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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-466

No. COA21-107

Filed 7 September 2021

Alamance County, Nos. 19 JA 112–113

IN THE MATTER OF:

R.W.; A.R.

Appeal by Respondent-Father and Respondent-Mother from order entered 10 November 2020 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 10 August 2021.

*Jamie L. Hamlett for Petitioner-Appellee Alamance County Department of Social Services.*

*Administrative Office of the Courts, by GAL Appellate Counsel Michelle FormyDuval Lynch, for Guardian ad Litem.*

*J. Thomas Diepenbrock for Respondent-Appellant-Father.*

*Peter Wood for Respondent-Appellant-Mother.*

GRIFFIN, Judge.

ceasing reunification efforts with minor children “Rhonda” and “Amy”<sup>1</sup> and awarding guardianship of the children to foster parents. Respondent-Father argues that the trial court erred by (1) concluding that reunification efforts would clearly be unsuccessful and/or inconsistent with the children’s health or safety; and (2) awarding guardianship to foster parents on the basis that Respondent-Father acted inconsistently with his constitutionally protected parental rights. Respondents-Parents together argue that the visitation provision of the trial court’s order improperly delegated discretion in the guardians as to when or whether visitation would occur. Upon review, we affirm the trial court’s ruling.

### **I. Factual and Procedural History**

¶ 2 On 15 July 2019, the Alamance County Department of Social Services (“DSS”) filed petitions alleging that both Rhonda and Amy were neglected and dependent juveniles. Respondent-Father is Rhonda’s father and was Amy’s caregiver at the time the petition was filed. Respondent-Mother is mother to both Rhonda and Amy. Amy’s biological father is incarcerated in another state and has not previously had a relationship with Amy. Prior to the petition, Respondent-Mother had four previous neglect investigations and one In-Home Services case with DSS.

¶ 3 The petition process began when DSS received a report on 12 July 2019

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<sup>1</sup> We use pseudonyms to protect the identity of the children and for ease of reading. See N.C. R. App. P. 42(b).

regarding concerns of neglect, improper care, improper supervision, and substance abuse. The report prompted an investigation by DSS, during which DSS discovered that the children did not have a permanent residence and had been staying at several different locations over the previous year, including with Amy's paternal grandmother. Respondent-Father informed DSS that he and Respondent-Mother had been leaving the children with caretakers while he and Respondent-Mother lived under a bridge after being evicted from a hotel. As part of the investigation, DSS requested that Respondents-Parents formulate a plan of care for the children. Respondent-Mother ultimately informed DSS that the children should be placed in foster care because she was unable to make a plan.

¶ 4 Following the DSS investigation, law enforcement returned to the location the same day to respond to a domestic violence incident between Respondents-Parents. Law enforcement officers entered the residence and discovered old food lying around, animal feces on the floor, and thirty grams of marijuana sitting on the floor in a lunch thermos within reach of the children. On 15 July 2019, a court order was entered granting custody of the children to DSS and authorizing DSS to place the children in a licensed foster home.

¶ 5 On 11 September 2019, the trial court adjudicated the children neglected and dependent juveniles. The trial court also found that Respondents-Parents had acted inconsistently with their constitutionally protected rights because the children were

neglected while in Respondents-Parents' care, and because Respondents-Parents had failed to remediate issues of concern. In its order, the trial court required Respondent-Father to take the following steps toward reunification listed in an Out-of-Home Family Services Agreement:

[1] develop a sufficient source of income to support himself and the child/children and use funds to meet basic needs. . . .

[2] provide a safe, stable and appropriate home environment. . . .

[3] refrain from allowing his substance abuse and mental health to impact his parenting of his child/children and providing a safe, appropriate home or exposing his children to an injurious environment. . . .

[4] refrain from allowing his anger management issues to impact his parenting. . . .

[5] demonstrate the ability to implement age appropriate disciplinary practices and parenting skills. . . .

[6] demonstrate the ability to assure the medical needs of the child[ren] are met.

¶ 6 The trial court held periodic review and permanency planning hearings from the time of the adjudication hearing until November 2020.

