An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-384

No. COA21-769

Filed 7 June 2022

Cumberland County, No. 18 JA 76

IN THE MATTER OF A.C.

Appeal by Respondent-Father from order entered 7 September 2021 by Judge Luis J. Olivera in Cumberland County District Court. Heard in the Court of Appeals 11 May 2022.

Patrick A. Kuchyt for petitioner-appellee Cumberland County Department of Social Services.

Richard Croutharmel for respondent-appellant father.

Parker, Poe, Adams & Bernstein LLP, by R. Bruce Thompson II, for guardian ad litem.

TYSON, Judge.

¶ 1 Respondent-Father appeals an order ceasing reunification efforts between him and the juvenile A.C. ("Antoinette"). *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). We vacate and remand.

I. Background

¶ 2 Respondent-Mother is the biological mother of A.S. and sister, Antoinette, born

28 December 2009. Mother is not a party to this appeal. Respondent-Father is the biological father of Antoinette. On 22 February 2018, the Department of Social Services ("DSS") received a Child Protective Services report alleging A.S. and Antoinette were abused, neglected, and dependent.

¶ 3 During DSS's medical examination, Antoinette reported that Respondent-Mother's then boyfriend had touched her inappropriately and made her touch his penis. A.S.'s examination revealed markings on her buttocks consistent with belt marks.

¶ 4 The trial court entered its order on 25 June 2018, adjudicating both children as neglected, and it dismissed the abuse and dependency allegations. The trial court found Respondent-Father was unemployed, lacked stable housing, and had amassed an extensive criminal record. The order continued kinship placement with Antoinette's paternal grandparents. Respondent-Mother was allowed supervised visitation. Respondent-Father was allowed unsupervised visitation.

¶ 5 The court ordered the children to remain with Antoinette's paternal grandparents after the disposition hearing on 12 September 2018. The court also ordered reunification efforts to be continued with Respondent-Mother and Respondent-Father. The court found Respondent-Father was active and engaged in the case plan, had familial support, and stable housing in finding of fact 21 in the disposition order. The order required Respondent-Father to maintain suitable

housing and obtain employment.

¶ 6 The court entered a Subsequent Permanency Planning Order and Order to Close Juvenile File on 11 October 2019, and found Respondent-Father had stable employment, but he lacked stable housing as his lease had expired. The court ordered the reunification efforts with Respondent-Mother and Respondent-Father to cease, as they had not alleviated the conditions, which had led to the children's removal to the satisfaction of the court.

¶ 7 Respondent-Mother appealed the order ceasing reunification efforts with Antoinette on 31 December 2020. *See In re A.S. & A.C.*, 275 N.C. App. 506, 506, 853 S.E.2d 908, 909 (2020). This Court found the contested findings of fact were not supported by competent evidence, and the conclusions of law were erroneous. *Id.* at 516, 853 S.E.2d at 915. This Court vacated the order and remanded for further proceedings. *Id.* at 517, 853 S.E.2d at 915.

¶ 8 The Guardian *Ad Litem* ("GAL") recommended placement of Antoinette with Respondent-Mother on 8 April 2021. DSS agreed with the GAL in their permanency planning report and recommended Antoinette have legal and physical custody returned to Respondent-Mother.

¶ 9 On 7 July 2021, the court placed Antoinette with Respondent-Mother, while allowing Respondent-Father and the paternal grandparents to have visitation. In the court's Subsequent Permanency Planning Order & Order Waiving Future

Reviews (the "Order") on 7 September 2021, the court returned legal and physical custody of Antoinette to Respondent-Mother.

¶ 10 In the Order, the court found Respondent-Father lacked suitable and stable housing and employment. Respondent-Father testified he had been living at his current address for "four going on five years." DSS conducted a home visit on 6 July 2021 to determine the suitability of Respondent-Father's home. DSS reported the home to be "very cluttered" and the room where Antoinette would sleep was "completely covered with a lot of stuff." The court found the home to be potentially dangerous and unsuitable to allow Antoinette to reside.

