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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-248

No. COA20-808

Filed 1 June 2021

Cumberland County, No. 18JA191

IN THE MATTER OF W.A.

Appeal by Respondent-Father from order entered 3 August 2020 by Judge Cheri Mack in Cumberland County District Court. Heard in the Court of Appeals 28 April 2021.

Patrick A. Kuchyt for Petitioner-Appellee Cumberland County Department of Social Services.

Matthew D. Wunsche for Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant-Father.

COLLINS, Judge.

¶ 1 Father appeals from the trial court's Permanency Planning Review Order ceasing reunification efforts between Father and his minor child "Woodrow,"[1] arguing that the trial court failed to follow multiple statutory requirements.[2] We affirm.

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[1] A pseudonym has been used to protect the identity of the juvenile.

[2] The juvenile's biological mother did not appeal from the trial court's order and is not a party to this appeal.

I. Background

¶ 2 Cumberland County Department of Social Services ("DSS") filed a petition on 11 May 2018 alleging that Woodrow was neglected and dependent after he was placed in the neonatal intensive care unit and tested positive for cocaine shortly after his birth on 6 May 2018. An order for nonsecure custody was entered the same day awarding DSS physical custody and Woodrow was placed with licensed foster parents on 17 May 2018.

¶ 3 Father stipulated to the allegations alleged in the DSS petition and Woodrow was adjudicated neglected and dependent on 24 July 2018. At the temporary disposition hearing on that date, DSS was awarded physical and legal custody of Woodrow. Father was awarded unsupervised weekend visitations until DSS was comfortable placing Woodrow for a "full trial home visit."

¶ 4 The trial court held a permanent disposition hearing on 20 September 2018. Woodrow remained in DSS custody "for placement in foster care, with suitable relatives or with other suitable persons[.]" Father was ordered to participate in random drug screens, complete age-appropriate parenting classes, complete a 16-week nurturing parenting class, and maintain stable housing and income. Father was allowed unsupervised weekend visitations until the social worker felt comfortable giving Father a full trial home visit, but visitation could be "tapered back if [Father] gets overwhelmed."

¶ 5 At the initial permanency planning hearing on 17 January 2019, the trial court ordered a primary plan of reunification and a secondary plan of adoption. The trial court ordered Father to comply with his case plan and submit to random drug screens. At the next permanency planning hearing on 2 May 2019, the trial court found it was possible for Woodrow to return home immediately, or within the next six months, if Father actively engaged in services.

¶ 6 The trial court held a third permanency planning hearing on 29 August 2019 and the trial court found that it was not possible for Woodrow to return home within the next six months because both parents needed to engage in substance abuse treatment. The trial court ordered that reunification remain the primary permanent plan but modified the secondary permanent plan to be adoption concurrent with guardianship. The trial court ordered DSS to investigate placement options with Father's relatives pursuant to the Interstate Compact on the Placement of Children ("ICPC"). DSS, in accordance with the ICPC, coordinated a home study of Woodrow's paternal uncle Larry[3] by the Department of Family and Protective Services in Texas.

¶ 7 The final permanency planning hearing was held on 2 June 2020. The trial court found that both parents "acted in a manner that is inconsistent with their constitutionally protected status as parents[,] . . . willfully abdicated their rights and

[3] A pseudonym is used to protect the identity of the juvenile.

responsibilities as parents to the juvenile[,]" and were "unfit to have custody, care, and control of the juvenile."

¶ 8 The trial court found that Larry was willing and able to provide a safe home for Woodrow, but that placement of Woodrow with Larry would be contrary to the best interests of Woodrow. The trial court designated Woodrow's foster parents as Woodrow's permanent guardians. The primary permanent plan was changed to guardianship and DSS was relieved of further reunification efforts with Father. The trial court scheduled a Review Hearing for 4 August 2020. Father filed notice of appeal.

