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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-448

Filed 17 December 2024

Onslow County, No. 19JA144

IN RE: M.C.

Appeal by respondent-parents from order entered 6 February 2024 by Judge James W. Bateman, III in Onslow County District Court. Heard in the Court of Appeals 6 November 2024.

Richard Allen Penley, for petitioner-appellee Onslow County Department of Social Services.

Administrative Office of the Courts, by Matthew D. Wunsche, for the guardian ad litem-appellee.

J. Thomas Diepenbrock for respondent-appellant father.

Anné C. Wright for respondent-appellant mother.

FLOOD, Judge.

Respondent-Parents appeal from the trial court's final permanency planning order, whereby the court granted legal and physical custody of Respondent-Parents' minor child, Oscar,¹ to his foster parents. On appeal, Respondent-Parents argue the

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

trial court's order was in error, alleging (A) the trial court's requisite custodial finding under N.C. Gen. Stat. § 7B-911(c)(2)b. is unsupported by competent evidence, and (B) the trial court's determinations that Respondent-Parents acted inconsistently with their constitutionally-protected status of, and are unfit for, parentage was unsupported by sufficient findings of fact or clear and convincing evidence. Respondent-Mother further argues, (C) the trial court abused its discretion in ceasing reunification efforts prematurely and without due regard to her rights under the Americans with Disabilities Act ("ADA"). Upon review, we conclude the trial court's custodial finding is supported by competent evidence, and the trial court did not abuse its discretion in ceasing reunification efforts. We further conclude Respondent-Parents' constitutional argument, as well as Respondent-Mother's ADA argument, are waived on appeal, and therefore affirm the trial court's order and dismiss Respondent-Parents' waived arguments.

I. Factual and Procedural Background

The following facts are derived in part from those set forth in the opinion of *In re M.C.*, 286 N.C. App. 632, 881 S.E.2d 871 (2022), published following Respondent-Parents' prior appeal to this Court.

Respondent-Father and Respondent-Mother have been married for approximately eight years. In 2018, Respondent-Mother's parental rights in her three children—born prior to her relationship with Respondent-Father—were terminated. On 1 November 2019, Respondent-Mother prematurely gave birth to

Oscar, who is the biological son of both Respondent-Parents. Four days later, on 5 November 2019, Onslow County Department of Social Services (“DSS”) received a report that Oscar was born with significant respiratory issues, as Respondent-Mother had not managed her diabetes while pregnant. On 14 November 2019, DSS filed a petition alleging Oscar to be a neglected and dependent juvenile (the “initial petition”), and on 21 November 2019, the trial court entered an order granting DSS nonsecure custody of Oscar.

Following entry of the nonsecure custody order, from 21 November 2019 until 27 April 2021, the trial court conducted twenty separate nonsecure custody hearings, each followed by an “Order on Need for Continued Nonsecure Custody.” Following the first nonsecure custody hearing, in December 2019, Respondent-Parents each entered a case plan with DSS, whereby they were to participate in mental health treatment, couples therapy, Early Childhood Nurturing (“EC Nurturing”) classes, and scheduled visits with Oscar.

On 24 May 2021, this matter came on before the trial court for an adjudication hearing, and on 29 June 2021, for a disposition hearing. On 22 September 2021, the trial court entered adjudication and disposition orders, whereby the trial court, *inter alia*, adjudicated Oscar a neglected juvenile and maintained his custody with DSS, ordered Respondent-Parents to continue to engage in their case plans and follow all provider recommendations, and ordered Respondent-Father to maintain stable employment and housing for a period of at least six months. Respondent-Parents

timely appealed to this Court, and in an opinion published 6 December 2022, we affirmed the trial court's adjudication and disposition order. *See In re M.C.*, 286 N.C. App. at 649, 881 S.E.2d at 883.

On 24 January 2022, prior to Respondent-Parents' initial appeal, this matter came on before the trial court for a permanency planning hearing. Following the hearing, on 8 August 2022, the trial court entered a permanency planning order (the "first order"), in which the trial court, *inter alia*: found that, while Respondent-Mother expressed willingness to comply with the trial court's recommendations, she had refused parenting classes, not participated in or found a provider for mental health services, and missed more than half of her scheduled visits with Oscar; found that, while Respondent-Father had maintained employment and housing, he had not engaged with any other element of his case plan and had been twice incarcerated since entering the plan; and established a primary permanent plan of reunification with a secondary plan of guardianship.