¶ 11 Respondent-Father testified he was employed and directed his employer to email his pay stubs to DSS. DSS requested the pay stubs during the home visit conducted on 6 July 2021. At trial DSS was unable to confirm they had received any pay stubs from Respondent-Father's employer. The paternal grandfather was unaware of what work Respondent-Father did to earn money, but he was familiar with his past employment. The court found verification of employment was needed to make further determination on his employment status.

¶ 12 Antoinette enjoys spending time with Respondent-Father, but desires to live with Respondent-Mother. The GAL noted Antoinette and Respondent-Father's visits have gone well with no concerns. DSS employees testified Antoinette enjoys her visits with Respondent-Father at her paternal grandparents. The paternal grandparents

testified they enjoy Antoinette's visits and she and Respondent-Father get along well. Respondent-Father brings Antoinette food and gifts during those visits. Respondent-Father testified he wants to be involved with Antoinette's school, extracurricular activities, and medical treatments. Respondent-Father wants joint custody of Antoinette.

¶ 13 In its written Order, the trial court entered Findings of Fact and ordered Respondent-Father was not a fit and proper person for the continued care, custody, and control of Antoinette, and eliminated reunification as a permanent plan. The trial court awarded visitation to Respondent-Father, along with the ability to participate in school events and to receive updates regarding Antoinette. Respondent-Father appeals.

II. Jurisdiction

¶ 14 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2021).

III. Issue

¶ 15 On appeal, the issue before this court is whether the trial court's findings of fact are supported by competent evidence and those findings support the trial court's conclusion Respondent-Father is not a fit and proper person for custody of Antoinette and that reunification efforts should cease.

IV. Analysis

A. Ceasing Reunification Efforts

1. Standard of Review

¶ 16 "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 P.T.W.*, 250 N.C. App. 589, 594, 794 S.E.2d 843, 848 (2016) (citations and quotation marks omitted); *See In re J.H.*, 373 N.C. 264, 267, 837 S.E.2d 847, 850 (2020). The trial court's findings of fact are conclusive on appeal if supported by credible and competent evidence. Conclusions of law are reviewed *de novo*.

2. N.C. Gen. Stat. § 7B-906.2

¶ 17 In order to cease reunification efforts following a permanency planning hearing, the trial court shall "make[] written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2021).

> At any permanency planning hearing under subsection[] (b) [. . .] of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (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.

N.C. Gen. Stat. § 7B-906.2(d) (2021).

¶ 18 The trial court made the following findings of fact regarding their decision to cease reunification efforts:

> 31. Respondent Father . . . is the nonremovable parent. Respondent Father . . . reports that he is employed. The Department needs verification of employment. The Department completed a home study on the home Respondent Father . . . reported to be his residence and found the home to be inappropriate due to the extensive clutter that included the room designated for [Antoinette], thus being a potentially dangerous environment for the juvenile. [Antoinette] has reported that Respondent Father . . . has a temper and gets angry easily. Respondent Father . . . has never indicated to the Department that he desires custody of [Antoinette]. Social Worker's last contact with Respondent Father . . . was on [6 July] 2021 during the home study at his residence.
>
> . . .
>
> 34. A plan of reunification with Respondent Father . . . is no longer appropriate and is in fact contrary to the continued health and safety of the juvenile [Antoinette]. The Respondent Father . . . has failed to demonstrate that he is capable of providing a safe environment for the juvenile and the Court no longer has any other alternative than to relieve the Department of reunification efforts. The Court will do so at today's hearing.

> 35. Respondent Father . . . is not making adequate progress within a reasonable period of time to achieve a permanent plan of reunification. Respondent Father is not actively participating in or cooperating with a permanent plan of reunification, the Cumberland County Department of Social Services, and the Guardian ad Litem. Respondent Father has not remained available to the Court, the Cumberland County Department of Social Services, and the Guardian ad Litem. Respondent Father has acted in a manner inconsistent with the health, and safety of the juvenile, and the conditions that led to the removal have not been alleviated at this time. The Respondent Father has acted inconsistent with his constitutionally protected status as a parent and has abrogated his parental duties to the juvenile. Reasonable efforts towards reunification with Respondent Father . . . for [Antoinette] would clearly be unsuccessful or inconsistent with the juvenile's need for a safe and permanent home within a reasonable period of time. Return of custody of [Antoinette] to Respondent Father . . . would be contrary to her health and safety.

