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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-540

No. COA21-764

Filed 2 August 2022

Pender County, No. 20 JA 21

IN THE MATTER OF:

N.G.

Appeal by respondent from order entered 27 August 2021 by Judge R. Russell Davis in Pender County District Court. Heard in the Court of Appeals 25 May 2022.

Stephen M. Schoeberle for petitioner-appellee Pender County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant father.

N.C. Administrative Office of the Courts Guardian Ad Litem Program, by Michelle FormyDuval Lynch, for guardian ad litem.

DIETZ, Judge.

¶ 1 Respondent appeals the trial court's permanency planning order awarding guardianship of his son to the child's maternal great aunt and waiving further review hearings in this matter.

¶ 2 Respondent argues that the trial court erred by improperly applying a burden of proof to Respondent. Respondent also argues that the trial court failed to

adequately verify the proposed guardian's financial resources and understanding of the legal significance of guardianship. Finally, Respondent argues that the trial court erred by waiving further review without making the necessary findings required by the applicable statute.

¶ 3 We hold that the trial court correctly applied the appropriate legal standard and made adequate findings of fact, supported by the record, in its guardianship determination, and that the court did not misapply the burden of proof. We also hold that the trial court's verification of the guardian's financial resources and understanding of guardianship was sufficient. But, as all of the parties acknowledge, the trial court failed to make findings of fact required by statute to waive further review hearings in this matter.

¶ 4 Accordingly, as explained in more detail below, we affirm the trial court's award of guardianship but vacate the portion of the trial court's order waiving further review and remand for additional proceedings on that issue.

Facts and Procedural History

¶ 5 On 28 April 2020, the Pender County Department of Social Services filed a petition alleging that Respondent's newborn son, Nolan[1], was neglected and dependent. DSS obtained custody of Nolan the same day. In June 2020, DSS placed

[1] We use a pseudonym to protect the identity of the juvenile.

Nolan with his maternal great aunt, who already had been appointed as guardian of Nolan's older sister in a separate juvenile matter. In July 2020, Respondent moved to Texas, where his mother lives.

¶ 6 On 23 October 2020, the trial court adjudicated Nolan neglected. The court's order continued DSS custody of Nolan, ordered Respondent to comply with his DSS case plan, and set a primary permanent plan of reunification with a secondary plan of guardianship. In January 2021, a home study was initiated to evaluate the possibility of placement of Nolan with Respondent's mother in Texas.

¶ 7 At a permanency planning hearing in March 2021, DSS recommended that the trial court award guardianship of Nolan to his maternal great aunt. The trial court continued the primary permanent plan of reunification and secondary plan of guardianship. In April 2021, social services in Texas approved placement of Nolan with his paternal grandmother and submitted their report.

¶ 8 The trial court held a permanency planning hearing on 18 June 2021. Both proposed guardians, Nolan's paternal grandmother and his maternal great aunt, testified at the hearing. DSS and Nolan's guardian ad litem recommended that the trial court award guardianship to Nolan's great aunt, so that Nolan could remain in his "current consistent, nurturing, dependable environment with his Aunt . . . and his older sister to whom [Nolan] has bonded." DSS and the GAL noted concerns with the paternal grandmother's lack of independent financial means to support Nolan,

inconsistent statements, and inadequate efforts to bond with Nolan, as well as concerns about moving Nolan from a placement where he is doing well to an unknown situation in another state.

¶ 9 On 27 August 2021, the trial court entered a permanency planning order, awarding guardianship to Nolan's maternal great aunt and waiving further review in this matter. In awarding guardianship, the trial court concluded that "it is in the best interest of the minor child that Guardianship be granted to the maternal great aunt . . . . There is no compelling basis or reason for the Court to go against the recommendations of the PCDSS and the GAL." Respondent timely appealed the trial court's order and later petitioned for a writ of certiorari to address defects in the notice of appeal.

Analysis

I. Petition for a writ of certiorari

¶ 10 We first address Respondent's petition for a writ of certiorari and our jurisdiction to reach the merits of this appeal. Respondent timely filed a notice of appeal from the trial court's 27 August 2021 order but that notice of appeal incorrectly identified the basis on which the appeal was taken and cited the wrong statutory subsection for the right to appeal from the order.

¶ 11 A "mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the

intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011). Here, Respondent's notice of appeal was timely filed and specified that he was appealing the trial court's order entered on "August 27, 2021," despite incorrectly stating that the order was one "eliminating reunification" and citing to "N.C. G.S. 7B-1001(a)(5)" instead of N.C. Gen. Stat. § 7B-1001(a)(4). Respondent's intent to appeal from the August 2021 guardianship order is clear from his notice and there is no indication that the appellees were misled by the errors. *Id.* Thus, we conclude that the defects in Respondent's notice of appeal do not deprive us of jurisdiction.