II. Discussion

¶ 9 Father argues that the trial court erred by: (1) failing to place Woodrow with Larry; (2) failing to advise and give notice to Father of his right to file a motion for review of his visitation plan, in violation of N.C. Gen. Stat. § 905.1(d); and (3) ordering DSS to cease its efforts to reunite Father with Woodrow. We find no merit to Father's arguments and affirm the trial court's order.

1. Permanency Planning Order

¶ 10 Father first argues that the trial court erred by failing to place Woodrow with Larry, a suitable relative, instead of non-relative guardians, in violation of N.C. Gen.

Stat. §§ 7B-903 and 7B-506.[4]

¶ 11 "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). Unchallenged findings of fact are binding on appeal. *Kaufman v. Kaufman,* 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 12 We review a trial court's determination that placement of a juvenile with a suitable relative is contrary to the best interests of the juvenile for an abuse of discretion. *See In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007) ("We review a trial court's determination as to the best interest of the child for an abuse of discretion.") (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008) (quotation marks and citation omitted).

¶ 13 When placing a juvenile who has been adjudicated neglected or dependent in out-of-home care, the trial court

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[4] Father contends that the trial court erred and abused its discretion when it failed to place the juvenile with a suitable relative and failed to comply with the statutory mandates in N.C. Gen. Stat. §§ 7B-903(a1) and 7B-506(h)(2). N.C. Gen. Stat. § 7B-506 is entitled "Hearing to determine need for continued nonsecure custody[.]" None of the orders for continued nonsecure custody are at issue on appeal, and therefore we address only Father's argument as to relative placement under N.C. Gen. Stat. § 7B-903.

> shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. In placing a juvenile in out-of-home care under this section, the court shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence.

N.C. Gen. Stat. § 7B-903(a1) (2019). Thus, the trial court must first consider whether a "relative is willing and able to provide proper care and supervision in a safe home[.]" *Id.* If a willing and able relative exists, "then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.*

¶ 14 The trial court found that Woodrow's paternal uncle Larry was "a willing and able relative to provide a safe home for the juvenile." Accordingly, the trial court was required to order placement of Woodrow with Larry unless that placement was contrary to the best interests of Woodrow.

¶ 15 The trial court specifically concluded:

> 9. Pursuant to N.C. Gen. Stat. § 7B-903(a1), this Court has considered placement of the juvenile with a relative. However, when considering the totality of the findings made today and in the incorporated Orders, the Court concludes that placement with the juvenile's relative, the Paternal Uncle [Larry], would be contrary to the best interests of the juvenile.

In support of this conclusion, the trial court made the following findings of fact:

> 46. [Larry] currently resides in Texas with his fiancé and her three children aged 11, 8, and 7 years. They have been residing together since 2014. Two (2) of those juveniles have development delays. They reside in a three-bedroom, two-bathroom home. The family owns five dogs and one guinea pig as pets. The home study did not note any safety concerns or aggressive behaviors on the part of any of these animals, but there was not a vaccination record or dog behavior assessment provided.
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> 47. That [Larry's] family receives Medicaid and SNAP services to assist their family.
>
> 48. The ICPC investigative Social Worker in Texas conducted interviews of [Larry's] neighbors, all whom indicated his home appeared to be a loving environment for his fiancé's children.
>
> 49. The potential relative placement, [Larry] and his fiancé are willing to be a long-term placement provided for the juvenile [] and would be willing to adopt the juvenile if necessary.
>
> . . . .
>
> 51. [Larry] is willing to allow speech and occupational therapists in their community to come into their home to provide services if the juvenile were placed with him.
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> 52. [Larry's] fiancé is a stay-at-home mother who has the time and ability to care for the minor child full-time. That the relative placement and his fiancé have resided together since 2014. That the fiancé's children residing in [Larry's] home are all school-aged. That [Larry's] fiancé previously worked for a daycare.
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> 53. The ICPC investigator interviewed three non-relative personal references of [Larry]. All neighbors indicated they

would trust the couple to take care of their children and had no safety concerns.

