sotolongo and Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant-Father.*

*Battle, Winslow, Scott & Wiley, PA, by M. Greg Crumpler, for Guardian ad Litem.*

CARPENTER, Judge.

¶ 1

Respondent-Father appeals from adjudication and disposition orders entered 19 June 2020 adjudicating his minor child J.P., Jr. (“J.P.”) a neglected juvenile, maintaining J.P. in custody of Scotland County Department of Social Services (“DSS”

or “Petitioner”), relieving DSS of reunification efforts, and suspending visitation. After careful review of the record, we affirm the Adjudication Order. We reverse the Dispositional Order awarding DSS legal and physical custody of J.P. because the trial court made no dispositional findings of fact that Respondent-Father was unfit or had acted inconsistently with his constitutionally-protected status as a parent.

### **I. Factual & Procedural Background**

¶ 2 In May 2018, C.P., J.P.’s half-sister, tested positive for illegal substances at birth due to her mother’s drug use, which commenced DSS’s involvement in J.P.’s family. On 3 April 2019, DSS accepted a report from Child Protective Services (“CPS”) alleging neglect of a minor child by his mother, who is not a subject of this appeal, and Respondent-Father due to J.P. also testing positive at birth for several illegal substances, including cocaine. Upon J.P.’s release from the hospital, he was voluntarily placed in the care of his maternal grandmother, K.U., who was, at the time, the relative placement for C.P.

¶ 3 DSS investigated the allegations raised by CPS in J.P.’s case and confirmed substance abuse by his mother; DSS concluded her conduct “placed [J.P.] at risk.” On 23 May 2019, DSS opened case management services for J.P. and entered into an In-Home Family Services Agreement with his mother in which DSS recommended she complete a substance abuse assessment and treatment, participate in mental health treatment, and attend domestic violence counseling. J.P.’s mother continued to use

illegal substances throughout the pendency of the case. Also, in May 2019, DSS attempted to develop a case plan with J.P., Sr., the father of C.P. and the original purported father of J.P., but he was arrested before the plan was completed.

¶ 4

In July 2019, Respondent-Father submitted to a DNA paternity test, and he was found to be J.P.'s biological father. After Respondent-Father's paternity was established, DSS developed a case plan for Respondent-Father in August 2019 with objectives of addressing "child characteristics," or the child's physical and mental needs, and improving mental health, although the plan never became active because he refused to sign it. DSS requested Respondent-Father undergo a mental health evaluation due to certain criminal charges and because the medical report he provided indicated that he was prescribed Xanax by his primary medical provider.

¶ 5

Respondent-Father failed to sign a release so that DSS could obtain information regarding his mental health diagnoses; however, counsel for Respondent-Father provided the trial court with a current mental health assessment on the day of the 5 March 2020 hearing, which had not yet been reviewed by DSS.

¶ 6

On 10 October 2019, DSS filed a juvenile petition alleging that J.P. was a neglected juvenile without seeking nonsecure custody—K.U. continued to care for J.P. and his sister C.P. In November 2019, J.P. and C.P. were removed from K.U.'s placement after a domestic violence incident occurred between J.P.'s mother, J.P., Sr., and K.U.; the children were then placed with a family friend. DSS conducted

home studies on Respondent-Father's home as well as on the home of J.P.'s paternal grandmother, G.A. DSS found that Respondent-Father's home was unacceptable for placement due to his convictions of violent crimes as well as a sexual offense against a child. Only G.A.'s home was approved for placement.

¶ 7 On 9 January 2020, the trial court ordered J.P. be placed with G.A. It also ordered two hours per week of supervised visitation to Respondent-Father and J.P.'s mother, respectively.

¶ 8 On 5 March 2020, the case came on for an adjudication and dispositional hearing at the Scotland County District Court before the Honorable Sophia G. Crawford.

¶ 9 The transcript from the 5 March 2020 hearing tends to show that there were communication issues between G.A. and DSS. Jennifer Scott ("Ms. Scott"), the DSS case manager assigned to J.P.'s case, testified that she had attempted to contact G.A. by telephone approximately fourteen times between the period of 30 January 2020 and 21 February 2020, and was unsuccessful in reaching her, although Ms. Scott's supervisor was able to "finally get in contact with [G.A.]" and arrange for visitation. Ms. Scott conceded that she did not always leave messages, and at times, G.A. was visiting the DSS offices when Ms. Scott had tried to call her.