¶ 19 Antoinette was initially adjudicated as neglected. The trial court had dismissed allegations of abuse and dependency. In each subsequent order and hearing, no evidence or instances of neglect by Respondent-Father were shown. He completed a home study, which DSS reported its condition was "very cluttered."

¶ 20 Respondent-Father argues the court's conclusion his home is a "potentially dangerous environment" is not supported by any competent, much less clear, cogent, and convincing evidence or findings. DSS never asserted in any report they had found his home "potentially dangerous," just that it was "very cluttered". A "very cluttered"

home is not, *ipso facto,* a "potentially dangerous" home. The court's finding is unsupported to sustain this conclusion.

¶ 21 The statute defines a "safe home" as, "a home which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C. Gen. Stat. § 7B-101(19) (2021). The only finding to support any "danger" in Respondent-Father's home was a crib that may fall over onto a mattress where he intended for Antoinette to sleep. Respondent-Father could easily move the crib and alleviate the concern. No evidence supports a finding or conclusion that "clutter" in the home alone would result in a substantial risk of danger or physical or emotional neglect to Antoinette.

¶ 22 In addition, our trial courts have allowed for time periods in which to make home improvements and cleanings to allow for a clean and suitable home. *In re Black*, 76 N.C. App. 106, 110, 332 S.E.2d 85, 87 (1985) (Trial court allowed three months additional time before termination proceeding to make improvements to the home and provide a clean and suitable home for the children.). DSS testified the home study occurred on 6 July 2021, and the hearing was held on 15 July 2021, less than a week and a half later. This time frame left little time for Respondent-Father to clean his home and for DSS to return and inspect. The court's findings are unsupported by credible and competent evidence.

¶ 23 The court also made the finding, Respondent-Father does not desire custody of Antoinette. No evidence supports this assertion, which was expressly refuted during trial, when Respondent-Father testified he was seeking custody of Antoinette.

¶ 24 Finding of Fact 34 is also unsupported by credible and competent evidence, for the reasons set forth above relating to the cleanliness and suitability of Respondent-Father's home.

¶ 25 Finding of Fact 35 is also unsupported by credible and competent evidence. Respondent-Father's reunification plan required him to maintain suitable and stable housing and employment. As discussed above the findings do not support lack of progress in maintaining housing, as he claims to have been living in the same home for nearly five years. In terms of maintaining employment, no record evidence supports his contention he is employed. Respondent-Father testified he asked his employer to send pay stubs to DSS, which DSS was unable to confirm receipt at the hearing.

¶ 26 Respondent-Mother is currently unemployed and drawing unemployment. This requirement of the plan seemingly carries less weight in determining ultimate success in the reunification plan. This finding does not support the contention Respondent-Father has not made adequate progress in his plan.

¶ 27 The court makes the finding, Respondent-Father is not actively participating in the plan, however, DSS reports this as "unknown." Respondent-Father is active

in Antoinette's life and participates in every scheduled visit. He also participated in the home study and has held discussions with DSS and GAL and the custodians. This evidence shows Respondent-Father's visits are appropriate and he is actively participating in Antoinette's life and brings her food and gifts to maintain reunification efforts.

¶ 28 The trial court makes the finding, Respondent-Father does not make himself available to the agency. DSS reported he answers calls but does not always call back if he misses a call or says he will. While Respondent-Father may not be the most responsive, he has made himself available to complete a home study, attended every visit, and has discussions with DSS and GAL about reunification with Antoinette. His employment or activities may preclude phone calls during business hours.

