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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-759

Filed 05 July 2023

Wilkes County, No. 20 JA 95

IN THE MATTER OF

M.N. – R.S.

Appeal by Respondent-Mother from Order entered 7 June 2022 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 6 June 2023.

Erika Leigh Hamby, for Petitioner-Appellee Wilkes County Department of Social Services.

J. Thomas Diepenbrock, for Respondent-Appellant Mother.

Rosenwood, Rose & Litwak, PLLC by Nancy S. Litwak, for Guardian ad Litem.

RIGGS, Judge.

Appellant-Mother (“Mother”) appeals an order granting custody of the minor child M.N.-R.S. (“Megan”)¹ to her paternal grandmother (“Grandmother”). On

¹ A pseudonym is used to protect the identity of the minor child. N.C. R. App. P. 42(b).

appeal, Mother argues that the trial court committed reversible error when it ceased further reviews without making the findings required by N.C. Gen. Stat. § 7B-906.1(n) using the standard of clear, cogent, and convincing evidence. Mother also argues the trial court erred when it failed to assign responsibility for the cost of supervised visitation. Finally, Mother argues that the trial court erred when it failed to make a finding that Mother was unfit or had acted in a manner inconsistent with her constitutionally protected status as a parent before considering the best interest of the child.

After careful review, we vacate and remand for statutory findings using the required standard of proof. The order's visitation resolution must also be remanded for additional findings as to whether Mother is responsible for the cost of supervised visitation and, if so, whether she is able to pay these costs. Because we have determined that the order must be vacated, we do not need to reach the remaining issue on appeal.

I. FACTS AND PROCEDURAL HISTORY

On 5 June 2020, the Wilkes County Department of Social Services ("DSS") received reports that two-year-old Megan had been left unattended at a motel while her parents, who were intoxicated and under the influence of illegal substances, went across the street to a gas station. Megan attempted to walk across a busy highway by herself to the gas station, which prompted multiple calls to law enforcement. When law enforcement arrived, the motel asked the officers to remove the parents

from the motel. While packing their belongings, the parents were yelling, fighting, and failing to supervise Megan. DSS placed Megan in a safety placement with Grandmother.

DSS filed a petition alleging Megan was a neglected and dependent juvenile on 8 July 2020. The trial court issued a nonsecure order granting custody of Megan to DSS. In an effort to permanently place Megan with Grandmother, DSS made a home visit to Grandmother's home; however, the home visit revealed that Grandmother's home posed safety concerns and did not meet minimum standards. Consequently, Megan was moved into a foster home.

Megan was adjudicated a neglected and dependent child at a hearing on 17 August 2020. DSS submitted a case report indicating that Mother was homeless, unemployed, and had a long history of substance abuse. The putative father, David Smather ("Father"), was also homeless, unemployed, and had a history of substance abuse issues. Father had an extensive criminal history, including criminal charges that were pending at the time of the hearing. On 13 August 2020, both parents signed case plans that outlined what they would need to do for reunification. Mother signed a case plan that required her to: (1) attend parenting classes; (2) obtain stable employment, housing, and transportation; (3) attend substance abuse assessments; (4) participate in drug screens before visitation; (5) attend all court proceedings, visitation, and meetings; (6) refrain from illegal activity; and (7) maintain weekly contact with the social worker. In the order from the hearing, Megan's placement in

a foster home was continued, and Mother was granted twice monthly visitation; however, she was required to submit to a drug screen prior to each visit.

In the first permanency planning hearing on 9 November 2020, the trial court found that Grandmother had made improvements to her home such that the home was safe and appropriate for Megan. Megan was placed with Grandmother, and the previous order regarding Mother's visitation was left in place. In this hearing, the trial court did not establish a primary and secondary plan; however, DSS was required to continue reasonable efforts to reunite Megan with a parent.

In the next permanency planning hearing on 15 June 2021, the trial court first established a primary plan of reunification and a secondary plan of custody with an approved caregiver. The trial court found that Mother had completed the parenting classes. Mother also completed mental health and substance abuse assessments but was not following the recommendations. The trial court found that Mother remained unemployed, had not found appropriate housing, and had failed multiple drug screens causing visitation to cease. The trial court noted that Father had been incarcerated and would be unable to continue working on his case plan.

In the subsequent permanency planning hearing on 22 November 2021, the trial court changed the plan to custody with Grandmother and eliminated reunification as a plan. During this hearing, the DSS social worker testified on the

Mother's case plan progress.² DSS testified that Mother was living in a motel, unemployed, and had tested positive for amphetamines and methamphetamines on 20 October 2021. Mother testified at the hearing and indicated that she had recently moved into a new home with a bedroom for Megan. Additionally, Mother testified that she had secured employment and would start in a few weeks after receiving a second COVID vaccine. Mother stated that she has a prescription for Adderall and Buprenorphine which would explain her positive drug screen. Mother requested additional time to keep working on her case plan.