¶ 10 G.A. appeared as a witness for her son, Respondent-Father. When questioned regarding her intent to comply with visitation orders, she responded that she was

willing and able to assist with visitation, but she did not currently have time for it since she was dealing with “[J.P.] being sick and having deaths in her family.”

¶ 11 Under the placement of G.A., J.P. had become ill with the flu while at daycare, and G.A. picked him up and took him to the doctor. G.A. testified that J.P. had been hospitalized just one day before the hearing for an infection that may have developed from the flu, although she failed to notify DSS of J.P.’s illness before he was hospitalized, and she had to cancel J.P.’s scheduled visitation with his mother.

¶ 12 The DSS court report for the 5 March 2020 hearing reveals that Respondent-Father has an extensive criminal background, as well as a history of engaging in domestic violence with J.P.’s mother. Respondent-Father’s criminal record includes, *inter alia*, a 2008 conviction of sexual activity by a substitute parent and pending charges for assault by strangulation, assault on a female, and possession of a firearm by a felon. Based on the record, Respondent-Father was once registered as a sex offender and is currently placed on DSS’s Responsible Individuals List.

¶ 13 The hearing and the record also provide multiple examples of incidents of domestic violence that have occurred between J.P.’s mother and Respondent-Father. Eddie Smith, the Chief Deputy for the Scotland County Sheriff’s Office (“Chief Deputy Smith”), testified at the 5 March 2020 hearing as to an interaction he had with Respondent-Father when he responded to a 911 call in 2015. Chief Deputy Smith described having “to physically restrain [Respondent-Father] from assaulting his

wife.” Moreover, on 23 August 2019, J.P.’s mother reported to DSS that Respondent-Father “pulled her by her hair” and was “abusive to her.” On 10 October 2019, J.P.’s mother alleged Respondent-Father “held her hostage.” Mutual no-contact orders were put in place between Respondent-Father and J.P.’s mother.

¶ 14 DSS expressed concerns at the hearing regarding G.A.’s ability to provide a safe home for J.P. considering Respondent-Father’s potential influence over G.A. and the fact that G.A. was not always cognizant of when Respondent-Father came on her property. G.A. had testified that she had seen Respondent-Father’s truck on her property near an animal enclosure when he was not scheduled for visitation, but she could not perceive whether the person driving the truck was Respondent-Father or one of his friends given the distance from her home to the hog pen located in the woods. Additionally, G.A. testified that she did not believe Respondent-Father had committed the acts against his stepdaughter, which were the basis of his conviction for the crime of sexual activity by a substitute parent.

¶ 15 Despite DSS’s causes for concern, Ms. Scott testified that Respondent-Father would be “in compliance” with DSS’s requirements for reunification after the case plan was updated to reflect the mental health evaluation, and Respondent-Father signed the plan. She also testified that Respondent-Father had been visiting with the child, providing for the child’s needs, and attending the child’s doctor appointments—consistent with the “child characteristics” objectives in his case plan.

¶ 16 In light of challenges in communication between DSS with G.A., Respondent-Father's criminal history and pending charges, and safety concerns regarding G.A. as J.P.'s placement, counsel for DSS recommended J.P. be removed from G.A.'s care. In contrast, the Guardian *ad Litem's* report prepared for the 5 March 2020 court date made recommendations for J.P. to remain placed with G.A. and for visitation to continue with both parents.

¶ 17 On 19 June 2020, the trial court entered an adjudication order (the "Adjudication Order"), which concluded as a matter of law that J.P. was "a neglected juvenile within the intent and meaning of the North Carolina Juvenile Code." On the same day, the trial court entered a dispositional order (the "Dispositional Order"). In its dispositional findings, the trial court found, *inter alia*, that "it [was] not . . . in the juvenile's best interests" to remain placed with G.A. or to have continued visitation with either of his parents at the present time. Rather, it concluded that "[i]t would be in the best interest of the juvenile and the State of North Carolina that DSS retain the legal and physical custody of the juvenile . . . ." Accordingly, the trial court ordered "legal and physical custody of the juvenile [to] remain with DSS . . . ." Next, it "relieved [DSS] of reunification efforts" and ordered DSS to "proceed with a permanent plan for the juvenile as reunification is not likely to occur within the next six (6) months." Finally, the trial court ordered J.P.'s visitation with his mother and Respondent-Father be suspended, and it removed J.P. from G.A.'s placement.

