IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-368

No. COA20-736

Filed 20 July 2021

Cumberland County, No. 15 JA 324

IN THE MATTER OF M.F.

Appeal from an order entered 4 March 2020 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 9 March 2021.

Dawn M. Oxendine, for Cumberland County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook and Tiffany M. Burba, for Guardian ad Litem.

Benjamin J. Kull, for Respondent-Mother.

GORE, Judge.

¶ 1 Mareshel Freemen ("Respondent-Mother") appeals from a permanency planning order and order waiving further review hearings, entered 4 March 2020, granting guardianship of M.F. ("Maria")[1] to Lily Sumpter ("Ms. Sumpter"). We affirm in part, reverse in part, and remand.

I. Procedural Background

[1] A Pseudonym to protect the identity of the juvenile.

¶ 2 On 27 August 2015, Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging Maria to be both neglected and dependent. The district court granted nonsecure custody on that same day. The court entered an order for continued nonsecure custody on 2 September 2015.

¶ 3 On 9 September 2015, a hearing on the need for continued non-secure custody was held. At this hearing Respondent-Mother requested that Maria be placed with either her Maternal Aunt or Lily Sumpter (Maria's Godmother), if custody was not returned to her. The court ordered continued non-secure custody and ordered DSS to conduct a home study on both the home of the Maternal Aunt and Ms. Sumpter. On 5 February 2015, Maria was placed with her Maternal Aunt. Continued non-secure custody was subsequently ordered on 4 November 2015, 1 December 2015, and 21 January 2016. Continued non-secure custody was again subsequently ordered on 14 March 2016, 14 April 2016, and 12 May 2016.

¶ 4 On 9 June 2016, an adjudication and temporary disposition hearing was held, and a subsequent order was entered. The district court adjudicated Maria dependent, the allegations of neglect were dismissed, a plan was established for the Respondent-Mother to regain custody of Maria, and the matter was continued for a full dispositional hearing, set for 14 July 2016. Following the dispositional hearing the court ordered legal and physical custody of Maria shall remain with DSS.

¶ 5 On 28 October 2016, ahead of the first permanency planning hearing, DSS filed

a report recommending a primary permanent plan of reunification and a secondary permanent plan of custody. However, on 10 November 2016 the district court ordered the primary permanent plan for Maria was custody with a secondary plan of reunification. On 14 November 2016, Respondent-Mother filed a notice of objection to the change of case plan. The 10 November 2016 order was substantively reaffirmed at the 8 March 2017 hearing.

¶ 6 On 14 April 2018, the trial court found Respondent-Mother to not be a fit or proper person for continued care, custody, or control of Maria. The trial court entered an order updating the primary permanent plan for Maria to guardianship with Joel and Vickie Holston, Maria's foster placement at the time. DSS was relieved of continuing reunification efforts with Respondent-Mother. On 20 August 2018, DSS again identified Ms. Sumpter as a potential placement for Maria and Maria was placed with Ms. Sumpter on 28 December 2018.

¶ 7 At the final permanency planning hearing, held 4 March 2020, the court changed Maria's permanent plan to guardianship with Ms. Sumpter, and the court awarded Ms. Sumpter guardianship of Maria. Respondent-mother gave notice of appeal on 8 July 2020.

II. Factual Background

¶ 8 On 27 August 2015, Respondent-Mother left Maria with a male friend at a McDonalds. The male friend subsequently left Maria with an unidentified female

friend, who subsequently left Maria unattended. The police were called and DSS became involved. Respondent-Mother had a child protective services history dating back to 2005 due to unstable housing. At the time of the August 2015 incident Respondent-Mother stated she and her children were homeless. Maria's father was not involved in her life at the time.

¶ 9 In the adjudication order finding Maria dependent, the court issued an initial plan for Respondent-Mother. Respondent-Mother was to submit to and engage in psychological evaluation and treatment; complete a parenting assessment; attend parenting classes; obtain and maintain suitable and stable employment, sufficient to support herself and Maria; obtain and maintain suitable and stable housing; comply with medication management; and was allowed two hours of supervised visitation each week.

¶ 10 By July 2016, Respondent-Mother had completed parenting classes and completed a domestic violence assessment. However, Respondent-Mother was still in need of income management services, did not have stable housing, and had been inconsistent with her mental health services. In July 2016, the court also added to Respondent-Mother's plan, requiring she participate in Vocational Rehabilitation; complete a substance abuse assessment; and submit to random drug screens upon request of DSS.

¶ 11 Respondent-Mother continued to progress on her plan throughout 2016,

having attended Vocational Rehabilitation, obtained employment, and obtained stable housing by September. Respondent-Mother had been diagnosed with bipolar disorder and was prescribed medication, however she ceased taking her medication.

By November 2016, Respondent-Mother was no longer engaged in counseling services and was not responding to an outreach program she was referred to. Respondent-Mother did not re-engage in counseling services until February 2017. Respondent-Mother was later scheduled for a psychological evaluation in June 2017, in accordance with her court ordered plan. However, Respondent-Mother failed to attend her appointment.

