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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-720

No. COA 22-169

Filed 1 November 2022

Catawba County, No. 19JA254

IN THE MATTER OF:

C.M.W.,

A Minor Child

Appeal by Respondent-Mother from Order entered 30 November 2021 by Judge Amy Sigmon Walker in Catawba County District Court. Heard in the Court of Appeals 21 September 2022.

Catawba County Department of Social Services, by Lauren Vaughan, for Petitioner-Appellee.

Richard Croutharmel for Respondent-Appellant.

Troutman Pepper Hamilton Sanders, LLP, by Joshua D. Davey, for Guardian ad Litem.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Mother appeals from the trial court's Subsequent Permanency Planning Order entered 30 November 2021 awarding guardianship of C.M.W. to

C.M.W.'s adult sister.[1] All parties to this appeal agree the trial court erred by failing to specify the standard of proof it applied in determining Respondent-Mother had acted inconsistently with her parental rights and that, at a minimum, the trial court's Order must be vacated and this matter remanded to the trial court. The Record tends to reflect the following:

¶ 2 Respondent-Mother is the mother of C.M.W. On 23 September 2019, the Catawba County Department of Social Services (DSS) filed a Juvenile Petition alleging C.M.W. was neglected and dependent as defined by N.C. Gen. Stat. § 7B-101. On 13 February 2020, the trial court entered its Consolidated Order of Adjudication and Disposition. The trial court adjudicated C.M.W. as a neglected juvenile and awarded custody—including placement authority—of C.M.W. to DSS. DSS maintained placement of C.M.W. with C.M.W.'s adult sister. C.M.W. had been living with her adult sister since August 2019 after DSS first became involved.

¶ 3 On 2 December 2020, the trial court entered a Permanency Planning Order establishing the primary permanent plan for C.M.W. as reunification with adoption as the secondary plan. On 23 March 2021, the trial court entered another Permanency Planning Order which determined adoption was not in the best interests of C.M.W. and instead established the primary permanent plan as guardianship with

[1] Respondent-Father is not party to this appeal.

the secondary plan of reunification. A later Permanency Planning Order entered 15 June 2021 maintained guardianship as the permanent plan.

¶ 4 On 2 November 2021, the trial court conducted a further permanency planning review hearing. On 30 November 2021, the trial court entered the Subsequent Permanency Planning Order, which is the subject of this appeal. The trial court found Respondent-Mother acted inconsistently with her constitutionally protected parental status. The trial court also found reunification efforts would be unsuccessful and inconsistent with C.M.W.'s health and safety. The trial court concluded "[t]he most appropriate permanent plan is a sole plan of guardianship. Concurrent planning is not required because a permanent plan has been achieved with entry of this order." The trial court granted guardianship of C.M.W. to her adult sister and her adult sister's husband. On 1 December 2021, Respondent-Mother filed notice of appeal from the Subsequent Permanency Planning Order. *See* N.C. Gen. Stat. § 7B-1001 (a)(4) (2021).

Issue

¶ 5 The dispositive issue on appeal is whether the trial court erred in awarding guardianship of C.M.W. to C.M.W.'s adult sister and husband, when the trial court failed to state what standard of proof it used in determining Respondent-Mother acted inconsistently with her constitutionally protected status as a parent.

Analysis

¶ 6 Respondent-Mother argues the trial court erred in finding she acted inconsistently with her constitutionally protected status as a parent. Specifically, Respondent-Mother contends the trial court erred in determining she acted inconsistently with her constitutionally protected status as a parent as "the trial court's written order fails to indicate its findings and conclusions are based on clear and convincing evidence." Further, Respondent-Mother contends the trial court also "failed to state in open court what standard of evidence [it] was using." DSS and the Guardian ad Litem both agree the trial court erred in this respect. DSS states "the trial court simply failed to articulate the standard of proof it applied, either in open court or in its order" and thus, "[t]he appropriate remedy in this case is to remand the matter to the trial court for the court to articulate what standard of proof it applied in its decision." The GAL concedes "[Respondent-Mother] correctly argues that the trial court failed to state the standard of proof it employed when determining that [Respondent-Mother]'s conduct was inconsistent with her constitutionally protected status as a parent."

¶ 7 "A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of [their] child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption [they] will act in the best interest of the child." *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018) (internal citation and quotation marks omitted). However,

this right is not absolute as a natural parent "may lose [their] constitutionally protected right to the control of [their] 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 [their] constitutionally protected status." *Id.*

¶ 8 "Because the decision to remove a child from a natural parent's custody 'must not be lightly undertaken[,] . . . [the] determination that a parent's conduct is inconsistent with . . . her constitutionally protected status must be supported by clear and convincing evidence.' " *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019) (quoting *In re E.M.*, 249 N.C. App. 44, 57, 790 S.E.2d 863, 874 (2016) (alterations in original)). "Clear and convincing evidence is an intermediate standard of proof, greater than the preponderance of the evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases." *In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 266 (2019) (internal citations and quotation marks omitted).

¶ 9 When a trial court fails to expressly state it is applying the "clear and convincing" standard of proof in its decision awarding custody to a non-parent, this Court will vacate and remand for further proceedings to ensure the trial court applied the proper standard. *Id.* ("Absent an indication that the trial court applied the clear and convincing standard in this case, we reverse the order of the trial court and remand this case for findings of fact consistent therewith." (citation omitted; internal

quotation marks omitted). Indeed, in *In re J.L.*, for example, this Court reversed and remanded a permanency planning order awarding guardianship of the juvenile to third-parties where the trial court's order failed to state the evidentiary standard it used in making its determination and the trial court did not articulate the standard of proof during the hearing. *Id*.

¶ 10 Here, the parties agree the trial court did not state the standard of proof it applied either during the hearing or in its written Order. Thus, the Record fails to reflect whether or not the trial court was, in fact, applying the clear and convincing evidentiary standard applicable to this case. Therefore, in the absence of any indication the trial court was applying the clear and convincing evidentiary standard, the trial court erred in finding Respondent-Mother acted inconsistently with her constitutionally protected status as a parent. Consequently, consistent with *In re J.L.*, we are compelled to vacate the trial court's Subsequent Permanency Planning Order and remand this matter to the trial court to articulate in its Order that it applied the clear and convincing evidentiary standard of proof or, to the extent the trial court in its discretion determines it necessary, make new findings of fact on the

existing record under the clear and convincing evidentiary standard and enter a new order thereon.[2]

Conclusion

¶ 11 Accordingly, for the foregoing reasons, we vacate the 30 November 2021 Subsequent Permanent Planning Order and remand this matter to the trial court for further proceedings set forth herein.

VACATED AND REMANDED.

Judges ARROWOOD and GORE concur.

Report per Rule 30(e).

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[2] In so concluding, we acknowledge the trial court, in all likelihood, applied the correct standard of proof in its ruling and likely expected that standard to be included in the written order it directed to be prepared. However, to the extent the trial court on remand determines it applied an incorrect standard, it is free to reconsider the existing record to make new findings. We are also cognizant, however, given the age of the case and the age of the juvenile the best interests of C.M.W. require swift finalization of the permanent plan.