On 2 May 2022, this matter came on before the trial court for a second permanency planning hearing, and that same day, the trial court entered a second permanency planning order (the "second order"). In the second order, the trial court, *inter alia*: found Respondent-Mother had not participated in any mental health services, had missed more than half of her scheduled visits with Oscar, and refused to complete a requisite intake questionnaire for her EC Nurturing class; found Respondent-Father had not completed any other objectives of his case plan, and had

repeatedly asserted “he does not need parenting classes”; and maintained the primary permanent plan of reunification with a secondary plan of guardianship.

On 3 October 2023, this matter came on before the trial court for a third permanency planning hearing. At the hearing, the DSS social worker assigned to Respondent-Parents’ case testified that DSS was requesting Oscar’s primary plan be changed to adoption with a secondary plan of reunification, because, despite the “countless resources” DSS afforded Respondent-Parents, they had “made no progress.” Specifically, in relevant part, the social worker testified that: Respondent-Father failed to execute a release that would allow DSS access to his treatment records, and while he had completed a parenting class, he had not completed the requisite mental health or marriage counseling classes; neither Respondent-Father nor Respondent-Mother had visited Oscar since April 2023, despite DSS offering to reimburse them for associated travel expenses; and Oscar had a “minimal” relationship with Respondent-Parents.

The trial court also heard testimony from Helen Dupuy, a Family Preservation Specialist with Methodist Children’s Home, who had worked with Respondent-Parents after receiving referrals from DSS in July 2023. Dupuy testified that Respondent-Father’s issues were not likely to be resolved with individual therapy, and that, while he had recently completed a comprehensive clinical assessment (“CCA”), it had been difficult to obtain permanent information from him throughout the CCA, as he is “very much evasive and guarded around his family life.” Dupuy

further testified that Respondent-Mother had been similarly “defensive” and “irritable,” and loathe to provide pertinent information throughout her CCA, which she also completed.

Finally, Oscar’s foster mother testified that Oscar has lived with her family since he was discharged from the hospital on 14 November 2019, and has never resided anywhere else. The foster mother further testified that: she is willing to serve as a permanent placement for Oscar, including if the trial court appointed her as custodian or guardian; she understands that, if Oscar were placed in her care, she would no longer receive a foster care stipend or other financial support to care for him; and her family has sufficient financial resources to care for Oscar. During her testimony, the foster mother also had the following colloquy with the DSS attorney:

[DSS attorney]: Has custody or guardianship of [Oscar] been discussed with you?

[Foster mother]: Yes.

[DSS attorney]: So you understand that if the [c]ourt were to close this case today, with custody or guardianship to you and your husband, you understand that . . . you wouldn’t have parental rights to the child, you would be providing for their care, medical needs until they are [eighteen]?

[Foster mother]: Yes.

In addition to testimonial evidence, at the hearing, the social worker introduced into evidence the DSS court report, which stated: “Legal Guardianship would benefit . . . [Oscar] by giving [him] permanence and removing him from the

foster care system quickly.”

Following evidence, Respondent-Parents were given the opportunity to present arguments, and Respondent-Father’s attorney argued as to the negative effect Respondent-Father’s poverty had on his ability to comply with his case plan, as well as the consequences of Oscar being separated from his siblings. Respondent-Mother’s attorney argued that DSS failed to make reasonable efforts towards reunification, spoke to the effect that Respondent-Mother’s poverty had on her ability to comply with the case plan, and acknowledged that “[Respondent-Parents] are difficult people.”

Following this third permanency planning hearing, on 6 February 2024, the trial court entered its final permanency planning order (the “final order”), ordering the foster parents be granted sole legal and physical custody of Oscar, ceasing reunification efforts, transferring the matter to Chapter 50 Civil Custody Court, and concluding this to be in Oscar’s best interests. In support of its conclusion, the trial court found as fact, in relevant part:

18. The Juvenile is three years of age and is currently placed in foster care and the current placement is appropriate for the juvenile. The juvenile has remained in the same placement since coming in the care of . . . [DSS]. [Oscar] is sweet and sociable; he is up to date on all physical and dental needs.

19. During the pendency of this action and based on the testimony of [the foster mother,] . . . she stayed with the juvenile in the hospital.

....

22. [Respondent-Parents] . . . have failed to make reasonable progress to establish a safe home for the juvenile to be reunified with [them] . . . in that [Respondent-Mother] has failed to resolve health issues[,] . . . [Respondent-Father] has failed to address his mental health[,] [and Respondent-Parents] have failed to satisfactorily comply with ordered services tailored to address the concerns that resulted in [Oscar] coming into the care of [DSS.]

