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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-229

No. COA21-632

Filed 5 April 2022

Lenoir County, No. 19 JA 96

IN THE MATTER OF: K.W.

Appeal by Respondent-Mother from order entered 7 July 2021 by Judge Beth Heath in Lenoir County District Court. Heard in the Court of Appeals 8 March 2022.

Robert W. Griffin for petitioner-appellee Lenoir County Department of Social Services.

Lisa Anne Wagner for respondent-appellant mother.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for guardian ad litem.

MURPHY, Judge.

¶ 1 A parent who is a party to a juvenile case does not have a statutory right to argue on appeal that the trial court erred in eliminating reunification as a permanent plan when the order being appealed from merely continues a permanent plan.

¶ 2 A trial court verifies that prospective guardians understand the legal significance of the appointment of guardianship when it conducts a colloquy with the prospective guardians regarding whether they are willing and able to care for the juvenile. In addition, if the prospective guardians have provided a stable placement

for the juvenile for at least six consecutive months, there is evidence that they have adequate resources to care appropriately for the juvenile.

¶ 3 Without a showing in the record of an extreme instance of a parent's incompetence or motion by counsel for an inquiry, a trial court does not abuse its discretion when it does not inquire into whether the parent needed a guardian ad litem ("GAL").

¶ 4 When a party does not object, present argument, or otherwise raise an issue regarding a parent's constitutionally protected parental status at a permanency planning hearing that involved a guardianship determination and provides an opportunity to present evidence on that issue, the party waives review of the trial court's conclusion that the party acted inconsistently with her constitutionally protected parental status.

¶ 5 As discussed below, we dismiss the appeal in part and affirm in part.

BACKGROUND

¶ 6 Stan[1] was born in August 2019 and, only ten days later, Lenoir County Department of Social Services ("DSS") responded to a child protective services report. Upon entering the home, the DSS employee observed "a stench so overwhelming it was hard to [breathe]." The DSS employee found the home to be unsafe as it was

[1] Pseudonyms are used for all relevant persons throughout this opinion to protect the identity of the juvenile and for ease of reading.

extremely cluttered with trash, there was dirt on the floor, "[r]oaches were crawling on the window ledges," and there was no baby formula or baby supplies in the home. That same day, DSS filed a juvenile petition alleging Stan was neglected and an *Order for Nonsecure Custody (Abuse/Neglect/Dependency)* was entered, placing custody of Stan with DSS.

¶ 7 On 24 September 2019, an adjudication hearing was held, and Mother and Father[2] consented to the entry of an order adjudicating Stan as a neglected juvenile. The trial court also held an initial disposition hearing on 24 September 2019. In an order entered 24 January 2020, the trial court ordered custody of Stan to remain with DSS and ordered DSS to place Stan in a licensed foster home. The trial court found:

> [t]he attorneys for [Mother] and [F]ather reported that they have had multiple conversations with their clients. They are able to effectively communicate with counsel and understand why they are in court. They receive disability payments due to some developmental delays, but in the opinion of their attorneys, nothing that would rise to the level of incompetence and the need to appoint a Rule 17 [GAL] for [Mother] and [F]ather.

The trial court concluded that "[t]here is no need for appointment of a Rule 17 [GAL] for [Mother] or [F]ather." Mother was ordered to, *inter alia*, "obtain a mental health assessment to determine whether any barriers to effective parenting exist[;]" "follow all recommendations for treatment from any mental health assessment[;]" "attend

[2] Father is not a party to this appeal.

and participate in parental responsibility classes and demonstrate the skills learned[;]" "obtain and maintain stable housing[;]" "submit to random drug testing[;]" and "cooperate with DSS and the [GAL] and maintain regular and frequent contact with them." Mother was allowed "minimum supervised visitation" of one hour per week.

