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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 24-593

Filed 2 April 2025

Onslow County, Nos. 16JA000200-660, 16JA000201-660

IN THE MATTER OF: K.M. and K.M.

Appeal by respondent from order entered 4 October 2023 by Judge James W. Bateman, III in District Court, Onslow County. Heard in the Court of Appeals 13 February 2025.

Jason Senges, for respondent-appellant father.

Garron T. Michael, for respondent-appellant mother.

Fairman Family Law, by Kelly Fairman, for legal guardians.

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

Parker, Poe, Adams & Bernstein L.L.P., by Charles E. Raynal, IV and Molly P. McCabe, for the Guardian Ad Litem.

ARROWOOD, Judge.

Respondent-mother (“mother”) and respondent-father (“father”) appeal from a 4 October 2023 order granting primary physical custody of minor children K.M. and

K.M.¹ to legal guardian appellees (“guardians”) and secondary physical custody to respondents; granting guardians and respondents joint legal custody; and ceasing reunification efforts between the minor children and respondents. For the following reasons, we affirm the trial court’s order.

I. Factual Background

On 17 August 2016, the Onslow County Department of Social Services (“DSS”) filed a juvenile petition alleging that the minor children were neglected and dependent. DSS had a history with the family, with concerns about parenting, mother’s mental health, and unsanitary conditions. Responding to a report made around 15 July 2016, a DSS social worker and EMS found the house smelling of urine and feces, and in general disarray. Infant K.M. was found in a heavily soiled diaper weighing three pounds, and juvenile K.M. was found trapped under a blanket in the closet of a locked room, also in a soiled diaper. After this visit and an attempt to implement services, the home briefly improved, then deteriorated to the point that the children had to be removed.

DSS was granted nonsecure custody of the children on 17 August 2016. They were placed in foster care, and respondents were provided mental health and parenting resources, as well as referrals for housing and daycare. The trial court found the children were neglected and dependent on 9 May 2017, and DSS was given

¹ Initials are used to protect the identity of the minor children.

full legal and physical custody. Respondents were given two hours of visitation per month. At the permanency planning hearing, the court found that mother was engaged in therapy, but had not yet started medication management; that father had not obtained a full-scale psychological evaluation; and that neither parent had completed the recommended parenting classes. At the following hearing the court found that the parents were making progress, but that reunification would be premature. Respondents continued to engage with their case plan throughout the rest of 2017. Their minimum visitation hours were raised to two supervised, six unsupervised per month.

However, issues began to arise in 2018. At the 29 March 2018 permanency planning hearing, the court found that both parents had stopped making progress in their case plans; a social worker had developed concerns that mother was either lying about or was legitimately convinced of events that did not happen; that mother had begun signing emails “MRS. US ARMY”; that she was working nights and had not researched or instituted appropriate daycare; and that the family home and mother’s clothes smelled strongly of cat urine. Father was granted six hours unsupervised visitation every other weekend, while mother’s was supervised.

By June 2018, respondents were improving. Mother completed a clinical assessment, maintained medication management, completed her case plan except for stabilization of her mental health, and began working during the day. Father also

completed his case plan, moved back in with mother, and began working locally. The court increased visitation to twelve hours per month for both parents.

Respondents continued to make advancements; unfortunately, their home was subsequently damaged by Hurricane Florence. Mother found work in Ohio and stayed with friends, while father stayed behind to repair the home. At the 12 October 2018 planning hearing, the court determined that the primary plan would be guardianship with a court-appointed caretaker, with reunification being the secondary plan.

Mother was able to return to Jacksonville and find work at Hardee's, but she appeared to develop hostility towards DSS, and a social worker expressed concerns that mother could not properly care for the children due to her mental health issues. Father began to experience financial difficulties, and he was attempting to sell their home, which was in foreclosure. The court maintained guardianship as the primary plan.

On 14 March 2019, the trial court found that respondents were unfit parents by clear and convincing evidence, with a likelihood of repetition of future neglect. The court noted that following the 11 December 2018 hearing, respondents were "reluctant to allow social workers to assess the home for possible return of the juveniles to their care." Mother demonstrated continued mental instability, including continued hostility towards a social worker and failure to advance with her therapy. Father was also hostile towards DSS, did not keep in contact with his social worker,

and did not inquire after the well-being of his children. The court ordered that reunification efforts between respondents and their children were to cease.