¶ 29 Finding of Fact 35 is unsupported by credible and competent evidence for the reasons above. No findings made by the trial court support Respondent-Father's failure toward meeting the plan and seeking reunification with Antoinette as set forth in N.C. Gen. Stat. § 7B-906.2(d). No acts or omissions by Respondent Father gave rise to DSS's initial involvement with the family. Antoinette was not present with Respondent-Father when the actions raising the report to DSS occurred.

B. Parental Fitness

1. Standard of Review

¶ 30 The determination of parental unfitness or whether parental conduct is

inconsistent with the parents' constitutionally-protected status is reviewed *de novo*. *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018). Under *de novo* review, the appellate court "consider[s] the matter anew and freely substitute[s] judgment for that of the lower tribunal." *Id.* (citations, alterations, and internal quotation marks omitted).

2. Respondent-Father's Fitness

¶ 31 The trial court made the following findings related to Respondent-Father's unfitness:

> 36. Respondent Father . . . is not fit or proper person for the continued care, custody or control of the juvenile [Antoinette]. He has acted in a manner inconsistent with the health and safety of the juvenile. Respondent Father . . . has acted contrary to his constitutionally protected status as a parent by failing to provide the Department with proof of employment and housing.

¶ 32 "Prior to depriving parents of their natural and constitutionally protected rights of care, custody, and control over their minor child, a trial court must determine by clear and convincing evidence that a parent's conduct is inconsistent with his or her protected status." *In re J.C.-B.*, 276 N.C. App. 180, 184, 856 S.E.2d 883, 887, 2021-NCCOA-65, ¶14 (2021) (alterations and internal quotation marks omitted) (citing *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016)).

¶ 33 The trial court found Respondent-Father had acted contrary to his

constitutionally-protected status as a parent by failing to obtain suitable and stable housing and employment.

> Socioeconomic factors that this Court has held do not show a parents unfitness or acts inconsistent with constitutionally-protected status include the *propriety of the parents place of residence*, that the parents move frequently, that their house at times lacked heat or *was not cleaned regularly*, their choice in spouse or babysitter, that the parent did not have relatives nearby to assist in caring for the child, *a history of being unable to maintain stable employment*, and loss of a job. While socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation would be relevant to the determination of whose custody is in the best interest of the child, *those factors have no bearing on the question of fitness*.

Dunn v. Covington, 272 N.C. App. 252, 265, 846 S.E.2d 557, 567 (2020) (internal citations omitted) (emphasis supplied).

¶ 34 Respondent-Father asserts he maintained suitable housing and had resided in the home for nearly five years during these proceedings. This Court has held the cleanliness of his home is not determinative of parental fitness as the trial court has done here. Not only does no clear and convincing evidence support the trial courts findings relating to Respondent-Father's home, those findings were also inappropriately used to find him unfit as a parent.

¶ 35 Respondent-Father argues he maintained stable employment at the time of the hearing, but DSS was unable to confirm his testimony. Even if Respondent-Father

did not have stable employment at the time of the hearing, the trial court found Respondent-Mother was a fit and proper parent, even though she was unemployed. This Court has found employment instability cannot be used to determine parental fitness. *Id.*

¶ 36 Finding of Fact 36, and the conclusion Respondent-Father acted inconsistently with his constitutionally-protected status as a parent is unsupported by clear and convincing evidence.

V. Conclusion

¶ 37 "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 P.T.W.*, 250 N.C. App. at 594, 794 S.E.2d at 848 (citations and quotation marks omitted).

¶ 38 The trial court's findings and conclusions to cease reunification efforts with Respondent-Father are not supported by credible and competent evidence to meet DSS's burden that continued efforts would "clearly would be unsuccessful" to support ceasing efforts and removing reunification as a goal under the plan.

¶ 39 We vacate the trial court's order and remand for a new planning and disposition hearing not inconsistent with the statute and this opinion. *It is so ordered.*

VACATED AND REMANDED.

Judges DILLON and DEITZ concur.

Report per Rule 30(e).