¶ 12 On 7 September 2017, Respondent-Mother was granted overnight visitation with Maria. Respondent-Mother and DSS developed a safety plan for the overnight visits that allowed Maria's maternal aunt, Mary Davis, to provide transportation and childcare for Maria while Respondent-Mother was working. Respondent-Mother followed the safety plan during the first overnight visit. However, after the first visit, Respondent-Mother arranged for childcare with a woman not approved of by DSS and had Respondent-Mother's boyfriend provide Maria with transportation. Respondent-Mother's boyfriend had previously been convicted of domestic violence and first-degree attempted murder. Because Respondent-Mother failed to comply with the established safety plan and acted in a manner inconsistent with Maria's health and safety DSS suspended visitation on 21 December 2017. As a result, the trial court

reduced Respondent-Mother's visitation to supervised visitation in the community.

¶ 13 While Maria was in foster care, Respondent-Mother identified their godmother, Ms. Sumpter, as a possible placement for Maria. However, Maria was not initially placed with Ms. Sumpter due to concerns DSS had about the relationship between Ms. Sumpter and Respondent-Mother.

¶ 14 In August 2018, Ms. Sumpter was once again identified as a potential placement provider for Maria. A kinship care assessment was conducted by DSS with Ms. Sumpter on 10 August 2018. Maria was subsequently placed in the care of Ms. Sumpter on 4 November 2018. At this time, Ms. Sumpter was living with Respondent-Mother, however, Maria was not to be left unsupervised with Respondent-Mother at any time. On 11 November 2018, there was an incident involving Respondent-Mother's former boyfriend breaking and entering the residence while Maria was present. Respondent-Mother filed a complaint and motion for a domestic violence protective order on 13 November 2018, however, she remained in contact with the former boyfriend. Maria reported seeing the former boyfriend climb into the house through a window with a knife. Maria also reported to the Guardian ad Litem ("GAL") having seen her mother smoke marijuana and drink alcohol while she was living with Respondent Mother. On 11 December 2018, Ms. Sumpter moved Maria from the residence to ensure her safety and well-being.

¶ 15 In April 2018, DSS was relieved of making reunification efforts with

Respondent-Mother. However, Respondent-Mother remained in contact with DSS and continued to provide verification of the steps she was taking towards reunification. Respondent-Mother participated in individual counseling and medication management and provided verification of housing and income. Despite her efforts, Respondent-Mother remained inconsistent with several aspects of her reunification plan. Respondent-Mother was court ordered to submit to random drug screens on 29 May 2019, which she failed to do. Then on 15 August 2019 and 10 September 2019, Respondent-Mother did submit to random drug screens, both of which came back negative, but she again failed to submit to required drug screens after these dates. While Respondent-Mother did re-engage in mental health services in July 2019, there had previously been a seven-month gap in visits. Finally, Respondent-Mother continued to be involved with individuals who were deemed unfit to be around children.

III. Discussion

¶ 16 Respondent-Mother argues on appeal that the trial court erred in issuing the 4 March 2020 permanency planning order because the trial court's findings of fact were unsupported by competent evidence, the findings do not support the conclusion that Respondent-Mother forfeited her constitutionally protected parental status, and the trial court abused its discretion by determining that guardianship was in Maria's best interest. Respondent-Mother also argues that the trial court erred when it failed

to make statutorily mandated findings.

A. Standard of Review

¶ 17 "[Appellate] 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. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015) (citations omitted).

¶ 18 Statutory interpretation, conclusions of law, and matters of law are reviewed by the Court *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006); *In re A.C.F.*, 176 N.C. App. 520, 522, 626 S.E.2d 729, 732 (2006).

B. Permanency Planning Order

1. Findings of Fact

¶ 19 Respondent-Mother first contends that crucial findings of fact are unsupported by clear, cogent, and convincing evidence. While the trial court explicitly stated that it found all facts under the clear, cogent, and convincing standard, Respondent-Mother argues there is insufficient evidence to support several findings of fact.

¶ 20 Here, the trial court's findings were supported by detailed reports from both DSS and the GAL, as well as by testimony at the hearing from Meridith Underwood,

the DSS case worker, Heidi Choice, the GAL, Ms. Sumpter, and Respondent-Mother.