At the hearing, DSS recommended that the primary plan be changed to custody with Grandmother; the Guardian ad Litem recommended that the primary plan be changed to guardianship with Grandmother. Grandmother testified at the hearing and indicated that she was willing and able to accept custody of Megan. However, during her testimony, Grandmother said that she would "hate" for Mother to have visits with Megan. Mother's counsel did not object to any of Grandmother's testimony. The trial court stated that if it ordered visitation and Grandmother did not comply with the court order, she would be held in contempt of court.

At the conclusion of the hearing, the trial court granted custody of Megan to Grandmother. The trial court granted Mother a minimum of twice monthly

² At the time of the hearing, Father was incarcerated with a term of approximately 58 months. Father's counsel attended the hearing and did not oppose granting custody to Grandmother. The order granted visitation to Father upon his release from prison.

supervised visitation with Megan and indicated that the supervision “shall be supervised by the child’s custodian and/or Our House.” The trial court ordered that “visitation of the minor child by the parents shall not be frustrated or interfered with by the custodian.” Additionally, the trial court stated that no further hearings would be held in the matter. The trial court entered its order for the hearing on 7 June 2022.

Mother entered a timely notice of appeal on 5 July 2022.

II. ANALYSIS

A. Statutory findings to cease further hearings

In her first issue on appeal, Mother argues that the trial court erred when it ceased further review hearings without making the findings required by N.C. Gen. Stat. § 7B-906.1(n) by clear, cogent, and convincing evidence. We agree.

1. Standard of Review

This Court reviews statutory compliance *de novo*. *In re N.K.*, 274 N.C. App. 5, 13, 851 S.E.2d 389, 395 (2020).

2. Insufficient statutory findings

According to North Carolina General Statute § 7B-906.1(n) a trial court may waive further permanency hearings if the court finds by clear, cogent, and convincing evidence that: (1) the juvenile has resided in the placement for a period of at least one year; (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; and (5) the court order has designated a relative or another suitable person as the juvenile's permanent custodian or guardian. N.C. Gen. Stat. § 7B-906.1(n) (2021). 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 a reversible error. *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015).

Mother concedes in her brief that the trial court's order included "findings of fact complying with, or closely approximating, the findings required by N.C. Gen. Stat. § 7B-906.1(n)." However, she argues that the trial court did not specifically indicate that the findings were based upon clear, cogent, and convincing evidence; therefore, Mother contends, the findings do not meet the criteria listed in N.C. Gen. Stat. § 7B-906.1(n). The best practice is for a court to affirmatively state the standard of proof that it applied in making factual findings; however, failure to do so is not always prejudicial error, for example when the record "viewed in its entirety clearly reveals that the court applied the proper evidentiary standard" there is no prejudicial error. *In re E.M.*, 249 N.C. App. 44, 56, 790 S.E.2d 863, 873 (2016) (quoting *In re M.D., N.D.*, 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009)). Further, the failure to state the burden of proof is not a reversible error if the court states the appropriate

standard of proof in open court. *In re M.D., N.D.*, 200 N.C. App. at 39, 682 S.E.2d at 783.

Here, the trial court did not indicate the evidentiary standard that it used to make the findings required by N.C. Gen. Stat. § 7B-906.1(n) in the order, nor did it state the standard during the hearing. Accordingly, we consider the record viewed in its entirety to determine if the trial court applied the correct standard.

The record shows that the trial court had clear, cogent, and convincing evidence upon which to make the required findings for items (1), (2), (4), and (5) in section 7B-906.1(n) but lacked clear, cogent, and convincing evidence for item (3). The trial court had testimony and evidence in the record that Megan was placed with the proposed custodian, Grandmother, on 17 November 2020 and resided with her continually until the hearing on 20 November 2021, a period of one year. The trial court heard undisputed testimony from the social worker that the placement of Megan with Grandmother is stable, and Megan is doing well in the placement. The trial court advised Mother at the hearing that she can motion the court for modification of visitation and included notification in the order that matters may be brought before the court at any time by the filing of a motion. Lastly, the trial court designated Megan's paternal grandmother as her permanent custodian.