Respondent-Father gave timely written notice of appeal from the Adjudication Order and the Dispositional Order.

## **II. Jurisdiction**

¶ 18 This Court has jurisdiction to address Respondent-Father's appeal from the Adjudication Order and the Dispositional Order pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2019).

## **III. Issues**

¶ 19 The issues on appeal are whether: (1) the trial court erred in awarding custody of J.P. to DSS without first finding that Respondent-Father was unfit or had acted in a manner inconsistent with his constitutionally-protected status; (2) the trial court erred in eliminating reunification efforts at an initial disposition hearing when it failed to make the findings of fact required by N.C. Gen. Stat. § 7B-901(c); (3) the trial court abused its discretion in failing to award visitation to Respondent-Father or to advise him of his right to seek review; and (4) the trial court erred in failing to advise Respondent-Father of his right to seek review of the visitation provisions of the Dispositional Order.

## **IV. Adjudication Order**

¶ 20 Although Respondent-Father gave written notice of appeal "from the Adjudication Judgment and Dispositional Order that was filed on June 30, 2020," he does not challenge on appeal the 19 June 2020 Adjudication Order adjudicating J.P.



a neglected juvenile based on his mother's conduct. Since no party, including Respondent-Father, briefed this issue, we deem this issue abandoned. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

## V. Dispositional Order

¶ 21 We next consider Respondent-Father's contention that "[t]he trial court incorrectly applied the best interest of the child test in awarding custody of [J.P.] to DSS without first finding that [he] was unfit or had acted inconsistently with his constitutionally protected status." He maintains "[t]he Dispositional Order contains no findings [of fact or conclusions of law] establishing that [he] was an unfit parent or that he had neglected or abandoned [J.P.]." DSS and the Guardian *ad Litem* argue Respondent-Father waived his right to appellate review of the Dispositional Order because he failed to raise an objection at trial. After careful review of the record, we agree with Respondent-Father that the trial court improperly entered the Dispositional Order awarding DSS custody of J.P. without first addressing whether Respondent-Father had lost his constitutionally-protected parental rights.

### A. Standard of Review

¶ 22 "All dispositional orders of the trial court after abuse, neglect, and dependency hearings must contain findings of fact based upon the credible evidence presented at

the hearing. If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citations and quotation marks omitted).

### B. Analysis

¶ 23 As the Supreme Court of the United States reaffirmed in *Troxel v. Granville* and as North Carolina courts have recognized, natural parents have a constitutionally-protected liberty interest "in the care, custody, and control of their children." 530 U.S. 57, 65, 147 L. Ed. 2d. 49, 56 (2000); see *Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001); *In re A.C.*, 247 N.C. App. 528, 533, 786 S.E.2d 728, 733 (2016).

¶ 24 The protection of a parent's constitutionally-protected, paramount status is not absolute—a parent may lose this status "if the parent's conduct is inconsistent with th[e] presumption [that a parent will act in the best interests of the child] or if the parent fails to shoulder the responsibilities that are attendant to rearing a child." *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 806 (2000). "If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price v. Howard*, 346 N.C. 68, 79,

484 S.E.2d 528, 534 (1997). Therefore, before a trial court grants custody or guardianship to a nonparent, it must first “clearly address whether [the] respondent is unfit as a parent or if [his or] her conduct has been inconsistent with [his or] her constitutionally protected status as a parent . . . .” *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015). The trial court’s finding that a “parent is unfit or acted inconsistent[ly] with his or her constitutionally protected status” must be supported by clear and convincing evidence—“even when a juvenile has previously been adjudicated neglected and dependent.” *In re R.P.*, 252 N.C. App. 301, 304, 798 S.E.2d 428, 430 (2017); *Adams*, 354 N.C. at 63, 550 S.E.2d at 503; *see also In re D.M.*, 211 N.C. App. 382, 385–86, 712 S.E.2d 355, 357 (2011) (reversing a custody award to a third-party, which was entered by the trial court after the minor child was adjudicated dependent based solely on the mother’s conduct and without findings of fact the respondent-father had acted in a manner inconsistent with his status as a parent).