54. That [Larry] is a willing and able relative to provide a safe home for the juvenile.

55. The juvenile does not have any high-risk behaviors. However, the Court is concerned for the stress on the family if another juvenile was placed with them.

56. The juvenile has a strong bond with the foster parents[]. The juvenile has been placed with the [foster parents] in excess of 24 months, and this has been his only placement. This is the only home the juvenile has known during his life.

57. The juvenile [] is the only foster child in the home, however, [the foster parents] have other children. The juvenile [] has a strong bond with the other juveniles in the home. One of the other juveniles in the home has developmental delays.

58. The juvenile has resided in the same home and neighborhood since he was released from the hospital.

59. [The foster parents] have been consistently transporting the juvenile to and from medical and therapy appointments for more than two years. [The foster parents] have participated in the various therapies for the juvenile.

60. That if placed in the home with [Larry], the juvenile [] would sleep in a bed located in the playroom.

61. [Larry's] home is approximately a 20-hour drive from where the Respondent Parents are currently located.

62. The foster parents do not plan to adopt the juvenile.

63. The juvenile has mild developmental delays, for which in-home speech and occupational therapists were provided

> at the foster placement. The juvenile attends two appointments weekly, and has been working with one of his current providers since shortly after his birth.
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> 64. The juvenile has never met, spoken with, or seen the Paternal Uncle [Larry].
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> 65. [Larry] was not aware that the juvenile had been born until the Respondent Father contacted him to inquire about placement in August of 2019. [Larry] was not aware of the circumstances that brought the juvenile into care until today's date.
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> 66. [Larry] and Respondent Father communicate multiple times a week, and have done so consistently throughout their lives, but [Larry] was unaware of the juvenile's birth until 15 months after he was born, when he was asked by Respondent Father about being a potential placement.
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> 67. [Larry] was laid off from his job due to the COVID-19 pandemic after the completion of the home study, it is unknown as to when he can return to work. He has filed for unemployment. [Larry] also owns a business flipping houses, but has not started to earn money from the business yet, as it just finished the set-up process.
>
> 68. [Larry] has never met, and does not have a relationship with the Respondent Mother.
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> 69. That if the Court placed the juvenile with [Larry], permanency for the juvenile could not be achieved for at least another year.

¶ 16 The trial court correctly considered the suitability of Larry's home, the lack of relationship between Woodrow and Larry, the distance between Larry's residence and Woodrow's biological parents, and the care provided by his current guardians before ultimately determining placement with Larry was "contrary to the best

interests of the juvenile." N.C. Gen. Stat. § 7B-903(a1). These findings show that the trial court's decision regarding the best interests of Woodrow was not "so arbitrary that it could not have been the result of a reasoned decision." *In re B.W.*, 190 N.C. App. at 336, 665 S.E.2d at 467 (quotation marks and citation omitted).

¶ 17 Father is essentially asking this Court to re-consider the trial court's determination as to best interests and substitute our own judgment for that of the trial court, but "[i]t is not the function of this Court to reweigh the evidence on appeal." *In re D.E.P.*, 251 N.C. App. 752, 761-62, 796 S.E.2d 509, 515 (2017) (quotation marks and citation omitted); *see Little v. Penn Ventilator Co.,* 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (When reviewing a trial court's determination for abuse of discretion, "the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason."). Accordingly, the trial court did not abuse its discretion by determining placement with Larry was contrary to Woodrow's best interests.

2. Motion For Review

¶ 18 Father next argues that the trial court erred by failing to advise Father of his right to file a motion for review of the visitation plan, as required by N.C. Gen. Stat. § 7B-905.1(d).

¶ 19 When a trial court removes custody of a juvenile from a parent and places the

juvenile outside of the home, "all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d) (2019).