¶ 8 Stan was seen by a nurse practitioner at Kinston Community Health Center, Inc., for his three-month checkup in early December 2019. The nurse practitioner advised that Stan may have Down Syndrome and other unknown healthcare needs and recommended genetic testing to determine future medical needs. At his six-month appointment, Dr. Stup of LaGrange Pediatrics, P.A., determined that Stan does not have Down Syndrome but may have a different genetic disorder. DSS was informed by the pediatrician that Stan is underweight, is considered developmentally delayed, and has a head too small for his age, resulting in a diagnosis of microcephaly.[3]

¶ 9 Mother completed a forensic psychological evaluation on 29 January 2020. The psychologist concluded the following: Mother has a moderate intellectual disability and mild persistent depressive disorder; Mother needed to reconsider medication for depression; Mother's intellectual functioning and adaptive skills are extremely low,

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[3] As of 4 March 2021, Stan was receiving speech therapy twice a week, physical therapy once a week, and occupational therapy once a week.

which caused a level of risk, especially given that Stan is a "higher needs child"; if Mother acts as a caregiver to Stan, an appropriate caregiver would need to be present to assist her; it is highly improbable that Mother is capable of sole caregiving to Stan; and it is highly improbable that Mother could be rehabilitated to be able to be the sole caregiver due to her intellectual limitations. The psychologist reported Mother acknowledged that she "might need some help with raising [Stan]."

¶ 10 On 22 September 2020, the trial court held an initial permanency planning hearing. The trial court ordered custody of Stan to remain with DSS and the permanent plan to be "a concurrent plan with a primary plan of adoption and a secondary plan of guardianship." The trial court also eliminated reunification as either the primary or secondary plan.[4]

¶ 11 On 9 March 2021, the trial court held a permanency planning review hearing. The trial court ordered custody of Stan to remain with DSS and the permanent plan to be "a concurrent plan with a primary plan of guardianship and a secondary plan of custody to a relative or other suitable person." The trial court eliminated reunification as either the primary or secondary plan in this order as well.

¶ 12 On 4 May 2021, the trial court held a second permanency planning review hearing that was continued to 15 June 2021. DSS filed a report for the hearing that

[4] For unknown reasons, this order was not signed or entered until 9 April 2021.

described Mother's progress, which stated Mother was "not complying with all the recommendations from the [trial] court or her mental health professionals." In a permanency planning order entered 7 July 2021 ("July 2021 Order"), the trial court granted guardianship of Stan to his foster parents. The trial court also ordered the permanent plan to be "a concurrent plan with a primary plan of guardianship and a secondary plan of adoption" and, for the third time, eliminated reunification as either the primary or secondary permanent plan. Mother was granted minimum supervised visitation for one hour every other week. Mother timely appealed from the July 2021 Order only.[5]

ANALYSIS

¶ 13 "Our 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 J.S.*, 250 N.C. App. 370, 372, 792 S.E.2d 861, 863 (2016) (mark omitted). "The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *Id.* "In choosing an appropriate permanent plan . . . , the juvenile's best interests are paramount." *In re J.H.,* 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015).

[5] Since Father did not appeal, the July 2021 Order as it pertains to him is not part of our analysis.

¶ 14 Mother argues the trial court erred in ceasing reunification efforts and eliminating reunification from the permanent plan; not making the necessary verification to support the grant of Stan's guardianship to his foster parents; failing to conduct a new examination regarding whether a GAL should be appointed for Mother; and concluding Mother acted inconsistently with her constitutionally protected status as a parent.

A. Appellate Jurisdiction

¶ 15 As an initial matter, we must determine whether Mother's arguments are properly before us. N.C.G.S. § 7B-1001(a) provides which juvenile orders may be appealed directly to the Court of Appeals:

> (4) Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.
>
> (5) An order under [N.C.G.S. §] 7B-906.2(b) eliminating reunification, as defined by [N.C.G.S. §] 7B-101(18c), as a permanent plan . . . .

N.C.G.S. § 7B-1001(a)(4)-(5) (2021). Here, we have jurisdiction to hear Mother's arguments regarding verification of guardianship, her constitutionally protected parental status, and the GAL inquiry because the July 2021 Order changed Stan's custody by granting guardianship to his foster parents. N.C.G.S. § 7B-1001(a)(4) (2021). However, we do not have jurisdiction to hear Mother's argument regarding the cessation of reunification efforts and elimination of reunification from the

permanent plan.