¶ 25           However, our Supreme Court has stated: “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001). Hence, the doctrine has been applied when a respondent has failed to raise the issue of whether a trial court found he or she was unfit or had acted in a manner inconsistent with his or her constitutionally-protected status—if the respondent did not raise an objection at trial to the

constitutional issue, then the “respondent has waived review of th[e] issue on appeal.” *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011); *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (stating that a parent may waive his or her constitutionally-protected status so long as the parent was “afforded the opportunity to object or raise the issue at the hearing”).

¶ 26 Here, Respondent-Father did not waive appellate review on the issue of his parental status because his counsel properly raised the constitutional issue at trial:

THE COURT: Well, I’m not here really to reward him. Well, I’m here to look out for the best interest of the child.

MR. THOMPSON: But this is the thing. This is a parent. This is not a third party. He has a constitutional right to have –

THE COURT: And it’s still best interest of the child, no matter who it is.

MR. THOMPSON: It has to have constitutional right to best protect -- he has rights as a parent.

THE COURT: And nobody’s terminated his parental rights.

MR. THOMPSON: Well, in a sense, they have. In a sense, they have because by the process of not allowing him visitation with the child that he’s the father of—and he has

complied—the Court is saying  
he has no rights to have  
visitation.

¶ 27 The colloquy between the trial court and Respondent-Father’s counsel at the 5 March 2020 hearing clearly indicates the trial court acted under a misapprehension of the law by applying the “best interest of the child” standard before first finding by clear and convincing evidence that Respondent-Father was “unfit or [had] acted inconsistent with his . . . constitutionally protected status” as a parent. *See In re R.P.*, 252 N.C. App. at 304, 798 S.E.2d at 430; *see also In re J.R.*, 227 N.C. App. 649, 745 S.E.2d 375, 2013 N.C. App. LEXIS 628, at \*13–14 (N.C. Ct. App., June 4, 2013) (unpublished) (holding the trial court erred when it applied the “best interest” analysis after rejecting a respondent-father’s constitutional argument that his rights as a parent were infringed since it failed to first find that the father had lost his parental status).

¶ 28 We note neither DSS’s petition alleging neglect nor the trial court’s 19 June 2020 orders make any findings and conclusions addressing whether Respondent-Father was unfit or had acted in a manner inconsistent with his parental status. The fact that the Adjudication Order adjudicated J.P. neglected due to his mother’s conduct is immaterial to the consideration of whether the trial court made the appropriate findings of fact before granting guardianship of a minor child to a nonparent in the Dispositional Order. *See In re R.P.*, 252 N.C. App. at 304, 798 S.E.2d

at 430.

¶ 29 Despite not making findings of fact concerning the forfeiture of Respondent-Father's parental rights, the trial court made, *inter alia*, conclusion of law 2, which states: "It would be in the best interest of the juvenile and the State of North Carolina that DSS retain the legal and physical custody of the juvenile with the responsibility to provide for appropriate foster care, relative or other placement."

¶ 30 Since the trial court concluded that it was in J.P.'s best interest to award custody to DSS, without first making the requisite findings as to Respondent-Father's loss of parental status, it improperly entered the Dispositional Order. *See In re B.G.*, 197 N.C. App. 570, 574–75, 677 S.E.2d 549, 552–53 (2009), *disc. rev. denied*, 365 N.C. 212, 709 S.E.2d 919 (2011) (reversing an order awarding custody to a nonparent that lacked findings to support the application of the best interest analysis); *see also In re S.D.*, 2021-NCCOA-93, ¶¶ 51–53. We therefore reverse the Dispositional Order and remand to the trial court for further proceedings not inconsistent with this opinion. Considering our reversal of the Dispositional Order, we need not consider Respondent-Father's remaining arguments related to the elimination of reunification efforts and the suspension of parental visitation.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).