However, the record does not demonstrate that the trial court found by clear, cogent, and convincing evidence that the juvenile's best interests (or the rights of any party) do not require that permanency planning hearings be held every six months,

N.C. Gen. Stat. § 7B-906.1(n)(3). There was conflicting testimony as to the progress that Mother had made on her case plan since the prior hearing related to housing and employment. The trial court did not resolve these differences in the findings of fact. Specifically, the trial court did not make a finding as to whether Mother was making adequate progress within a reasonable period of time under the plan, a required finding for a permanency hearing under N.C. Gen. Stat. § 7B-906.2(d)(1) (2021). Significantly, the record also included Grandmother's testimony that she would prefer not to allow visitation between Megan and Mother. These items raise questions about whether additional permanency hearings are necessary to evaluate Mother's progress on the case plan and to ensure that visitation is not frustrated. Related to whether the juvenile's best interests or the rights of any party do not require that permanency planning hearings be held every six months, N.C. Gen. Stat. § 7B-906.1(n)(3), the trial court only indicated that it did not believe that Mother had done enough, and "[t]here would be no further review on this matter since the child's been in for over a year."

We, therefore, vacate the order waiving future hearings and remand for a new permanency planning hearing and entry of a new permanency planning order which addresses the applicable statutory provision with the appropriate standard of proof. See *In re E.M.*, 249 N.C. App. at 56, 790 S.E.2d at 873 (vacating the portion of the order waiving future review hearing). Specifically, the trial court must make additional findings by clear, cogent, and convincing evidence that neither the

juvenile's best interests nor the rights of any party require that permanency planning hearings be held every six months.

B. Cost of Supervised Visitation

On appeal, Mother also argues that the trial court erred when it failed to assign responsibility for the cost of supervised visitation in the order. We agree.

1. Standard of Review

The trial court's dispositional choices are reviewed only for abuse of discretion, as those decisions are based upon the trial court's assessment of the child's best interests. *In re L.R.L.B.*, 377 N.C. 311, 315, 857 S.E.2d 105, 111 (2021).

2. Visitation Order lacked necessary findings

According to North Carolina General Statute § 7B-905.1(c), when a juvenile is placed or continued in the custody or guardianship of a relative or another suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. N.C. Gen. Stat. § 7B-905.1(c) (2021). Although the statute does not address the costs associated with supervised visitation, this Court has vacated visitation orders when the trial court ordered supervised visitation without making a finding as to what costs, if any, would be associated with supervised visitation, the responsibility for the costs, and the parent's ability to pay for the supervision. *In re J.T.S.*, 268 N.C. App. 61, 74, 834 S.E.2d 637, 646-47 (2019); *See also In re Y.I.*, 262 N.C. App. 575, 582, 822 S.E.2d 501, 506 (2018) (vacating the portion of the permanency planning order regarding

visitation and remanding for additional findings of fact addressing whether the respondent mother is to bear any costs associated with supervised visitation and, if so, whether the respondent mother has the ability to pay those costs). Our Supreme Court has held that when the trial court orders the supervision be at the parent's expense, the trial court must make findings as to the parent's ability to pay for the supervised visitation. *In re J.C.*, 368 N.C. 89, 89, 772 S.E.2d 465, 465 (2015) (per curiam). Without such findings, the appellate court cannot review whether the trial court abused its discretion in making the order. *Id.*

Here, the trial court granted Mother supervised visitation twice monthly at Our House or another neutral location, with supervision either by Our House or the custodian. However, the trial court did not indicate responsibility for the cost, if any, of the supervised visitation.³ In its brief, the Guardian ad Litem argues that Grandmother will bear the cost of visitation because Grandmother testified that she was able to financially support Megan. But Grandmother testified she was on a limited fixed income. Mother testified at the hearing that she had recently secured a job; however, at the time of the hearing, she had not yet started the job. Additionally, the trial court relieved DSS of any further responsibility in this matter.

³ The record does not indicate if there is any cost for visitation at Our House or if this issue has impacted visitation since the order was entered.

On remand, if the trial court orders supervised visitation, the trial court shall make findings of facts as to whether Mother is responsible for the cost of supervised visitation and, if so, whether Mother has the ability to pay those costs.

C. Constitutional right to the care, custody, and control of the child

Mother's final issue on appeal is whether the trial court erred when it failed to make a finding as to her fitness or whether she acted inconsistently with her constitutionally protected right to the care, custody, and control of her child. Because our holding on the first two issues requires vacatur and remand, we do not need to reach this issue.

III. CONCLUSION

After careful review, we vacate and remand the permanency planning order for further proceedings and statutory findings employing the proper standard of proof. The order's visitation resolution must also be remanded for additional findings on whether Mother is responsible for the cost of supervised visitation and, if so, whether Mother has the ability to pay the costs.

VACATED AND REMANDED.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).