¶ 7 On 4 December 2019, the trial court found that Respondent-Father was making "adequate progress within a reasonable period of time under the plan" but that Respondents-Parents had "failed to address issues of concern that led to the placement of the juveniles outside the home." The trial court's findings stated that Respondent-Father had obtained part time employment and completed a parenting program. However, the court also found that Respondent-Father had tested positive

for marijuana in September, that his housing situation was inappropriate, and that his status as a registered sex offender was a barrier to his goal of achieving an appropriate home environment.

¶ 8 On 27 March 2020, the trial court found that Respondent-Father was making “some progress within a reasonable period of time under the plan” but that Respondents-Parents had “acted inconsistently with their constitutionally protected rights.”

¶ 9 On 27 May 2020, the trial court again found that Respondent-Father was “somewhat making some progress within a reasonable period of time under the plan” but that Respondent-Parents had “acted inconsistently with their constitutionally protected rights.”

¶ 10 On 10 November 2020, the trial court found that “[t]he children are still at a high risk if returned because the parents have yet to remediate the areas of concern that brought the children into [DSS] custody” and that “reunification efforts shall cease as such efforts clearly would be unsuccessful and/or would be inconsistent with the juveniles’ health or safety.” The trial court order granted guardianship to foster parents and included the following visitation instruction:

That [Respondent-Mother] and [Respondent-Father] shall have visitation on the first Saturday of the month from 9am-12pm. That the visits be supervised by Ms. Lisa Walton at a high level when she is available. If she is not available, the visit may be supervised by [Foster Father] or

[Foster Mother]. That if all parties agree, the visit may be moved to another day.

¶ 11 Respondents-Parents timely filed notice of appeal from the trial court’s order.

## II. Analysis

### A. Cessation of Reunification

¶ 12 Respondent-Father argues that the trial court’s finding that reunification efforts would clearly be unsuccessful and/or inconsistent with the children’s health or safety was not supported by findings of fact or by competent evidence. We disagree.

¶ 13 “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 C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). “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 N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (citation and internal quotation marks omitted), *aff’d per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

¶ 14 “The trial court may only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts.” *Id.* at 10, 650 S.E.2d at 51 (citation

and internal quotation marks omitted).

¶ 15 In a review hearing the trial court must make findings regarding, *inter alia*, “[w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile’s health or safety and need for a safe, permanent home within a reasonable period of time.” N.C. Gen. Stat. § 7B-906.1(d)(3) (2019). Although reunification is the primary goal, “[t]he finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile’s health or safety may be made at any permanency planning hearing.” *Id.* § 7B-906.2(b). The trial court must make written findings which “demonstrate the degree of success or failure toward reunification[,]” including

- (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
- (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
- (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
- (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

*Id.* § 7B-906.2(d).

¶ 16 In a review hearing occurring more than a full year after the September dispositional hearing, the trial court found that Respondent-Father “[was] somewhat making some progress within a reasonable period of time under the plan,” “[was] somewhat actively participating in or cooperating with the plan,” “remain[ed]

available to the court,” and “[was] acting in a manner inconsistent with the health and safety of the juvenile.” However, Respondent-Father’s progress under the plan was negatively impacted by “his inability to appropriately control his behaviors.” The trial court also found that he was compliant in only one area of his Out-of-Home Family Services Agreement. Moreover, the trial court found that Respondents-Parents “continue[d] to associate with inappropriate persons . . . which would present a risk of harm to the juveniles” and had not “adequately addressed issues of concern or remediated issues which led to the removal of the juveniles.”

¶ 17 Respondent-Father argues that the trial court’s “evidentiary findings of fact” describing substantial efforts and progress toward meeting his case plan objective “are completely at odds with the trial court’s finding, conclusion and order that reunification efforts should cease.” Respondent-Father points to the various points at which the trial court found that Respondents-Parents had made some progress in their plans over the course of the review hearings, including by obtaining employment and addressing substance abuse and mental health issues.

