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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-570

No. COA21-109

Filed 19 October 2021

Yadkin County, No. 18 JA 66

IN THE MATTER OF:

X.D.P-S.

Appeal by respondent from order entered 21 October 2020 by Judge William F. Brooks in Yadkin County District Court. Heard in the Court of Appeals 10 August 2021.

*James N. Freeman, Jr., for petitioner-appellee Yadkin County Human Services Agency.*

*Mary McCullers Reece for respondent-appellant mother.*

*Paul W. Freeman, Jr., for guardian ad litem.*

DIETZ, Judge.

¶ 1 Respondent appeals from a permanency planning order that ceased reunification efforts with her child and awarded guardianship to the child's paternal grandparents. Respondent contends that the trial court's order fails to make sufficient findings that Respondent acted inconsistently with her constitutionally protected status.

¶ 2 Under recent precedent from this Court, Respondent properly preserved this argument for appellate review. Because the order does not contain the necessary findings required by our case law, we vacate the trial court’s order and remand for further proceedings.

### **Facts and Procedural History**

¶ 3 Respondent is the mother of Xerxes.<sup>1</sup> In 2018, the Yadkin County Human Services Agency received a report alleging domestic violence between Respondent and her boyfriend while ten-month-old Xerxes was home.

¶ 4 The Yadkin County Human Services Agency referred the family for evaluation, and the evaluating psychologist observed that Respondent “displays intellectual, academic, and functional adaptive delays to warrant a diagnosis of mental deficiencies.” The psychologist further noted that Respondent “expresses awareness that [Xerxes] should not be exposed to domestic violence. However, her appreciation of the potential consequences of exposure to domestic violence is poor.” Xerxes’s father is a registered sex offender and has never served in a parental role for Xerxes.

¶ 5 At the hearing, the trial court adjudicated Xerxes neglected. In a later review order, the trial court placed him in the home of his paternal grandparents. Ultimately, in a permanency planning hearing in September 2020, the trial court

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<sup>1</sup> We use a pseudonym to protect the juvenile’s identity.

ceased reunification efforts and awarded guardianship to the paternal grandparents. Respondent timely appealed.

### **Analysis**

¶ 6 Respondent first argues that the trial court failed to make sufficient findings that her conduct was inconsistent with her constitutionally protected status as a parent and thus lacked the authority to award guardianship to the paternal grandparents.

¶ 7 Before examining the best interests of the child in a custody dispute between a parent and a nonparent, the trial court must first “find that the natural parent is unfit or that his or her conduct is inconsistent with a parent’s constitutionally protected status.” *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009).

¶ 8 In this case, the trial court did not make these required findings, and neither the Yadkin County Human Services Agency nor the guardian ad litem contend that the court did so. But they argue that Respondent waived this argument on appeal by failing to raise it in the trial court.

¶ 9 Ordinarily, to preserve an issue for appellate review, the party must have “presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1).

¶ 10 This Court has long held that a parent must timely assert in the trial court

that there is insufficient evidence of conduct inconsistent with the parent's constitutionally protected status because constitutional issues "not raised and passed upon at trial will not be considered for the first time on appeal." *In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011). Relying on this precedent, this Court has further held that, when a parent is aware that guardianship or some other placement away from the parent is sought in a juvenile proceeding, the constitutional issue is waived if the parent "never argued to the court or otherwise raised the issue that guardianship [or some other placement] would be an inappropriate disposition on a constitutional basis." *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018).

¶ 11 But more recently, this Court examined this line of cases and held that, when a parent asks the trial court not to remove the juvenile from the parent's custody, that is sufficient to preserve the issue, even without any specific reference to the parent's constitutional rights or the applicable constitutional test. *In re B.R.W.*, 2021-NCCOA-343, ¶¶ 39–41. Thus, under *In re B.R.W.*, when a parent presents evidence opposing a recommendation of guardianship, the parent sufficiently preserves the constitutional issue "for appellate review by her evidence, arguments, and opposition to guardianship at the trial." *Id.*

¶ 12 As the most recent published decision on this question, *In re B.R.W.* is controlling in this case. *State v. Gonzalez*, 263 N.C. App. 527, 531, 823 S.E.2d 886, 889 (2019). Thus, because Respondent presented evidence opposing the

recommendation of guardianship, the issue is preserved for appellate review. As a result, we must vacate and remand this matter for further proceedings because the trial court did not make the necessary findings that Respondent acted inconsistently with her constitutionally protected status as a parent. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice.

¶ 13 Finally, because we vacate and remand on this basis, we need not address Respondent's remaining arguments, which may be mooted by the trial court's entry of a new order on remand.

### **Conclusion**

¶ 14 We vacate the trial court's permanency planning order and remand for further proceedings.

VACATED AND REMANDED.

Judges COLLINS and GORE concur.

Report per Rule 30(e).