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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-522

Filed 19 December 2023

Alexander County, No. 21JA43

IN THE MATTER OF:

Z.Y.

Appeal by respondent-mother from order entered 28 February 2023 by Judge Carole Hicks in Alexander County District Court. Heard in the Court of Appeals 28 November 2023.

*Garron T. Michael Attorney at Law, by Garron T. Michael, for respondent-appellant-mother.*

*Clark & Clark, P.A., by Heather M. Hennessee, for petitioner-appellee-Alexander County DSS.*

*Mobley Law Office, PA, by Marie H. Mobley, for guardian ad litem-appellee.*

FLOOD, Judge.

Appeal by Respondent-Mother from the trial court's order granting guardianship of her minor daughter, "Zoe," to the "Guardians."<sup>1</sup> For the reasons set forth below, we vacate and remand.

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<sup>1</sup> A pseudonym is used for Zoe, and the names of Respondent-Mother and the Guardians are omitted to protect the identity of the minor child. See N.C.R. App. P. 42(b).

**I. Factual and Procedural Background**

On 7 October 2021, Alexander County Department of Social Services (“DSS”) filed a juvenile petition alleging Zoe was a neglected and dependent juvenile. The petition was filed after law enforcement conducted a traffic stop of Respondent-Mother and found her as she was breastfeeding Zoe. During this traffic stop, Respondent-Mother admitted to law enforcement that she had used methamphetamine as recently as the day before.

On 6 October 2021, Respondent-Mother was arrested and charged for misdemeanor child abuse related to the traffic stop that had been conducted a few days prior. Law enforcement notified DSS that Respondent-Mother was being arrested, and a DSS social worker responded to the scene. At the time of Respondent-Mother’s arrest, she was unable to provide the DSS social worker with any appropriate alternative childcare placements for Zoe. The social worker also discovered Respondent-Mother was living with Zoe on the property of a man who had been convicted of multiple drug charges. The social worker was concerned that there was drug activity and use on the property. Zoe was subsequently taken into DSS custody and eventually placed with the Guardians on 24 November 2021. The Guardians are Respondent-Mother’s first cousin and the cousin’s spouse.

On 22 April 2022, Zoe was adjudicated as a neglected and dependent juvenile. At the time of this pre-adjudication hearing, Respondent-Mother was incarcerated in Iredell County Detention Facility and unable to provide care or supervision for Zoe.

On 25 January 2023, Alexander County District Court held a subsequent permanency planning hearing. Respondent-Mother had just been released from incarceration, had completed a drug rehabilitation program, and was residing in a half-way house.

During the hearing, the trial court heard testimony from Shannon Adams (“Adams”), Zoe’s DSS supervisor. Adams testified that Respondent-Mother had visited Zoe only once during the 2022 calendar year. Adams further recommended that the Guardians be granted guardianship of Zoe, as Zoe had been residing with the Guardians for over a year. The trial court heard additional testimony from one of the Guardians, who represented that Zoe was “doing wonderful” and thriving in the home environment she and her husband had provided. The Guardian expressed a clear desire to take on full responsibility for Zoe until Zoe reached the age of majority.

Following the hearing, the trial court entered a written order (the “Order”) concluding, *inter alia*, Zoe should remain in the guardian placement of the Guardians. The Order further concluded Respondent-Mother and Zoe’s biological father<sup>2</sup> were entitled to visitation with Zoe for a minimum of two hours per month. On 15 March 2023, Respondent-Mother filed timely notice of appeal.

## **II. Jurisdiction**

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<sup>2</sup> Zoe’s father is not a party to this appeal.

Respondent-Mother's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 7B-1001(a)(4) (2021).

### **III. Analysis**

Respondent-Mother presents just one argument on appeal: the trial court failed to state that it applied the clear, cogent, and convincing evidentiary standard when determining that she was unfit and had acted in a manner inconsistent with her constitutionally protected parental status. We agree.

This Court reviews a permanency planning hearing order to determine “whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.” *In re J.T.*, 252 N.C. App. 19, 20, 796 S.E.2d 534, 536 (2017) (citation omitted). Findings of fact are conclusive on appeal if they are supported by any competent evidence. *Id.* at 20, 796 S.E.2d at 536 (citation omitted). “The determination of parental unfitness or whether parental conduct is inconsistent with the parents’ constitutionally protected status is reviewed *de novo*.” *In re J.C.-B.*, 276 N.C. App. 180, 184, 856 S.E.2d 883, 887 (2021). “Under *de novo* review, the appellate court ‘considers the matter anew and freely substitutes judgment for that of the lower tribunal.’” *Id.* at 184, 856 S.E.2d at 887 (citation omitted).