23. [Respondent-Parents] have not utilized a visit [with Oscar] since April 20, 2023. The evidence is uncontroverted that [they] . . . have the ability to obtain transportation to attend visits with [Oscar].

24. As a result of their failure to utilize their visits, . . . [Respondent-Parents] have failed to establish a bond with the juvenile, who has been in the custody of [DSS] since he was thirteen days old.

25. On the other hand, . . . [Oscar's foster parents] have established a bond with [Oscar]. He has lived with the same foster placement since coming into the care of [DSS] when he was thirteen days old.

26. Based on the foregoing facts, the [c]ourt finds by clear and convincing evidence that . . . [Respondent-Parents] have waived their paramount parental rights to the care, custody, and control of the juvenile because they have acted inconsistently with their constitutionally[-]protected status and . . . [they] are unfit.

....

29. Since the filing of the juvenile petition[,] . . . [DSS] has made reasonable efforts to prevent removal and eliminate the need for placement[,] . . .

30. In prior orders, the [c]ourt established that the best

plan to achieve permanence for the juvenile in a reasonable period of time is a primary plan of reunification and a secondary plan of guardianship. [DSS] . . . has made reasonable efforts to achieve these permanent plans.

. . . .

32. Based on the foregoing findings of fact, efforts to reunite [Oscar] with . . . [Respondent-Parents] clearly would be unsuccessful and inconsistent with the child's health and safety and need for a safe, permanent home within a reasonable amount of time.

33. The [c]ourt identified guardianship as a permanency plan for [Oscar] in . . . [the first order]. At least six months have passed since the [c]ourt identified placement with . . . [the foster parents] as the permanent plan for [Oscar].

34. It is in the best interest of [Oscar] . . . for the sole legal and physical custody of the juvenile to be granted to . . . [the foster parents].

35. There is no further need for continued [S]tate intervention through [c]ourt involvement in this action.

Respondent-Parents each filed timely notice of appeal.

II. Jurisdiction

Respondent-Parents' appeal is properly before this Court as an appeal from a trial court's order that changes the legal custody of a juvenile pursuant to N.C. Gen. Stat. § 1001(a)(4) (2023).

III. Analysis

On appeal, Respondent-Parents argue the final order was in error, alleging (A) the trial court's requisite custodial finding under N.C. Gen. Stat. § 7B-911(c)(2)b.

(2023) is unsupported by competent evidence, and (B) the trial court’s determination that Respondent-Parents acted inconsistently with their constitutionally-protected status of, and are unfit for, parentage is unsupported by sufficient findings of fact or clear and convincing evidence. Respondent-Mother further argues, (C) the trial court erred in ceasing reunification efforts prematurely and without due regard to her rights under the ADA. We address each argument, in turn.

A. Custodial Finding

Respondent-Parents contend the trial court improperly awarded custody of Oscar to the foster parents, as its Finding of Fact 33, which stated that at least six months have passed since the trial court identified placement with the foster parents as the permanent plan for Oscar, is unsupported by competent evidence. Respondent-Parents further allege that Finding of Fact 25 is unsupported by competent evidence, as the Record demonstrates Oscar was not living with the foster parents at the time DSS filed the initial petition. The trial court, according to Respondent-Parents, was therefore required to make Finding of Fact 33, pursuant to N.C. Gen. Stat. § 7B-911(c)(2)b. We disagree.

“Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law.” *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). “The trial court’s findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain

contrary findings.” *In re J.H.*, 244 N.C. App. 255, 268, 780 S.E.2d 228, 238 (2015) (citation and internal quotation marks omitted).

Pursuant to N.C. Gen. Stat. § 7B-911(c)(2)b., when entering a civil child custody order, the trial court must make a finding that,

[a]t least six months have passed since the court made a determination that the juvenile’s placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is *not required* if the court is awarding custody to a parent or *to a person with whom the child was living when the juvenile petition was filed*.

N.C. Gen. Stat. § 7B-911(c)(2)b. (emphasis added).

