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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-676

Filed 7 May 2025

Wilkes County, No. 20JA000127

IN THE MATTER OF: P.L.E.

Appeal by respondent from order entered 11 April 2024 by Judge William F. Brooks in Wilkes County District Court. Heard in the Court of Appeals 19 March 2025.

Sherryl West for the petitioner-appellee Wilkes County Department of Social Services.

Garron T. Michael for the respondent-appellant.

Schell Bray PLLC, by Christina Freeman Pearsall, for the Guardian ad Litem.

TYSON, Judge.

Respondent-mother (“Respondent”) appeals from a permanency planning order, which awarded guardianship of her minor child, P.L.E. (“Phoebe”) to Phoebe’s foster parents (“Mr. and Mrs. M.”). *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minor). Respondent was awarded the minimum visitation recommended by the Wilkes County Department of Social Services (“DSS”). We dismiss.

I. Background

The facts and procedural history are set forth in this Court's prior opinion:

Wilkes County Department of Social Services ("DSS") filed a petition on 23 September 2020 alleging Phoebe was a neglected juvenile. DSS stated it had received two reports regarding Phoebe's younger brother, "Blake," almost two years old, who was taken and admitted into the hospital by Respondent with significant bruising on 19 August 2020. Blake had sustained several injuries, including a broken clavicle, torn frenulum, and extensive bruising to his throat and other protected areas. The injuries were non-accidental. A subsequent skeletal survey conducted on 14 September 2020 showed Blake had suffered other bone breaks on the ulna and radius of his right arm and a distal portion of his left arm.

Due to Blake's extensive and unexplained injuries, which purportedly occurred while Phoebe, age three, was living inside the family home, and the parents' inability to identify the perpetrator, DSS alleged Phoebe was neglected. DSS asserted she did not receive proper care, supervision, or discipline and lived in an environment injurious to her welfare, where she was also at risk for abuse. No physical injuries to Phoebe were ever documented by DSS. Phoebe and Blake were placed with kinship, their maternal great-aunt, as a safety placement.

The district court held the adjudication and disposition hearing on 26 October 2020, yet failed to enter orders until over six months later on 8 June 2021. The trial court's order adjudicated Phoebe as neglected, based upon facts stipulated to by the parties. The same day, the district court entered a disposition order, which kept Phoebe in DSS' custody and approved her placement with Mr. and Mrs. M. after the maternal great-aunt stated she was unwilling or unable to continue caring for her. Blake was also placed with Mr. and Mrs. M. at this time. Respondent was denied any visitation with Phoebe "during the pendency of the investigation pertaining to the abuse allegations related to [Blake]."

The initial review hearing was held on 25 January 2021. Three and one-half months later, on 10 May 2021, the trial court entered an order, which found Respondent had signed a case plan on 12 November 2020. The court found her substantial progress on that plan, including she: (1) was in consistent contact with DSS; (2) was employed; (3) was residing in a stable home; (4) had started parenting classes; but, (5) had not scheduled her mental health or substance abuse assessments. Respondent had also been charged with misdemeanor child abuse based on the injuries allegedly sustained by Blake. While that charge remained pending, visitation with Blake was not permitted, unless visitation was “therapeutically recommended.” As required by statute, DSS was ordered to continue reasonable efforts towards reunification. N.C. Gen. Stat. § 7B- 901(c) (2021).

The trial court next conducted a permanency planning hearing on 26 July 2021. In its 10 August 2021 order, the court found Phoebe was attending therapy to address her “diagnosis” of “Unspecified Trauma and Stressor Related Disorder due to her reported and observed behaviors.” The trial court found Respondent’s continued progress, including she: (1) was attending parenting classes inconsistently; (2) had weekly contact with a DSS social worker; (3) had completed her mental health assessment; (4) had completed a substance abuse assessment; (5) had tested positive for cannabinoids; (6) had inappropriate housing; (7) was not currently employed; and, (8) was attending all scheduled court dates and meetings with DSS.

