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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-567

No. COA21-96

Filed 19 October 2021

Mecklenburg County, No. 19 JA 308

IN THE MATTER OF: A.G.

Appeal by respondent-father from a Permanency Planning Order and a Guardianship Order entered on 2 November 2020 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals on 10 August 2021.

Dorothy Hairston Mitchell for appellant-respondent-father.

Rebekah Spaulding for appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.

BILTgroup, by Sarah Skinner, for Guardian Ad Litem.

GORE, Judge.

¶ 1

Respondent-father appeals from a permanency planning order and guardianship order which found respondent-father had acted inconsistently with his constitutionally protected status as a parent and awarded guardianship of the juvenile to her maternal grandmother. For the following reasons, we affirm.

I. Background

¶ 2

On 14 August 2019, Mecklenburg County Department of Social Services, Division of Youth and Family Services (“DSS-YFS”) filed a juvenile petition alleging one-year-old Angel¹ was neglected and dependent. Prior to the filing of the juvenile petition, an altercation occurred between respondent-father and Angel’s mother, which resulted in the death of the mother. Respondent-father has been charged with first-degree murder, possession of a firearm by a felon, and felony murder of an unborn child in connection with the death of Angel’s mother and remains incarcerated awaiting trial on these charges. Respondent-father is Angel’s biological father, which was confirmed by a paternity test. The trial court entered a Nonsecure Custody Order placing custody of Angel with DSS-YFS. DSS-YFS placed Angel in her maternal grandmother’s home.

¶ 3

At the initial nonsecure custody hearing, on 20 August 2019, the trial court allowed for visitation between Angel and the paternal grandmother but suspended any visitation between Angel and respondent-father. The trial court also ordered Angel to remain in non-secure custody with DSS-YFS.

¶ 4

On 27 November 2019, an adjudication and disposition hearing was held, and an order was entered on 7 January 2020. The trial court adjudicated Angel as neglected and dependent as defined by N.C. Gen. Stat. § 7B-101. The trial court found

¹ An agreed upon pseudonym is used to protect the juvenile’s privacy.

that, because of respondent-father's incarcerated status and the fact that Angel was present when the incident which led to her mother's death occurred, return of Angel to her own home is contrary to her health and safety. The trial court also concluded that visitation with respondent-father should remain suspended, but that the paternal grandmother's unsupervised visitation with Angel is allowed.

¶ 5 A permanency planning hearing was held on 11 February 2020. The trial court found respondent-father had made no progress on his case plan as laid out by DSS-YFS, partially due to the limitations of his incarceration. The trial court also found that termination of respondent-father's parental rights would be inappropriate, but that Angel's primary permanent plan should be guardianship with her maternal grandmother. The parties had submitted an agreed upon visitation plan, which provided for weekly weekend unsupervised visits with Angel's paternal grandmother and supervised telephone/video conference calls with respondent-father. However, the trial court found this plan was not in Angel's long-term best interest and continued the permanency planning hearing to 22 April 2020 to allow for the parties to participate in mediation to develop a more appropriate visitation plan.

¶ 6 The continued permanency planning hearing was delayed due to the COVID-19 pandemic and was not heard until 9 September 2020, and the order was entered on 2 November 2020. At the hearing, the trial court received into evidence reports from DSS-YFS and the Guardian Ad Litem and heard testimony. The trial court also

considered, but ultimately disregarded, an affidavit from an expert in forensic psychology, presented by respondent-father. Over objection by respondent-father, the trial court found by clear and convincing evidence that respondent-father had acted in a manner inconsistent with his constitutionally protected rights as a parent and elected not to award respondent-father visitation with Angel, as such visits would not be in Angel's best interest. The trial court based this finding and conclusion on the fact that respondent-father remains incarcerated awaiting trial having been charged with first-degree murder, possession of a firearm by a felon, and felony murder of an unborn child in the death of Angel's mother, as well as the facts from the adjudication hearing. The findings of fact from the adjudication hearing include findings that Angel was present when her mother was killed, and respondent-father was charged with the murder of Angel's mother. The findings of fact also include findings that DSS-YFS received a referral with concerns of domestic violence, injurious environment, and the mother being deceased. The findings show that respondent-father informed a social worker that he and Angel's mother got into an argument on the night of the mother's death, that when the petition was filed respondent-father's whereabouts were unknown, there was an active warrant for respondent-father's arrest, and respondent-father did not make appropriate alternative childcare arrangements for Angel following the night Angel's mother died. The trial court also found that respondent-father has not completed his case plan, noting that he has

cooperated to the best of his ability but has been limited due to the COVID-19 pandemic.

¶ 7

The trial court found that legal guardianship should be established with maternal grandmother and ordered guardianship to be Angel's primary permanent plan. On 2 November 2020, the trial court also entered a Guardianship Order granting guardianship of Angel to her maternal grandmother. Respondent-father appeals.

II. Permanency Planning Order

¶ 8

"[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).

¶ 9

Respondent-father argues that the trial court erred in finding and concluding that he acted inconsistently with his constitutionally protected status as a parent. Specifically, respondent-father contends that his incarceration status is not, by itself, sufficient to support a finding he acted inconsistently with his protected status as a parent and that the trial court improperly relied upon the findings of fact from its earlier adjudication order.