¶ 20 In this case, the trial court advised the parties of their right to file a motion to review its visitation plan in open court. While discussing potential visitation between Woodrow and Larry, the trial court stated:

> [I]f he's going to be up here and if he[] wants to come to visit and be up here, and that's something you want me to consider, him having visitation with the child, you all need to just file a motion. I'm not going to close [DSS's] file, nor am I closing the [Guardian ad Litem's] file, because I've got to come up with a way how visitation is going to be effectuated.

Thus, the trial court advised all parties, in open court, that if they wanted to change or alter the terms of visitation, they could file a motion. *See In re J.L.*, 264 N.C. App. 408, 422, 826 S.E.2d 258, 268 (2019) (vacating the trial court's visitation order because the trial court failed to inform respondent-mother of her right to file a motion in its order or in open court). Accordingly, Father's argument lacks merit.

¶ 21 Moreover, even if the trial court's statement was not a clear advisement under N.C. Gen. Stat. § 7B-905.1(d), Father was not prejudiced. Father's "assignment of error on this issue indicates that he has since become aware of his right of review under N.C. Gen. Stat. § 7B-905.1(d)[,]" *In re I.K.*, 848 S.E.2d 13, 23-24 (N.C. Ct. App. 2020), and a review hearing was scheduled on 4 August 2020 to allow Father the

opportunity to "present a proposed plan to facilitate visitation between the Respondent Father and the juvenile."

3. Reunification Efforts

¶ 22 Father finally argues that the trial court erred by ordering DSS to cease reunification efforts. Specifically, he argues that the trial court erred by determining that: (1) he was unfit as a parent and acted inconsistently with his constitutionally protected status as a parent; and (2) reunification efforts would be unsuccessful and inconsistent with the juvenile's health or safety, pursuant to N.C. Gen. Stat. § 7B-906.2(b).

a. Constitutionally Protected Status

¶ 23 Father argues that the trial court made insufficient findings to support a conclusion that he was unfit and engaged in conduct that was inconsistent with his constitutionally protected status.

¶ 24 "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Heatzig v. MacLean,* 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008) (quotation marks and citations omitted). "[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children." *Price v. Howard,* 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). "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." *Boseman v. Jarrell,* 364 N.C. 537, 549, 704 S.E.2d 494, 503 (2010) (quotation marks and citation omitted). There is "no bright line beyond which a parent's conduct meets this standard." *Id.* (citation omitted). A trial court "must clearly address whether respondent is unfit as a parent or if h[is] conduct has been inconsistent with h[is] constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent." *In re J.L.*, 264 N.C. App. at 419, 826 S.E.2d at 266 (quotation marks and citations omitted).

¶ 25 Here, the trial court concluded that:

> 8. [] Respondent Parents are not fit or proper persons for the care, custody, and control of the juvenile. They have willfully abdicated their rights and responsibilities as parents and have acted inconsistently with their constitutionally protected status.

In support of this conclusion, the trial court found that:

> 22. Respondent Father has exhibited financial instability in that he has lost his housing due to foreclosure in July 2019.
>
> 23. . . . He tested positive for opioids on 8/23/19 and 8/28/19. . . .
>
> 24. The Social Worker visited the Respondent Father's residence on January 29, 2020 and the home was not safe or appropriate for the juvenile. There were prescription bottles in places that would be within reach of the juvenile, mattresses blocking the floor, and the crib was being used for storage. Respondent Father had three (3) weeks' notice for the home inspection.

> 25. Respondent Father does submit to random drug screens however there have been two (2) no shows since the last court date.
>
> 26.The Respondent Parents continue to exhibit unhealthy relationship behavioral patterns that affect their ability to engage in court ordered services. The Respondent Parents requested couples counseling which was also recommended by [DSS]; however, they failed to participate. They have repeatedly argued in the presence of the juvenile during visitation laying all the blame of [DSS]'s continued involvement with the family on the Respondent Mother.
>
> 28. Due to Respondent Father's lack of substantial progress in his services, his substance abuse issues of long standing and enduring nature, his continued toxic relationship with the Respondent Mother, and lack of stable income and housing, further reunification efforts clearly would be unsuccessful and inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time.