¶ 21 In examining the challenged findings, the trial court's finding that "The juvenile continues to express her desire [to] remain with Ms. Sumpter" was supported by Ms. Choice's testimony. The trial court's findings that Respondent-Mother "continues to exhibit poor decision-making skills when it comes to parenting her children," that Respondent-Mother is not a "fit or proper person[] to have care, custody or control of the juveniles," and that she "has acted in a manner inconsistent with the health and safety of the juveniles" are supported by the several adjudication, disposition, review, and permanency planning orders entered throughout this case. The trial court's findings that Respondent-Mother has "not remained available to the Court, [DSS], and the [GAL]," that "It is not possible for the juveniles to be placed with a parent within the next six months and such placement is not in the juveniles' best interests," that "[t]he conditions which led to the removal of the juveniles from the home have not been alleviated. . .", that "the juveniles are in need of more adequate care and supervision than can be provided by [Respondent-Mother] at this time," that "[i]ssues remain with completing Court ordered services. . .", and the findings pertaining to Maria's placement with Ms. Sumpter are supported by the reports and testimony from DSS and the GAL. Finally, the trial court's finding pertaining to Ms. Sumpter's understanding and ability to care for Maria are supported by Ms. Sumpter's testimony. Therefore, we conclude that the trial courts

findings of fact were supported by clear and convincing evidence.

2. Constitutionally Protected Parental Status

¶ 22 Respondent-Mother also argues that the trial court's findings do not support the conclusion of law that Respondent-Mother waived her constitutionally protected parental status.

¶ 23 "[A] natural parent may lose [their] constitutionally protected right to the control of [their] 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). "[A] determination that a natural parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence." *Id.* However, this Court has previously held that a parent waives their right to a determination of his or her constitutionally protected status if they do not raise the issue before the trial court. *In re C.P.*, 252 N.C. App. 118, 122, 801 S.E.2d 647, 650–51 (2017). Respondent-Mother did not raise this issue during any portion of the permanency planning hearing. Therefore, Respondent-Mother has failed to preserve the issue, and her argument is overruled.

3. Award of Guardianship

¶ 24 Respondent-Mother argues that the trial court abused its discretion by concluding that awarding guardianship of Maria to Ms. Sumpter was in Maria's best

interest. We disagree. Respondent-Mother contends that the trial court's conclusion that guardianship was in Maria's best interest was conclusory and not supported by findings of fact. The crux of this argument hinges on the validity of Respondent-Mother's previous argument that crucial findings of fact are unsupported by the evidence. As discussed above, we find that the findings of fact were supported by competent evidence. Further, we review a trial court's determination as to the best interest of the child for abuse of discretion and review the facts for whether there is competent evidence to support the findings. *In re C.P.*, 252 N.C. App. at 122, 801 S.E.2d at 651.

¶ 25 Here, the trial court made findings that the Respondent-Mother acted inconsistently with her constitutionally protected rights as a parent, Respondent-Mother acted inconsistently with the health and safety of the juveniles, return of the juveniles to the custody of Respondent-Mother would be "contrary to the welfare and best interest of the juveniles," it is not possible for the juveniles to be placed with a parent within the next six months, and such placement is not in the juveniles' best interest. As well as finding that Maria's current placement is going well, Maria has a bond with the proposed guardian, Maria has resided with the proposed guardian for over one year, and Maria has been in the custody of DSS in excess of 1623 days. All these findings are supported by testimony given at the hearing, the DSS and GAL reports, or the court orders included in the record on appeal. Therefore, we find the

trial court did not abuse its discretion in finding guardianship with Ms. Sumpter was in Maria's best interest.

C. Statutory Findings

¶ 26 Respondent-Mother next contends that the trial court erred by failing to make findings required in N.C. Gen. Stat. § 7B-903(a2). The statute provides that "[a]n order under this section placing or continuing the placement of the juvenile in out-of-home care shall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's *health and safety*." N.C. Gen. Stat. § 7B-903(a2) (2020) (emphasis added).

¶ 27 The statutory use of the language "shall" is a mandate to trial judges that they must make findings in accordance with the statute. *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 631 (2010) (cleaned up). Failure to comply with the statutory mandate is reversible error. *Id.* Therefore, under N.C. Gen. Stat. § 7B-903(a2), the trial court was required to find that returning Maria to Respondent-Mother's home would be contrary to Maria's health and safety before placing Maria in Ms. Sumpter's care. However, the trial court found returning Maria to Respondent-Mother's home would be contrary to Maria's "welfare and best interest," not the required health and safety standard.

¶ 28 The Appellees argue this is not required here and instead N.C. Gen. Stat. § 7B-600 should control. However, this argument is not persuasive because N.C. Gen. Stat.

§ 7B-903(a)(5) lists appointment of a guardian under § 7B-600 as one of the "dispositional alternatives" § 7B-903 applies to. Therefore, § 7B-903(a2) is applicable to the present permanency planning order and the trial court erred by failing to apply the statutorily mandated standard.

IV. Conclusion

¶ 29 The trial court did not err in the permanency planning order in making findings of fact, concluding Respondent-Mother forfeited her constitutionally protected status as a parent, nor did it abuse its discretion by determining guardianship was in Maria's best interest. However, the trial court erred in not finding that the return of Maria to Respondent-Mother's home "would be contrary to [her] health and safety." N.C. Gen. Stat. § 7B-903(a2). The permanency planning order is reversed and remanded for a new permanency planning hearing, so that the trial court may consider the matter anew and apply the applicable statutory standard.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge TYSON concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).