The court also found Respondent had allowed another woman and her one-year-old twins, who had an active DSS case, to reside with Respondent in her mobile home, which purportedly “smelled of marijuana.” During a visit to Respondent’s home, children who were present purportedly reported “the adults in the home smoked ‘weed’ via a bong or rolling it up in weird paper” and “snorted white stuff into their noses through a metal tube.”

The court changed the plan and established a primary permanent plan of adoption with a secondary plan of guardianship. DSS was relieved from its obligation to assist the parents to make reasonable efforts towards reunification. Respondent's misdemeanor child abuse case remained pending, and she continued to be denied any visitation with Blake and Phoebe.

The next permanency planning hearing was held on 22 November 2021. The trial court again made findings regarding Respondent's progress, which had worsened. Respondent had completed four of sixteen parenting classes, was in arrears in child support, had not complied with the recommendation that she attend virtual group therapy, had not been employed since March 2021, and had a new criminal charge pending for misdemeanor larceny.

The court found Respondent had remained in contact with the social worker, had obtained housing, and was regularly attending court hearings and meetings with DSS. The court also found Phoebe's therapy had been suspended "due to her progress in meeting all of her treatment goals." No changes were made to the primary and secondary permanent plans, and reunification efforts remained ceased. Respondent was restored with "limited telephone and video visits" with Phoebe, but DSS retained "the discretion to cease these visits if they appear detrimental to the wellbeing of the child."

The permanency planning hearing at issue in this appeal was held on 18 April 2022. The trial court entered an order seven weeks later on 7 June 2022, which found: Phoebe had resumed therapy based on "regressive behaviors" following the initial video visits with Respondent; Respondent was not in full compliance with her case plan; DSS recommended the primary permanent plan be changed from adoption to guardianship. Mr. M. was present in court and provided the court with a financial affidavit, which demonstrated Mr. and Mrs. M. had adequate resources to take care of Phoebe and understood the legal significance of being appointed as Phoebe's guardians. The

court found by clear and convincing evidence Respondent and Phoebe's father had "acted inconsistently with their constitutional rights to parent the minor child."

The trial court changed the primary plan to guardianship with a secondary plan of adoption and awarded guardianship of Phoebe to Mr. and Mrs. M. Due to the therapist's report of Phoebe's negative reaction to her initial video visit with Respondent, no visitation was ordered. The court determined DSS had achieved the permanent plan for Phoebe and ordered no further review hearings were necessary.

In re P.L.E., 290 N.C. App. 176, 177-79, 891 S.E.2d 613, 614-16 (2023).

Respondent appealed challenging the trial court's award of joint guardianship to Mr. and Mrs. M. She contended insufficient evidence shows they understood the legal significance of being appointed as guardians for her children. *Id.* at 180, 891 S.E.2d at 616.

This Court held the district court's conclusion Mr. and Mrs. M. understood the legal significance of guardianship was unsupported. This Court vacated the district court's award of guardianship and also vacated and remanded the district court's denial of Respondent's visitation with her children for further consideration to comply with the mandates of N.C. Gen. Stat. §§ 7B-905.1 and 7B-906.1(d)-(e) (2023). *Id.* at 187, 891 S.E.2d at 620.

Upon remand the district court held permanency planning hearings on 30 October 2023 and 26 February 2024. The district court entered a permanency planning order on 11 April 2024 awarding guardianship to Mr. and Mrs. M., awarding

Respondent the minimum visitation recommended by DSS, and waived further review hearings. The district court's order stated "visitation may be reviewed at any time by the filing of a motion by any party to the matter." Respondent appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27 and 7B-1001(a)(4) (2023).

III. Issue

Respondent argues the district court erroneously awarded guardianship to Mr. and Mrs. M. when she had substantially complied with her case plan to reunify with her child and was not acting in a manner inconsistent with her constitutional right to parent her child. *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L.Ed.2d 511, 519 (1978).