At a permanency planning hearing, the trial court may grant a non-parent guardian custody of a juvenile if it determines a guardian placement “would be in the best interests of the juvenile.” N.C. Gen. Stat. § 7B-600 (2021). When determining

the best interests of a child “in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent’s constitutionally protected status.” *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009). “[A] trial court must announce[] the clear, cogent, and convincing standard of proof *either* in making findings of fact in the written [] order or in making such findings in open court.” *In re A.H.D.*, 287 N.C. App. 548, 557, 883 S.E.2d 492, 500 (2023) (second alteration in original) (citation and internal quotation marks omitted); *see also Moriggia v. Castelo*, 256 N.C. App. 34, 43–44, 805 S.E.2d 378, 383 (2017) (instructing the trial court to apply the clear, cogent, and convincing standard to its findings of fact on remand regarding the plaintiff’s constitutionally protected status).

Here, the Order made just one finding regarding Respondent-Mother’s unfitness and constitutionally protected right to parent:

23. The juvenile requires more adequate care or supervision than [] Respondent-[Mother] can provide, and return to the juvenile’s own home would be contrary to the juvenile’s health and safety. [] Respondent-[Mother is] not fit and proper to exercise the care, custody, and control of the juvenile and ha[s] acted in a manner inconsistent with [her] rights as parents.

The trial court failed to state the standard of review it applied to this finding or to twenty-five of the other twenty-six findings of fact. The trial court did, however, state the standard it applied to Finding of Fact 27:

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27. The [trial c]ourt finds by clear, cogent, and convincing evidence that: (a) the juvenile has resided with the relative or has been in the custody of the other suitable person for a period of at least one year []; (b) the placement is stable, and continuation of the placement is in the juvenile's best interest; (c) neither the juvenile's best interest nor the rights of any party require that review hearings be held every six months; (d) all parties are aware that the matter may be brought back before the [trial] court for review at any time by the filing of a motion for review or on the [trial c]ourt's own motion; and (e) the instant court order has designated the relative or other suitable person as the juvenile's permanent caretaker and/or guardian of the person.

DSS argues the inclusion of the clear, cogent, and convincing evidentiary standard in Finding of Fact 27 can be "imputed" to the other findings of fact. We disagree. The specific inclusion of the standard applied to the evidentiary finding in Finding of Fact 27 does not show to this Court that the trial court used this standard for all findings, most importantly to the finding of unfitness and Respondent-Mother's constitutional right to parent; rather, its inclusion supports the logical conclusion that this standard was applied solely to Finding of Fact 27, which is insufficient. *See Moriggia*, 256 N.C. App. at 43–44, 805 S.E.2d at 383 ("[A] trial court must be clear that it is applying the 'clear, cogent, and convincing standard' . . . when determin[ing] that a parent's conduct is inconsistent with his or her constitutionally protected status . . . ." (citation omitted)).

Normally, when remanding a case on these grounds, a new hearing is not warranted unless the record shows the conclusions of law are not adequately

supported by the findings of fact. *See In re A.H.D.*, 287 N.C. App. at 558, 883 S.E.2d at 500 (“A case reversed on these grounds can be remanded to the trial court for it to ‘review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact . . . unless the record of th[e] case is insufficient to support findings which are necessary to establish *any* of the statutory grounds for termination.” (citation omitted)). In this case, however, it is unnecessary to determine whether the trial court’s conclusions of law are adequately supported by the findings of fact as Respondent-Mother has not challenged any of the trial court’s findings of fact as being unsupported by the evidence, nor has she challenged the trial court’s conclusions of law.

Accordingly, we vacate the Order and remand with instructions to the trial court to “reconsider the record before it by applying the clear, cogent, and convincing evidentiary standard” to the findings. *See In re J.L.*, 264 N.C. App. 408, 419, 826 S.E.2d 258, 267 (2019). In its discretion, the trial court may order a new hearing or may apply the appropriate evidentiary standard to the findings of fact. *See David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751 (2005) (remanding for findings of fact applying the clear and convincing evidence standard).

#### **IV. Conclusion**

For the foregoing reasons, we conclude the trial court failed to articulate and apply the proper clear, cogent, and convincing evidentiary standard to the findings of unfitness and that Respondent-Mother acted contrary to her constitutional right to

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parent. We therefore vacate the Order and remand for further consideration of the findings of fact pursuant to the proper evidentiary standard.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).