¶ 16 Only the first permanency planning order that eliminates reunification under N.C.G.S. § 7B-906.2(b) may be appealed; a later permanency planning order merely continuing permanent plans that did not include reunification is not an "order . . . eliminating reunification" as a permanent plan and, therefore, is not an appealable order under N.C.G.S. § 7B-1001(a). N.C.G.S. § 7B-1001(a)(5) (2021); *In re J.A.K.*, 258 N.C. App. 262, 264, 266, 812 S.E.2d 716, 718, 719 (2018) (dismissing the respondent-father's appeal of an October permanency planning order that merely continued a concurrent permanent plan of adoption and guardianship ordered in April). The July 2021 Order merely continued the permanent plan announced in its prior permanency planning orders in regard to reunification; therefore, it is not an order eliminating reunification as a permanent plan pursuant to N.C.G.S. § 7B-906.2(b). N.C.G.S. § 7B-1001(a) does not provide for an appeal from an order that merely continues a permanent plan. Accordingly, we dismiss this portion of Mother's appeal and address her other three arguments below.

B. Verification of Guardianship

¶ 17 Mother argues "Finding [of Fact] 18 regarding the foster parents' understanding of the legal significance of being appointed [Stan's] guardians is unsupported by the evidence."

¶ 18 Finding of Fact 18 states:

> The court should make the following disposition: . . . Appoint the following as guardian of the person for [Stan] as provided in [N.C.G.S. §] 7B-600: [Stan's foster parents]. The court has verified that this person(s) understand(s) the legal significance of the appointment and will have adequate resources to care appropriately for [Stan].

¶ 19 N.C.G.S. § 7B-600(c) requires:

> If the [trial] court appoints an individual guardian of the person pursuant to this section, the [trial] court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile. The fact that the prospective guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

N.C.G.S. § 7B-600(c) (2021). The trial court does not need to "make any specific findings in order to make the verification." *In re J.E.,* 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73, *disc. rev. denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). "It is sufficient that the [trial] court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.,* 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014). This evidence can be in the form of "hearsay evidence . . . that the [trial] court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition[,]" N.C.G.S. § 7B-906.1(c) (2021), and "may include reports and home studies conducted by the [GAL] or [DSS]." *In re J.R.*, 2021-NCCOA-491, ¶ 24.

¶ 20 At the permanency planning hearing, the trial court conducted the following colloquy with Stan's foster parents:

> THE COURT: . . . [Foster parents], I need to ask you if you would step up here, please. Right there is good. If you could just -- right there is good. You're kind of crowded over there.
>
> [Foster parents], do you understand if I make you the legal guardians of [Stan] today that you're going to be responsible for [Stan] in every day?
>
> [FOSTER FATHER]: Yes.
>
> [FOSTER MOTHER]: Yes.
>
> THE COURT: Do you understand that? That means medically, physically, emotionally, education, every single kind of need he would have you would be responsible for those things. Do you understand that?
>
> [FOSTER FATHER]: Yes, Your Honor.
>
> THE COURT: And do you understand that means that financially you would be responsible for [Stan]?
>
> [FOSTER FATHER]: Yes, Your Honor.
>
> [FOSTER MOTHER]: Yes, Your Honor.
>
> THE COURT: All right. And do you understand that -- are you able to provide for him in those ways at this time?
>
> [FOSTER FATHER]: (Inaudible).
>
> THE COURT: And I want to ask you this, are you willing to continue to work with these parents to allow them to have some type of relationship with [Stan]?
>
> [FOSTER FATHER]: Yes, Your Honor.

> THE COURT: All right. Thank you. I appreciate that.
>
> I am going to grant guardianship today to [Stan's foster parents].

¶ 21 We note that there is evidence in the Record to resolve the foster father's inaudible answer to the trial court's inquiry regarding whether he is able to adequately provide for Stan financially. N.C.G.S. § 7B-600 provides that the trial court must verify that the prospective guardian has adequate resources to care appropriately for the juvenile. N.C.G.S. § 7B-600(c) (2021). "The fact that the prospective guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person had adequate resources." *Id.* Stan's foster parents had, at the time of the second permanency planning hearing, provided a stable placement for Stan for at least six consecutive months. As such, Stan's foster parents were able to adequately provide for Stan financially. Further, the DSS' court report reflects that Stan has lived with his foster parents since he was ten days old, for approximately a year-and-a-half at the time of the second permanency planning review hearing. During that time, the foster parents have attended to Stan's extensive medical needs by taking him to doctor's appointments and various types of therapy. The trial court found the foster parents had also done "an exceptional job with shared parenting with [Stan's] biological parents."