¶ 18 Notwithstanding the challenged findings regarding progress in reunification plans, we conclude that the trial court’s decision to cease reunification efforts was supported by the unchallenged findings of fact. We therefore hold that the trial court did not abuse its discretion in ceasing reunification efforts between Respondents-Parents and the children.

## **B. Guardianship Award**

¶ 19 Respondent-Father argues that the trial court erred by concluding that he acted inconsistently with his constitutionally protected parental rights and by awarding guardianship to foster parents on that basis. Respondent-Father argues that the trial court’s conclusion was not supported by evidentiary findings of fact or by clear and convincing evidence, and that the trial court inappropriately applied a best interest standard when it awarded guardianship. We disagree.

¶ 20 “[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).

¶ 21 When a trial court considers granting custody or guardianship to a nonparent, it must “clearly address whether respondent is unfit as a parent or if [his] conduct has been inconsistent with [his] constitutionally protected right as a parent.” *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015). When a trial court concludes that a parent has acted inconsistently with his constitutionally protected rights, the conclusion must be supported by clear and convincing evidence. *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017).

¶ 22 Here, the trial court concluded, “Based on clear, cogent, and convincing

evidence the Respondent Mother and Respondent Father[] have acted inconsistently with their constitutionally protected rights in that they have failed to address issues of concern that led to the placement of the juveniles outside the home.” The unchallenged findings of fact related to the cessation of reunification efforts discussed above are clear and convincing. Further, they are more than sufficient to support the trial court’s conclusion that Respondent-Father acted inconsistently with his constitutionally protected rights.

¶ 23 Respondent-Father again points to findings of fact regarding his progress in arguing that the trial court’s conclusion is not supported by clear and convincing evidence. However, despite evidence of some progress in his plan, the unchallenged findings of fact support the trial court’s conclusion that Respondent-Father acted inconsistently with his constitutionally protected parental rights. We therefore affirm the trial court’s determination.

### **C. Visitation**

¶ 24 Respondents-Parents argue that the visitation provisions of the trial court’s order impermissibly vest discretion in the guardians regarding when and whether visitation should occur. We disagree.

¶ 25 This Court reviews visitation determinations for abuse of discretion. *In re K.W.*, 272 N.C. App. 487, \_\_\_, 846 S.E.2d 584, 590 (2020). “When reviewing for abuse of discretion, we defer to the trial court’s judgment and overturn it only upon a

showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citation omitted).

¶ 26 N.C. Gen. Stat. § 7B-905.1(c) outlines the minimum requirements of trial court orders providing for visitation of minors in the custody of a guardian:

If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify [1] the minimum frequency and length of the visits and [2] whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(c) (2019). “[The] judicial function [of awarding visitation] may [not] be . . . delegated by the court to the custodian of the child.” *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

¶ 27 The trial court’s order in this case includes the following visitation provisions:

That [Respondent-Mother] and [Respondent-Father] shall have visitation on the first Saturday of the month from 9am-12pm. That the visits be supervised by Ms. Lisa Walton at a high level when she is available. If she is not available, the visit may be supervised by [Foster Father] or [Foster Mother]. That if all parties agree, the visit may be moved to another day.

¶ 28 We conclude that the visitation provisions in the trial court’s order met the minimum requirements contained in N.C. Gen. Stat. § 7B-905.1(c). The order specifies both “[1] the minimum frequency and length of the visits and [2] whether the visits shall be supervised.” N.C. Gen. Stat. § 7B-905.1(c). Although the order

allows either Ms. Lisa Walton or the children’s custodians to supervise visitation, it does not vest discretion in any party to choose whether visitation shall occur or to alter “the minimum length and frequency of the visits.” *Id.* Accordingly, the trial court did not abuse its discretion in setting the terms of visitation.

### **III. Conclusion**

¶ 29 For the reasons stated herein, we affirm the order ceasing reunification efforts between Respondents-Parents and Rhonda and Amy and granting guardianship of the children to foster parents. We also affirm the visitation provisions of the order.

**AFFIRMED.**

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).