IV. Waiver

DSS asserts Respondent did not raise the issue of her constitutional right to parent her child at any time during the 26 February 2024 hearing. After briefing concluded, the Supreme Court of North Carolina issued its decision in *In re K.C.*, 386 N.C. 690, 909 S.E.2d 170 (2024) addressing whether waiver of constitutional challenges occurred before the district court when placing a juvenile with someone other than a natural parent.

In the case of *In re K.C.* the Durham County Department of Social Services filed a petition alleging the juvenile to be a neglected juvenile on 25 August 2020. *In re K.C.*, 288 N.C. App. 543, 544, 887 S.E.2d 108, 110 (2023), *rev'd*, 386 N.C. 690, 909

S.E.2d 170 (2024). More than a year later, the trial court entered an order adjudicating the juvenile to be a neglected juvenile. *Id.* at 544, 887 S.E.2d at 111. At the dispositional hearing the trial court “contemplated removal of the child from the non-offending parent” for the first time. *Id.* The trial court entered “a limited order placing [the juvenile] in the temporary custody of her paternal aunt and uncle.” *Id.*

The trial court entered a

formal disposition order on 8 February 2022, wherein it formally placed [the juvenile] in the ‘temporary custody’ of her paternal aunt and uncle and ordered [the respondent] to complete a domestic violence program for perpetrators, refrain from physically disciplining [the juvenile], maintain contact with the social worker, maintain stable housing, maintain employment and income, refrain from using illegal substances, sign all necessary releases to allow the social worker to access service records, and ensure that all service providers have copies of the trial court’s orders.

Id. at 545, 887 S.E.2d at 111. The respondent appealed to this Court arguing “the trial court erred in placing the juvenile in the temporary custody of the paternal aunt and uncle where its determination that he acted inconsistently with his constitutional rights as a parent was not supported by the evidence or the findings of fact.” *Id.*

This Court held this argument was properly preserved for review because the respondent had “opposed DSS’s recommendation” to place the juvenile with the paternal aunt and uncle. *Id.* Respondent-mother also challenged the lack of findings to support this conclusion. A prior panel of this Court held a finding was unsupported and disregarded them. *Id.* at 550, 887 S.E.2d at 114. This Court noted: “There were

no allegations in the petition or findings in the adjudication order that [the respondent], the non-offending parent, has neglected the child, is unfit, or has acted inconsistently with his paramount constitutional right to custody of his child.” *Id.*

This Court reversed the district court holding: “the findings of fact are insufficient to support the trial court’s conclusion that [the r]espondent acted inconsistently with his paramount constitutionally protected status as a parent.” *Id.*

DSS appealed to the Supreme Court of North Carolina. *Id.* The Supreme Court of North Carolina allowed discretionary review on an additional issue: “Whether respondent properly preserved this constitutional issue for appellate review.” *In re K.C.*, 386 N.C. at 694, 909 S.E.2d at 174 (citation omitted). The Supreme Court also instructed the parties to submit supplemental briefs on an additional issue: “Whether the Court of Appeals’ reliance on its decision in *In re B.R.W.*, 278 N.C. App. 382, 399, 863 S.E.2d 202 (2021), conflicts with this Court’s holding in *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495 (2022).”

The Supreme Court first cited and quoted from the Supreme Court of the United States’ holding in *Quilloin*, 434 U.S. at 255, 54 L.Ed.2d at 519, reaffirming “freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment[,]” and “little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought

to be in the children’s best interest.”

The Supreme Court of North Carolina also examined and reaffirmed the constitutionally protected status of a parent, holding: “a parent’s constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child,” and parents are always presumed to act in their child’s best interest. *Id.* (citing *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997)).

The Supreme Court cited the primary legislative policy of the Juvenile Code to re-state the “core purpose of these statutes is to provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents,” and reunification of a child with their parent(s) must be the primary plan. *Id.* (citing N.C. Gen. Stat. § 7B-100(1) (2023)).