Here, Oscar’s foster mother testified that Oscar has lived with her family since he was discharged from the hospital on 14 November 2019, and the Record demonstrates that the initial petition was filed on that same day. As such, the trial court’s Finding of Fact 25—that Oscar “has lived with the same foster placement since coming into the care of [DSS] when he was thirteen days old”—is supported by competent evidence, and the trial court was not required to make a finding of fact as described under N.C. Gen. Stat. § 7B-911(c)(2)b. Respondent-Parents, however, allege that there is evidence supporting a finding contrary to that of Finding of Fact 25, and as such, the Finding is “not supported by clear and convincing evidence.” This is a misstatement of law. As set forth above, under our standard of review, the trial court’s findings of fact are conclusive on appeal “when supported by *any* competent evidence, even if the evidence could sustain contrary findings.” *In re J.H.*, 244 N.C.

App. at 268, 780 S.E.2d at 238 (emphasis added). The foster mother’s testimony was such competent evidence in support of a finding that Oscar has lived with his foster parents since the day the initial petition was filed, and as such, Finding of Fact 33—that “at least six months have passed since the [c]ourt identified placement with . . . [the foster parents] as the permanent plan for [Oscar]”—was not a finding the trial court was required to make. *See* N.C. Gen. Stat. § 7B-911(c)(2)b. We therefore need not address whether the Finding of Fact 33 is supported by competent evidence, the trial court did not err, and as to this assignment of error, we affirm the trial court’s final order. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

B. Constitutionally-Protected Parental Rights

Respondent-Parents contend the trial court erred in finding that they had acted inconsistently with their constitutionally-protected parental rights, and that they were unfit to parent. As explained in further detail below, Respondent-Parents have waived appellate review of this argument.

Regarding the constitutionally-protected right of parentage, our Supreme Court has provided that “the law presumes parents will perform their obligations to their children, [and] it presumes their prior right to custody, but this is not an absolute right.” *Peterson v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 904 (1994) (citation and internal quotation marks omitted). “Absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children

must prevail.” *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (citation and internal quotation marks omitted) (cleaned up). While a respondent-parent may challenge on appeal the trial court’s determination that his or her conduct was inconsistent with this constitutionally-protected right, “the existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal.” *Id.* at 133, 871 S.E.2d at 497 (citations omitted).

In *In re J.N.*, the respondent appealed from the trial court’s order granting guardianship of his juvenile children to the maternal grandparents, arguing the order was in error where the trial court failed to find “that he was an unfit parent or he had acted inconsistently with his constitutional right to parent.” 381 N.C. at 132, 871 S.E.2d at 497. This matter was eventually appealed to our Supreme Court, and upon review, the Court concluded the respondent waived this argument where he “failed to assert his constitutional argument in the trial court.” *Id.* at 133, 871 S.E.2d at 498.

In support of this conclusion, our Supreme Court provided:

[The r]espondent was on notice that DSS and the guardian ad litem were recommending that the trial court change the primary permanent plan . . . from reunification to guardianship. Prior to the hearing, DSS filed a court report in which it stated that reunification was not possible due to the minimal progress [the] respondent had made and because [the] respondent was unable to provide for the safety and well-being of . . . [the juveniles]. DSS, therefore, recommended that guardianship be granted to the

maternal grandparents. Further, the guardian ad litem also filed a court report recommending that guardianship be granted to the maternal grandparents. Moreover, during closing arguments at the hearing, the guardian ad litem attorney specifically stated, “Your Honor, at this point, we feel and would respectfully request that you allow guardianship to be given to the maternal grandparents.”

In turn, [the] respondent’s argument focused on the reasons reunification would be a more appropriate plan. Despite having the opportunity to argue or otherwise assert that awarding guardianship to the maternal grandparents would be inappropriate on constitutional grounds, [the] respondent failed to do so. Therefore, respondent waived the argument for appellate review.

Id. at 133–34, 871 S.E.2d at 498 (cleaned up).

Here, the Record demonstrates that, at the hearing: the social worker testified DSS was seeking to change Oscar’s primary plan to adoption with a secondary plan of reunification, because Respondent-Parents had “made no progress” with their case plans; the social worker introduced into evidence the DSS court report, which recommended the trial court grant and appoint legal guardianship of Oscar; and the DSS attorney directly asked the foster mother whether she understood the possibility of her taking custody or guardianship of Oscar. As such, Respondent-Parents were—at a minimum—on notice that DSS was recommending the trial court remove reunification as Oscar’s primary plan, which would necessarily implicate their constitutionally-protected parental rights. *See id.* at 133–34, 871 S.E.2d at 498.