¶ 22 The trial court's colloquy with the foster parents,[6] the trial court's unchallenged findings of fact, and the evidence submitted by the DSS employee were competent evidence in support of the trial court's finding that the foster parents "understand[] the legal significance of the appointment and will have adequate resources to care appropriately for [Stan]." *See In re P.A.*, 241 N.C. App. 53, 60, 772 S.E.2d 240, 245-46 (2015) (quoting the prospective guardian's unsworn testimony in support of the finding that the prospective guardian was aware of the legal significance of her appointment as legal guardian of the juvenile where there was no objection to the unsworn testimony at trial).

C. Rule 17 GAL Inquiry

¶ 23 On 24 September 2019, at the initial disposition hearing, the trial court made a finding on whether Mother's intellectual disability impacted her capacity such that a GAL should be appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. The trial court found that

> [t]he attorneys for [Mother] and [F]ather reported that they have had multiple conversations with their clients.

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[6] "[W]hen two persons are appointed together as guardians for a juvenile, there must be sufficient evidence before the trial court that both persons understand the legal significance of the appointment." *In re B.H.*, 278 N.C. App. 183, 2021-NCCOA-297, ¶ 24. We note that, in the colloquy quoted above, the foster father answered more questions than the foster mother. However, the foster mother's answers are sufficient to show she understood the legal significance of the appointment of guardianship. For example, when asked if they understood they would "be responsible for [Stan] in every day" and if they understood they would be responsible financially for Stan, the foster mother and foster father answered in the affirmative.

> They are able to effectively communicate with counsel and understand why they are in court. They receive disability payments due to some developmental delays, but in the opinion of their attorneys, nothing that would rise to the level of incompetence and the need to appoint a Rule 17 [GAL] for [Mother] and [F]ather.

After a psychological evaluation that was completed on 29 January 2020, the psychologist raised a concern as to whether Mother is a competent adult.

¶ 24 Mother argues that the trial court abused its discretion by failing to, *sua sponte*, conduct an additional inquiry into whether she should be appointed a GAL pursuant to Rule 17 to assist her during the permanency planning hearing because the psychologist's evaluation specifically brought the issue to the trial court's attention. Mother relies heavily on the report from her 29 January 2020 psychological forensic evaluation that was attached to DSS' report that was filed for the review hearing scheduled on 17 March 2020. The evaluation, completed by Dr. Amy James, states "concerns are raised . . . as to whether [Mother] is a competent adult. It is recommended that an evaluation is conducted to determine if [Mother] needs a legal guardian."

¶ 25 "[A] trial judge has a duty to properly inquire into the competency of a litigant in a civil trial or proceeding when circumstances are brought to the judge's attention [that] raise a substantial question as to whether the litigant is *non compos mentis*." *In re T.L.H.,* 368 N.C. 101, 106, 772 S.E.2d 451, 455 (2015). "A trial court's decision

concerning whether to conduct an inquiry into a parent's competency" and "[a] trial court's decision concerning whether to appoint a parental [GAL] based on the parent's incompetence" are both reviewed on appeal for abuse of discretion. *Id.* at 107, 772 S.E.2d at 455. "An abuse of discretion results where the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (marks omitted). "Further, the abuse of discretion standard is appropriate here because the evaluation of an individual's competence involves much more than an examination of the manner in which the individual in question has been diagnosed by mental health professionals." *In re M.S.E.*, 378 N.C. 40, 2021-NCSC-76, ¶ 10 (marks omitted).

¶ 26 According to N.C.G.S. § 7B-602(c), "[o]n motion of any party or on the [trial] court's own motion, the [trial] court may appoint a [GAL] for a parent who is incompetent in accordance with [N.C.G.S. §] 1A-1, Rule 17." N.C.G.S. § 7B-602(c) (2021). The language of N.C.G.S. § 7B-602(c), including the internally cited N.C.G.S. § 1A-1, Rule 17, affords the trial court a high degree of discretion in whether to conduct an inquiry and appoint a GAL. *See id.* According to N.C.G.S. § 7B-602(c), the trial court could have brought its own motion, or any other party could have brought a motion, for the appointment of a GAL for Mother. *Id.* Even if such a motion occurs, the trial court is under no obligation to grant it as the trial court "may appoint" a GAL for an incompetent parent. *Id.* Our Supreme Court has stated that

> when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [trial] court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

In re Z.V.A., 373 N.C. 207, 210, 835 S.E.2d 425, 429 (2019).