¶ 12 Because we find that the defects in Respondent's notice of appeal are not jurisdictional, we dismiss the petition for a writ of certiorari as moot.

II. Standard applied to guardianship determination

¶ 13 Respondent first argues that the trial court improperly applied a burden of proof to Respondent and presumption in favor of DSS and the guardian ad litem when it awarded guardianship to Nolan's maternal great aunt and declined to award guardianship to Respondent's mother. Respondent points to the language in the trial court's order where the court concluded that there was "no compelling basis or reason for the Court to go against the recommendations of the PCDSS and the GAL." Respondent contends that this language shows that "the trial court started with a

strong presumption that the DSS and GAL recommendation should be followed" and required him to "present clear and convincing 'compelling' evidence to outweigh the recommendation presented by DSS and GAL." We reject this argument.

¶ 14 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. 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). Conclusions of law are subject to *de novo* review. *In re K.L.*, 254 N.C. App. 269, 272–73, 802 S.E.2d 588, 591 (2017). We review the trial court's determination of which disposition is in the child's best interests only for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

¶ 15 When a ruling is "based upon a misapprehension of law," it is *per se* an abuse of discretion. *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009). There is no burden of proof on a respondent-parent in juvenile proceedings and it would be error for a trial court to impose a burden on a respondent-parent to prove that a placement is not in the child's best interests. *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984). Thus, we agree with Respondent that, if the trial court imposed an evidentiary burden on Respondent, that misapprehension of the law would constitute an abuse of the court's sound discretion.

¶ 16 But we are not persuaded that this is what occurred here. In placing a juvenile,

"the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile." N.C. Gen. Stat. § 7B-903(a1). The court "shall also consider whether it is in the juvenile's best interest to remain in the juvenile's community of residence." *Id.*

¶ 17 Here, the trial court found that placement with Nolan's paternal grandmother "was approved," but that there were concerns with her income, lack of transportation, and daycare arrangements. The court further found that the paternal grandmother wanted guardianship and placement of Nolan in her home, but that "she does not have a relationship with the minor child and had never seen him." As to the maternal great aunt, the trial court found that she was willing to accept guardianship of Nolan, and that she already had guardianship of Nolan's older sister. The court found that Nolan's mother requested guardianship with the great aunt because she did not "want him in Texas" and did not "want [her] children separated when they have built a bond together for almost a year now." Based on its findings, the trial court concluded that "it is in the best interest of the minor child that Guardianship be granted to the maternal great Aunt" and that there "is no compelling basis or reason for the Court to go against the recommendations of the PCDSS and the GAL."

¶ 18 At the hearing, the trial court explained its ruling. The court stated that its decision was difficult because the record evidence showed both proposed guardians would be "an appropriate, loving, and caring placement." The court then reasoned that it was going to adopt DSS's and the GAL's recommendations to "place guardianship with the maternal great aunt" because, given the length of time Nolan had already been in the current placement, the court was not "comfortable changing the placement at least in a drastically geographic distance way."

¶ 19 Nothing in the trial court's oral or written findings or reasoning demonstrate that the trial court acted under a misapprehension of law or that it improperly applied a burden of proof to Respondent. To the contrary, the trial court's order indicates that it found facts, based on competent evidence presented at the hearing, regarding the relative merits of and concerns with the two proposed guardianship candidates. *In re P.O.*, 207 N.C. App. at 41, 698 S.E.2d at 530. The trial court considered all of that evidence and then applied the appropriate best interests standard to determine that awarding guardianship to Nolan's current relative placement, his maternal great aunt, was in the child's best interest. *In re A.C.*, 247 N.C. App. 528, 532–33, 786 S.E.2d 728, 733 (2016).

¶ 20 The trial court's statement that it found no "compelling basis . . . to go against" the recommendation from DSS and the guardian ad litem for guardianship with Nolan's maternal great aunt merely reflects that the trial court agreed with the

recommendations of DSS and the guardian ad litem. In other words, the court was indicating that both proposed guardianship placements might be appropriate in isolation, but that under the circumstances—where Nolan had already been settled in his current, local placement with his older sibling for a significant period of time—the court could not identify a reason why it was in Nolan's best interest to remove him from his long-term placement and send him to a new placement in another state.

¶ 21 Accordingly, we hold that the trial court did not err or act under a misapprehension of law in its guardianship determination.

III. Verification of guardian

¶ 22 Respondent next argues that the trial court erred by awarding guardianship to Nolan's great aunt without adequately verifying her resources and her understanding of the legal significance of guardianship. We disagree.

¶ 23 Before awarding guardianship, 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." N.C. Gen. Stat. § 7B-600(c); *see also* N.C. Gen. Stat. § 7B-906.1(j). The statutes further provide that 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." *Id.*

¶ 24 In conducting the required statutory verification, the trial court is not required

to make any specific written findings as long as the record reflects that the court adequately considered the issue and reviewed appropriate information that supports the required verifications. *In re J.E.*, 182 N.C. App. 612, 616–17, 643 S.E.2d 70, 73 (2007).