¶ 10

"[A] natural parent may lose his constitutionally protected right to the control

of his 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). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it is also applied to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 387 (2011). 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. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753. This Court's inquiry must be whether the evidence presented is such that a finder of fact applying that evidentiary standard could reasonably find the fact in question. *In re K.L.*, 254 N.C. App. 269, 283, 802 S.E.2d 588, 597 (2017).

¶ 11 When determining whether a parent acted inconsistently with their constitutionally protected status, courts should consider evidence of the parent's conduct cumulatively. *See Speagle v. Seitz*, 354 N.C. 525, 533-34, 557 S.E.2d 83, 88 (2001). The *Speagle* Court further found that evidence of one parent's involvement in the murder of another parent is relevant and should be considered by the trial court in analyzing whether the parent's actions were inconsistent with their protected status. *Speagle*, 354 N.C. at 533-34, 557 S.E.2d at 88 (finding that evidence of the mother's involvement in the father's murder was properly considered, despite mother

being acquitted of all criminal charges relating to the murder, because standard of proof in child custody cases is lower than that in criminal cases).

¶ 12 In the present case, the trial court considered the fact that respondent-father remains incarcerated awaiting trial on charges of first-degree murder, possession of a firearm by a felon, and felony murder of an unborn child relating to Angel's mother's death, as well as findings of fact from the adjudicatory hearing. The findings of fact from the adjudicatory hearing include findings that respondent-father was unable to be contacted or located following the mother's death, respondent-father did not make arrangements for Angel while his location was unknown following the mother's death, and that Angel was present when her mother died. These findings are supported by the evidence presented at the permanency planning hearing. As a result, we find the trial court's findings of fact are supported by competent evidence presented at the hearing and support a conclusion that respondent-father acted inconsistently with his constitutionally protected status as a parent.

¶ 13 Further, respondent-father incorrectly asserts that the trial court improperly relied on the findings of fact from its prior adjudication order. A trial court may consider and incorporate by reference its prior findings of fact, but the trial court may not solely rely on those findings. *See Rodriguez v. Rodriguez*, 211 N.C. App. 267, 278, 710 S.E.2d 235, 243 (2011) (citation omitted). In addition to incorporating the findings of fact from its adjudication order, the trial court specifically found at the permanency

planning hearing that Angel was present when her mother was killed, respondent-father was unavailable for Mecklenburg County DSS-YFS after they became involved (following the mother's death but before respondent-father's arrest), respondent-father's whereabouts were unknown when the petition was filed and had not made alternative child care arrangements for Angel, and that respondent-father was incarcerated awaiting trial for the murder of Angel's mother. Therefore, we conclude that the trial court did not err in basing its finding that respondent-father acted inconsistently with his constitutionally protected status on the findings of fact from the adjudication order and the fact that respondent-father remains incarcerated awaiting trial.

III. Guardianship Order

¶ 14 This Court reviews “an order disallowing visitation for abuse of discretion.” *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019). Respondent-father argues the trial court abused its discretion by denying him and Angel's paternal grandmother visitation and contact with Angel. Specifically, respondent-father argues that denying him and Angel's paternal grandmother visitation was not in Angel's best interest, and that the denial of visitation was a sudden change and inconsistent with prior orders.

¶ 15 Respondent-father's arguments are not persuasive. The 2 November 2020 guardianship order was consistent with prior orders, where the trial court

consistently suspended visitation with respondent-father throughout the life of the case, beginning with the initial nonsecure custody hearing on 20 August 2019 where the trial court initially found visitation with respondent-father would not be in Angel's best interest. These findings were consistently based on respondent-father's status as incarcerated awaiting trial, which has not changed. Additional findings of fact by the trial court, such as the fact that respondent-father has not made progress on his case plan with YFS, further support the trial court's denial of visitation. Finally, the trial court noted in its order and at the hearing that while the matter of visitation would not come back for automatic regular review by the trial court, if circumstances were to change, for example, if respondent-father was acquitted on his pending charges, then on a motion by respondent-father the 2 November 2020 order would be able to be reconsidered by the trial court. Therefore, we conclude that the trial court did not abuse its discretion in finding visitation with respondent-father would not be in Angel's best interest.

¶ 16 With regards to the paternal grandmother, the trial court never found that visitation with the paternal grandmother would not be in Angel's best interest, nor did the trial court prohibit visitation with the paternal grandmother. The trial court did not expressly provide for visitation with the paternal grandmother, but also did not prohibit visitation. The trial court shed some light on this determination at the permanency planning hearing when it noted that it needed to implement a plan that

would be in Angel's best interest until she is 18 years old, and that an order splitting guardianship between the two grandmothers, based on the trial court's experience, would potentially be problematic as Angel grew older and respondent-father's case proceeded to trial. The trial court also noted how well the grandmothers get along, how successful they have been so far at allowing visitation with the paternal grandmother on the weekends, and that nothing in the trial court's order prohibits that arrangement from continuing. As a result, the trial court also did not abuse its discretion by not expressly ordering visitation with the paternal grandmother.

IV. Conclusion

¶ 17 For the foregoing reasons we affirm the trial court's 2 November 2020 Permanency Planning Order and Guardianship Order.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).