¶ 27 In *In re Z.V.A.*, our Supreme Court declined to find an abuse of discretion when a trial court did not inquire into the respondent's competency, despite the respondent's IQ indicating a mental disability, and noted the trial court's finding that the respondent's completion of empowerment classes in ameliorating her disability's impact. *Id.* at 210-11, 835 S.E.2d at 429. Our Supreme Court emphasized that, in order to find the trial court abused its discretion in failing to conduct an inquiry into a parent's competence and need for a GAL, an extreme instance was necessary. *Id.* at 210, 835 S.E.2d at 429.

¶ 28 The instant case does not present one of "the most extreme instances" that would warrant a holding that the trial court abused its discretion. *Id.* The July 2021 Order included unchallenged findings of fact that Mother completed a parenting class, maintained stable housing, received and participated in mental health services and anger management counseling, cooperated with DSS and the GAL and made herself available to answer questions and provide updates, was employed part-time at Bojangles, and asked questions and sought help about care for Stan. *See id.* at

210-11, 835 S.E.2d at 429; *see also In re J.C.,* 277 N.C. App. 585, 2021-NCCOA-220, ¶ 23 (unpublished). These unchallenged findings of fact are binding on appeal. *In re I.T.P-L.,* 194 N.C. App. 453, 462, 670 S.E.2d 282, 287 (2008), *disc. rev. denied*, 363 N.C. 581, 681 S.E.2d 783 (2009).

¶ 29 While the trial court's findings of fact note that Mother "has a diagnosis of Intellectual Developmental Disorder[,]" and the psychological evaluation recommended an evaluation of the necessity for a "legal guardian," the discretionary nature of N.C.G.S. § 7B-602(c) and similarity of this matter to *In re Z.V.A.* support our conclusion that the trial court did not abuse its discretion when it did not conduct an additional inquiry into Mother's competency.

D. Constitutionally Protected Parental Status

¶ 30 In the July 2021 Order, the trial court found that Mother "[has] acted inconsistently with [her] constitutionally protected parental status as shown by clear and convincing evidence . . . ." Mother argues this conclusion "is not supported by the evidence or findings and must be reversed."

¶ 31 "[C]onstitutional 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) (holding the respondent waived the issue when she did not raise an objection to the trial court's finding that "[the] respondent acted in a manner inconsistent with her protected status"). However, the respondent must have had the

opportunity to raise an objection, raise the issue, or otherwise argue against guardianship on constitutional grounds at the permanency planning hearing. *In re R.P.*, 252 N.C. App. 301, 304-05, 798 S.E.2d 428, 430-31 (2017). When a parent "never argued to the [trial] court or otherwise raised the issue that guardianship would be an inappropriate disposition on a constitutional basis[,]" they have waived appellate review of that issue. *In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018).

¶ 32 Here, the second permanency planning review hearing included testimonial evidence, documentary evidence, and argument regarding guardianship. Mother was on notice that guardianship to a third party was recommended. Mother's attorney had the opportunity to object on constitutional grounds or present evidence or argument regarding her constitutionally protected status as a parent and did not do so. Mother has waived appellate review of the trial court's finding that she "[has] acted inconsistently with [her] constitutionally protected parental status . . . ."

CONCLUSION

¶ 33 Mother's argument that the trial court erred by eliminating reunification from the permanent plan and ceasing reunification efforts is not properly before us.

¶ 34 The trial court did not err in granting guardianship of Stan to Stan's foster parents because there was competent evidence in the Record to support the trial court's finding that Stan's foster parents understand the legal significance of guardianship and have adequate resources to care appropriately for him.

¶ 35 The trial court did not abuse its discretion when it did not conduct an additional inquiry into whether a GAL should be appointed to Mother.

¶ 36 Mother did not object, present argument, or otherwise raise the issue of her constitutionally protected parental status at the permanency planning hearing. As such, she waived review of the trial court's finding in the July 2021 Order that she acted inconsistently with her constitutionally protected parental status.

DISMISSED IN PART; AFFIRMED IN PART.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).