These unchallenged findings support the trial court's conclusion that Father was not a fit or proper person for the care, custody, and control of Woodrow and that Father acted inconsistently with his constitutionally protected status as a parent due to his lack of appropriate housing, lack of stable income, failure to engage in therapy, continued substance abuse issues, and continued toxic relationship with Woodrow's mother. *See In re I.K.*, 848 S.E.2d at 22 (affirming the trial court's determination that respondent parents acted inconsistently with their constitutionally protected status as parents due, in part, to "chronic issues related to unsafe housing, domestic violence, and substance abuse[.]"). Accordingly, the trial court did not err by

concluding that Father was not a fit or proper person for the care, custody, and control of Woodrow and that Father acted inconsistently with his constitutionally protected status as a parent.

b. N.C. Gen. Stat. § 7B-906.2

¶ 26 Father further argues that the trial court erred by failing to follow the statutory requirements of N.C. Gen. Stat. § 7B-906.2 and instead made "a mere conclusory finding" that was centered on Father's prior conduct rather than his current abilities.

¶ 27 "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re M.T.-L.Y.*, 265 N.C. App. 454, 466, 829 S.E.2d 496, 505 (2019) (quotation marks and citation omitted).

¶ 28 Reunification must remain a primary or secondary plan except in three circumstances: (1) "the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or [N.C. Gen. Stat. §] 7B-906.1(d)(3), (2) "the permanent plan is or has been achieved in accordance with subsection (a1) of this section[,]" or (3) "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).

¶ 29 Here, the trial court concluded that "further efforts would be futile as well as contrary to the health, safety, and best interest of the juvenile" and relieved DSS of further reunification efforts. The trial court complied with the requirements of N.C. Gen. Stat. § 7B-906.2(b) when it explicitly found:

> 28. Due to the Respondent Father's lack of substantial progress in services, his substance abuse issues of long standing and enduring nature, his continued toxic relationship with the Respondent Mother, and lack of stable income and housing, further reunification efforts clearly would be unsuccessful and inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time.

This ultimate finding is supported by the findings pertaining to Father's continued issues with lack of housing, lack of stable income, substance abuse, and unhealthy relationship with Woodrow's mother. These findings support the trial court's conclusion that reunification efforts would be unsuccessful and inconsistent with Woodrow's health and safety.

¶ 30 If a trial court ceases reunification efforts under N.C. Gen. Stat. § 7B-906.2(b) on grounds that efforts would be "unsuccessful or would be inconsistent with the juvenile's health or safety," the trial court must comply with N.C. Gen. Stat. § 7B-906.2(d), which requires the trial court to make written findings of fact as to: (1) "[w]hether the parent is making adequate progress within a reasonable period of time

under the plan[,]" (2) "[w]hether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile[,]" (3) "[w]hether the parent remains available to the court, the department, and the guardian ad litem for the juvenile[,]" and (4) "[w]hether 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). These findings "must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013).

¶ 31 The trial court considered Father's lack of progress and made findings regarding his failure to make substantial progress with services, substance abuse issues, unhealthy relationship with Woodrow's mother, and lack of financial stability. Based on Father's lack of progress in these areas, the trial court found that reunification efforts would be "inconsistent with the juvenile's health and safety." The trial court further considered whether Father was actively participating with his plan by finding that Father was actively participating with medication management and substance abuse counseling but was not attending couples counseling. The trial court also found that Father made himself available to the Department. A thorough review of the trial court's findings shows that it properly considered the four factors and did not abuse its discretion with respect to disposition. Accordingly, the trial court did not err and followed the statutory requirements of N.C. Gen. Stat. § 7B-906.2(b).

III. Conclusion

¶ 32 We discern no abuse of discretion or error by the trial court and conclude that the trial court's unchallenged findings of fact supported the trial court's conclusions of law. Accordingly, we affirm the Permanency Planning Order entered on 3 August 2020.

AFFIRMED.

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).