¶ 25 The trial court "need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, nor does the law require any specific form of investigation of the potential guardian. But the statute does require the trial court to make a determination that the guardian has 'adequate resources' and some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence." *In re P.A.*, 241 N.C. App. 53, 61–62, 772 S.E.2d 240, 246 (2015) (citations omitted).

¶ 26 Likewise, the record must contain some evidence or statement from the guardian that they understand the legal significance of guardianship. *In re E.M.*, 249 N.C. App. 44, 55, 790 S.E.2d 863, 872 (2016). Evidence that a social worker has spoken to the proposed guardian about the legal consequences of guardianship can also support the verification. *In re H.L.*, 256 N.C. App. 450, 459–60, 807 S.E.2d 685, 691–92 (2017).

¶ 27 In reviewing the trial court's verification on appeal, we do not "weigh and compare the evidence; our standard of review merely asks if there was competent

evidence, even hearsay evidence, at trial to support the trial court's findings." *In re N.H.*, 255 N.C. App. 501, 507, 804 S.E.2d 841, 845 (2017).

¶ 28 Here, the record contains an affidavit from Nolan's maternal great aunt which includes information regarding her income, employment, resources, and expenses. The affidavit states that she "understand[s] the nature, duties, and responsibilities associated with assuming guardianship"; that she "understand[s] what is required" if she is appointed as Nolan's guardian; that she is willing to become Nolan's guardian and desires to do so; and that she has adequate resources to provide care for Nolan. At the permanency planning hearing, she testified that the information in the financial affidavit is correct and that she is "willing to be responsible outside of child support, financially, spiritually, mentally for little [Nolan]" and "willing to accept guardianship." She further testified that she has been providing for Nolan and his sister since she took them in and is willing to continue doing so.

¶ 29 Based on the evidence, the trial court found that Nolan "is currently placed in a kinship placement in New Hanover County with his maternal aunt . . . and his older sister. He has been there since June 16, 2020 and continues to do well." And the trial court found that Nolan's great aunt "testified that she is willing to accept Guardianship of the minor child. She also has the minor child's sister in the home and was awarded Guardianship from DSS Court in New Hanover Court. She testified as to the information contained in her Financial Affidavit and it was introduced and

admitted into evidence."

¶ 30 The trial court's findings and the record evidence supporting them readily are sufficient to satisfy the statutory verification requirements. *In re N.H.*, 255 N.C. App. at 507, 804 S.E.2d at 845. The record and findings demonstrate that the trial court considered appropriate information to support a determination that the guardian had adequate resources to provide for Nolan and that she understood the significance of becoming Nolan's guardian. The trial court specifically indicated that it reviewed information regarding the guardian's financial resources, in the form of her testimony and financial affidavit. The trial court also considered information that the guardian had been caring for Nolan in a stable environment in her home for approximately a year, already was guardian of Nolan's older sister, and understood the requirements of and wanted to accept guardianship of Nolan. *In re P.A.*, 241 N.C. App. at 61–62, 772 S.E.2d at 246; *In re E.M.*, 249 N.C. App. at 55, 790 S.E.2d at 872; *In re J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73.

¶ 31 Accordingly, we hold that the trial court sufficiently verified the guardian's resources and understanding of the legal significance of the appointment before awarding guardianship.

IV. Waiver of review

¶ 32 Finally, Respondent contends that the trial court erred by waiving further review hearings in this matter without making the necessary findings to support that

decision as required by N.C. Gen. Stat. § 7B-906.1. Both DSS and the guardian ad litem concede error on this issue, and we agree.

¶ 33 Whether "the trial court failed to follow a statutory mandate . . . is a question of law and reviewed *de novo*." *In re J.C.-B.*, 276 N.C. App. 180, 192, 2021-NCCOA-65, ¶ 50. Under the applicable statute, the trial court may waive further review hearings if the court makes findings on each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that permanency planning hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n).

¶ 34 "The trial court must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B–906.1(n), and its failure to do so

constitutes reversible error." *In re P.A.*, 241 N.C. App. at 66, 772 S.E.2d at 249. Here, the trial court made findings addressing only three of the five required criteria and failed to make the findings required by subsections (3) or (4). As a result, we vacate the portion of the trial court's order waiving further review, and remand for the trial court to either make the findings required under N.C. Gen. Stat. § 7B-906.1(n)(3) and (4) or reinstate further review hearings.

Conclusion

¶ 35 For the reasons discussed above, we affirm the trial court's order awarding guardianship to Nolan's maternal great aunt, but vacate the portion of the court's order waiving review and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges WOOD and GORE concur.

Report per Rule 30(e).