Both respondents appealed this order which resulted in our decision *In re K.M., K.M.*, __ N.C. App. __, 2020 WL 4188120. We affirmed the trial court's findings that mother had acted inconsistently with her constitutionally protected parental rights, and that the court properly ended reunification efforts as to her. *Id.* at 6. However, we reversed the trial court's ruling that reunification should end as to father. *Id.* at 4. All but one of the findings supportive of future neglect were not particular to father. *Id.* We noted his sustained progress and his employment in North Carolina that allowed him to be close to his children, and thus remanded the case for further proceedings as to him. *Id.* We further agreed with father that the trial court had abused its discretion by awarding guardianship to the foster parents, and remanded to the trial court to create primary and secondary plans. *Id.* at 5.

Following our court's decision, the trial court had a permanency planning hearing on 31 August 2020. The trial court maintained that reunification efforts with mother were ceased, but reinstated unification as a primary plan for father. The trial court noted that father was not present at the hearing, as he was at the DMV instead, and also found that his home was not suitable to receive the children at that time. On 28 May 2021, the trial court granted father overnight visitation.

The court next conducted a permanency planning hearing on 8 November 2022. At that hearing, mother expressed concerns about father's ability

to care for the children. The court found that mother had been the one primarily responsible for the children during visitation, and determined that reunification efforts between mother and children should resume. There were numerous issues with father's actions: he had only allowed a social worker to view his home once in the previous 14 months; he did not call for updates on the children's wellbeing; visitation did not take place at his home; he rarely communicated with the foster parents; and he did not attend IEP meetings. The court made guardianship the primary plan, and reunification with both parents the secondary plan.

At the penultimate hearing in this case, a motion to review visitation on 11 August 2023, the trial court found numerous issues with the manner in which the children's visitation was conducted. The children had stayed with mother at a location that had not been approved by DSS on multiple occasions, in violation of the visitation order. The children had been transported by an unidentified man named "Jose," who had not received DSS approval and did not put the children in booster seats. Mother had taken the children to an eight-hour shift at McDonald's and kept them there while she worked. The court found that father, who had found work as a long-haul trucker, should have been aware of the issues with mother's visitation and addressed them. He also either minimized or denied the issues with mother's actions. The court reduced the amount of visitation hours to six unsupervised.

The trial court conducted its final hearing on this matter on 4 October 2023, at which mother was not present. The court made numerous findings as to mother: she

had not complied with her case plan; she had been evicted and, as far as the court was aware, was homeless; she was diagnosed with anxiety and bipolar disorder, and had a poor mental health prognosis due to her failure to engage in treatment and comply with recommendations for her mental health; she did not exercise her visitation rights to their fullest extent and would end visitation early. The court found numerous issues with father's home, such as an unidentified odor, animal feces on the floor, and a cockroach infestation. Father never verified his employment, could not explain how his money was being spent, and did not have a plan to care for the children.

The court found that neither parent was making adequate progress in their case plan and that the children were well-bonded to their foster parents. The court consequently granted primary physical custody, and joint legal custody, to the children's guardians, and removed reunification as a case plan. Respondents filed a notice of appeal 28 March 2024.

II. Discussion

Respondent-father raises two issues on appeal. First, he argues that the trial court erred in finding that he acted contrary to his constitutionally protected parental status through failure to use the correct evidentiary standard and failure to properly support its conclusions of law. Second, he argues that DSS failed to make reasonable efforts towards reunification.

Respondent-mother raises one issue on appeal. She argues that the trial court failed to apply the correct standard of review in determining that she had acted inconsistently with her constitutionally protected parental status. For the following reasons, we affirm the trial court's order.

A. Preservation of Constitutional Arguments

Under the Rules of Appellate Procedure, a party must make a “timely request, objection, or motion,” along with the grounds for their desired ruling, to preserve their argument for appellate review. N.C. R. App. P. Rule 10(a)(1). While the rules permit plain error review for unpreserved errors in criminal cases, N.C. R. App. P. Rule 10(a)(4), we have adopted a different rule when the issue in question is constitutional. “Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 77-78 (2001) (citation omitted). Our Supreme Court has applied this rule to cases involving abused, neglected, and dependent children, including the recent decision *In re J.N.*, 381 N.C. 131 (2022). There, the respondent argued that his constitutional argument was automatically preserved under *Petersen v. Rogers*, 337 N.C. 397 (1994). *In re J.N.*, 381 N.C. at 133. However, the Court noted that North Carolina appellate courts “have consistently found that unpreserved constitutional arguments are waived on appeal,” and that nothing in *Petersen* negated this long-standing rule. *Id.*