The Supreme Court also “recognized that there might be rare circumstances in which the provisions of the Juvenile Code are insufficient to protect the constitutional rights of parents. . . . In these rare cases, even if the Juvenile Code authorizes the trial court to remove a child from a parent, the court may not do so because the United States Constitutional (sic) prohibits it.” *Id.* at 696, 909 S.E.2d at 175 (citations omitted).

The Supreme Court examined whether the preservation of the constitutional right to parent and the parental presumption of acting in the child’s best interest was or could be implicated by reaffirming its holding in *In re J.N.*, 381 N.C. at 134, 871 S.E.2d at 498. The parent had opposed DSS’ recommendation of guardianship in the

trial court and had argued the statutorily-required “reunification would be the more appropriate plan.” *In re K.C.*, 386 N.C. at 697, 909 S.E.2d at 176 (citation omitted).

Where a parent:

who merely argues against a child’s removal, or against the child’s placement with someone else, does not adequately preserve the constitutional issue. To preserve it, the parent must inform the trial court and the opposing parties that the parent is challenging the removal on constitutional grounds and articulate the basis for the constitutional claim.

This preservation requirement is necessary for a crucial reason. As noted above, the argument is essentially a claim that the Juvenile Code is unconstitutional as applied to that parent. After all, the argument applies only when the Juvenile Code *authorizes* the removal of the child from the parent’s care, but the Constitution nevertheless *prohibits* it. Thus, the parties opposing the parent’s argument must be given notice of the constitutional challenge so that they can present evidence to rebut it. This evidence, by its nature, may be different from the evidence those parties present to establish grounds for removal under the Juvenile Code —after all, the constitutional claim can prevail only in rare cases where the evidence that is sufficient to satisfy the Juvenile Code nevertheless is insufficient to comply with the constitutional criteria.

Moreover, because of this need to provide notice to the opposing parties, the preservation requirement applies even if the trial court addresses the constitutional claim on its own initiative in its order. A trial court’s findings are limited to evidence in the record. Without notice that the parent is asserting a constitutional claim, the opposing parties will not know that they must present evidence that would support the necessary findings to reject the claim.

Id. at 697-98, 909 S.E.2d at 176 (citations omitted). The Supreme Court reversed

Court of Appeals case law relying on *In re B.R.W.* and its progeny as contrary to *In re J.N. Id.* at 698, 909 S.E.2d at 176.

DSS asserted Respondent has waived appellate review citing *In re J.M.* Respondent challenges the trial court's award of guardianship to Mr. and Mrs. M. She contends many of the trial court's findings of fact are unsupported by the evidence and the remaining findings do not support the district court's conclusion she was unfit and had forfeited her constitutionally-protected status as a parent. Respondent never raised her as applied constitutional argument before the district court during the 26 February 2024 hearing. This constitutional claim is not preserved for appellate review. *See In re K.C.*, 386 N.C. at 698, 909 S.E.2d at 176; *In re J.N.*, 381 N.C. at 134, 871 S.E.2d at 498.

V. Conclusion

Our Supreme Court's precedent requires Respondent to specifically "argue th[e] issue as a violation of a constitutional right." *In re K.C.*, 386 N.C. at 698, 909 S.E.2d at 176; *see In re J.N.*, 384 N.C. at 604-04, 887 S.E.2d at 835-36. Respondent failed to assert or argue her constitutionally-protected parental status was violated as applied before the district court. Her parental rights to Phoebe were and are not terminated. As noted in the trial court's order, Respondent remains free to assert for further "visitation may be reviewed at any time by the filing of a motion by any party to the matter."

Respondent's appeal from the trial court's order is dismissed as unpreserved.

IN RE: P.L.E.

Opinion of the Court

The order awarding guardianship remains undisturbed. *It is so ordered.*

DISMISSED.

Judge STADING concurs.

Judge FREEMAN concurs in result only.

Report per Rule 30(e).