Following evidence, Respondent-Parents were afforded the opportunity to develop a constitutional argument, but as shown by the Record, Respondent-Parents’

arguments concerned only the effect their poverty had on adherence to their case plans, the consequences of separating Oscar from his siblings, and DSS allegedly failing to make reasonable efforts towards reunification. Despite having the opportunity to do so, Respondent-Parents failed to argue or otherwise assert on constitutional grounds that awarding guardianship of Oscar to the foster mother would be inappropriate. *See id.* at 134, 871 S.E.2d at 498. Respondent-Parents have failed to preserve their constitutional argument, and it is therefore waived on appeal. *See id.* at 133, 871 S.E.2d at 498. We dismiss this argument.

C. Reunification Efforts

In addition to presenting identical arguments as those contained in Respondent-Father's brief, Respondent-Mother contends the trial court erred in "prematurely" ceasing reunification efforts with Oscar, and that this cessation of reunification was in violation of her ADA rights. We disagree.

As an initial matter, Respondent-Mother's argument regarding her ADA rights is waived on appeal. As this Court has provided, "any claim that . . . [DSS] is violating the ADA must be raised in a timely manner so that any reasonable accommodations can be made[,]" and where a respondent failed to raise such a claim "before or during the permanency planning hearing[,] . . . [she] waived her argument by raising it for the first time on appeal." *In re A.P.*, 281 N.C. App. 347, 358, 868, S.E.2d 692, 700–01 (2022) (citations and internal quotation marks omitted) (cleaned up). Here, nothing in the Record indicates Respondent-Mother raised an ADA claim before or during the

three permanency planning hearings; her argument is therefore waived on appeal, and we address only Respondent-Mother's argument as it concerns cessation of reunification efforts. *See id.* at 358, 868, S.E.2d at 700–01.

“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 C.M.*, 273 N.C. App. 427, 429, 848 S.E.2d 749, 751 (2020) (citation and internal quotation marks omitted).

Under N.C. Gen. Stat. § 7B-906.2(b):

At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made written findings under [N.C. Gen. Stat. §§] 7B-901(c) or . . . 7B-906.1(d)(3), *the permanent plan is or has been achieved in accordance with subsection (a1) of this section*, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. . . . *Unless permanence has been achieved*, the court shall order . . . [DSS] to make efforts toward finalizing the primary and secondary permanent plans[.]

N.C. Gen. Stat. § 7B- 906.2(b) (2023) (emphasis added). Pursuant to N.C. Gen. Stat. § 7B-906.2(a1), “[c]oncurrent planning shall continue until a permanent plan is or has been achieved.” Further, as set forth by our Supreme Court,

the use of the disjunctive term “or” in N.C. [Gen. Stat.] § 7B-906.2(b) demonstrates that satisfaction of any one of

the three delineated circumstances which are identified in the statute, even to the exclusion of the remaining two circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan.

In re K.P., 383 N.C. 292, 305, 881 S.E.2d 250, 258 (2022).

Here, since the first permanency planning hearing—as demonstrated in the first and second orders—Oscar’s permanent plan had included a secondary plan of guardianship. In entering the final order, the trial court granted full custody and guardianship of Oscar to the foster parents. Per N.C. Gen. Stat. § 7B-906.2(b), the trial court is empowered to properly eliminate reunification as a primary or secondary plan where the permanent plan has been achieved, and in entering the final order, the trial court achieved Oscar’s permanent plan of guardianship. *See* N.C. Gen. Stat. § 7B-906.2(a1)–(b); *see also In re K.P.*, 383 N.C. at 305, 881 S.E.2d at 258. As such, the trial court did not abuse its discretion in ceasing reunification efforts, and we affirm the trial court’s final order. *See In re C.M.*, 273 N.C. App. at 429, 848 S.E.2d at 751; *see also In re K.P.*, 383 N.C. at 305, 881 S.E.2d at 258 (concluding the trial court did not abuse its discretion where it satisfied the requisite “components as found in N.C. [Gen. Stat.] § 7B-906.2(b)”).

IV. Conclusion

Upon review, we conclude competent evidence supports the trial court’s custodial finding of fact, and the trial court did not abuse its discretion in ceasing reunification efforts. We further conclude that the arguments concerning

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Opinion of the Court

Respondent-Parents' constitutional rights, and concerning Respondent-Mother's ADA rights, are waived on appeal. Accordingly, we affirm the trial court's final order, and dismiss Respondent-Parents' waived arguments.

AFFIRMED In Part, and DISMISSED In Part.

Judges GORE and THOMPSON concur.

Report per Rule 30(e).