This court addressed the question of the mechanism of preservation of constitutional arguments in *In re J.O.*, 293 N.C. App. 556 (2024), holding that the

existence of notice and the failure to use proper language waives constitutional arguments. There, respondent-mother argued that while she did not explicitly raise a constitutional argument at trial, her argument was preserved for two reasons: “(1) she was not afforded an opportunity to raise an objection at the hearing, citing *In re R.P.*, 252 N.C. App. 301, 798 S.E.2d 428 (2017), or (2) ‘Mother did object with her testimony and arguments requesting the trial court return custody of Josh to her.’” *In re J.O.*, 293 N.C. App. at 564. In response to her first argument, we held that she was on notice that a grant of guardianship would be recommended at the upcoming hearing by way of two court reports. *Id.* at 566. Her second argument failed since her counsel never “contend[ed] guardianship would be improper on constitutional grounds or that mother was a fit and proper parent.” *Id.*

In the case *sub judice*, respondents face similar issues with preservation as did the respondent in *In re J.O.* The Guardian ad Litem (“GAL”) in this case prepared a court report in advance of the permanency planning hearing on 4 October 2023. In this report, the GAL wrote that his recommendation was for the guardians to receive custody of the children, with a secondary plan of adoption. This recommendation served to give respondents notice that their constitutional right to raise their children would be challenged at the permanency planning hearing.

At the hearing, neither respondents’ counsel objected on proper constitutional grounds. At no point did either counsel invoke the word “constitutional,” nor were any arguments raised that invoked these rights. The closest that respondents’

counsel came to making a proper constitutional argument was during closing arguments, when respondent-father's counsel stated that respondents "have felt fit the entire time to get their kids back." This is not enough. While the term "fit" is used, the *In re J.O.* court requires that counsel argue that respondent "was a fit and proper parent." Counsel opining that respondents "felt fit" is not an argument that respondents were indeed fit and proper parents.

Respondent-father also raises the fact that when asked if he wanted to be the primary caretaker, and if the Court should maintain the current plan, he answered yes. However, this is merely restating the purpose of his presence at the hearing. Our caselaw clearly holds that preservation of constitutional issues requires something more. We therefore deem both respondents' constitutional issues waived.

B. Respondent-Father's Preservation of Second Issue

Respondent-father also raises a second, non-constitutional issue, that DSS did not make reasonable efforts to reunite him and his children. We find that father waived this argument by failing to raise it before the trial court; in the alternative, even if it were preserved, we hold that the reunification efforts of DSS were reasonable.

It is a matter of settled law in North Carolina that an appellant cannot raise an argument for the first time on appeal. *See, e.g., State v. Benson*, 323 N.C. 318, 322 (1988) (citing *Weil v. Herring*, 207 N.C. 6 (1934)) ("Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal."). In the case *sub judice*,

counsel for respondent-father did not raise the issue of unreasonable efforts by DSS at any point during the permanency planning hearing. Counsel engaged in some possible, albeit oblique, references to DSS' alleged failures; for example, he asked DSS witness Melanie D'zurilla ("Ms. D'zurilla") if there had been any "brainstorming" about how to rectify the fact that respondent was away from home due to his job. However, at no point did these references rise to any form of stated argument before the court that DSS' efforts were unreasonable.

If, however, father did preserve this issue, we hold that DSS engaged in reasonable efforts to reunify the children with father. DSS is required to engage in the "diligent use of preventive or reunification services . . . when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-101(18) (2024). "Our General Assembly requires social service agencies to undertake reasonable, not exhaustive, efforts towards reunification." *In re A.A.S.*, 258 N.C. App. 422, 430 (2018).

DSS has provided ample resources and recommendations to father throughout the course of this case. On 13 August 2020, a social worker visited father and counseled him on the steps he needed to take to get his children back, including setting up doctors and medications, researching schools, and finding childcare. Father said that he thought the list was small, and that he could get it done. In a GAL report, it was made clear that the County was offering resources and assistance

to father, but he was not proactive in taking advantage of this assistance and providing a proper home for his children.

While respondent asserts that DSS did not engage in reasonable efforts, it is clear from the record that respondent's actions prevented DSS from providing needed assistance. In a 14 October 2022 court report, Ms. D'zurilla listed "community resource utilization" as one of respondents needs, rather than a strength. At the final permanency planning hearing, the trial court found that respondents had refused to allow DSS to access his home on multiple occasions, and refused to cooperate with DSS. It is clear that DSS engaged in reasonable efforts to reunite respondent with his children, and it is also clear that respondent did not take advantage of the assistance DSS provided, and actively prevented the department from performing its duties.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges STROUD and FREEMAN concur.

Report per Rule 30(e).